

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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JAN 10 2005

Federal Communications Commission
Office of Secretary

In re Application of)
)
INFINITY BROADCASTING EAST INC.) File No. BRH-20040601BHZ
WKRK-FM, Detroit, Michigan) Facility ID # 9618
)
For Renewal of License)

TO: The Secretary
ATTN: Chief, Media Bureau

REPLY TO
OPPOSITION TO PETITION TO DENY

2005 JAN 11 A 11:18

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January 10, 2005

RIGHT TO DECENCY, INC.
AMERICAN DECENCY ASSOCIATION

SUMMARY

The "Opposition to Petition to Deny" filed in this matter by the licensee of WKRK-FM, Detroit, Michigan attempts to defend the indefensible—its atrocious record as a serial and recidivist violator of 18 U.S.C. §1464, the federal statute which proscribes indecent, obscene and/or profane radio broadcasting with felony penalties. As corporate entities, Viacom, Inc. and its various Infinity Broadcasting subsidiaries lack the basic character qualifications required of FCC licensees. Viacom/Infinity confronts the FCC with a stark choice: by voting to renew the Viacom/Infinity broadcast licenses, the Commission will be condoning recidivist violations of federal communications law, anti-Catholic and anti-Christian bigotry and hate crimes against women and children.

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Right to Decency, Inc. and American Decency Association ("Petitioners"), by their attorney, and pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d), and Section 73.3584 of the Commission's Rules, 47 CFR §73.3584, hereby respectfully submit their Reply to the "Opposition to Petition to Deny" filed by Infinity Broadcasting East Inc. In so doing, the following is shown:

Reply to Infinity's Opposition

1. Infinity and its counsel have a tough job: to defend the indefensible. So, they have gone on the attack against Petitioners, and have raised a number of trivial procedural issues, none of which have merit. For example, at page 3, Infinity attacks the credibility of William

Johnson, president of petitioner American Decency Association. Infinity's key employee Howard Stern is a well known broadcast pornographer, and yet it is ADA's Mr. Johnson, and not Infinity and Stern, whom Infinity claims has a credibility problem. This is the pot calling the kettle black.

2. Infinity hates the concept of private citizens organizing to petition the government for a redress of grievances. Infinity, like its counterparts at Clear Channel, Emmis and other broadcast behemoths, believes that the millions of dollars spent by it on "government relations" and high-priced K Street legal talent entitle it to exclusive access to regulatory decision makers and to favors not granted to others in society. That is why Infinity made a deal with the FCC at the start of the 1995 radio renewal cycle that we now know it had no intention of keeping.

3. Infinity makes a remarkable claim that character qualifications in broadcast licensing "requires examination of only the record of the subject station during the preceding license term" (Opposition at 4); its citation is merely to a letter from the Commission's staff.

4. Of course, Commission and appellate precedent contradicts Infinity's claim. In *Contemporary Media, Inc.*, 13 FCC 14437 (1998), *recons. den.* 14 FCC Rcd 8790 (1999),

affirmed sub nom. *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, cert. den. 532 U.S. 920 (2001), the FCC relied on the felony child molestation conviction of Michael Rice, the principal stockholder of a broadcast licensee, to find that it no longer possessed the relevant character qualifications to be a Commission licensee. The offenses did not appear to have related to any particular station; however, when viewed in their totality, the FCC ruled that its policy statement on *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) required that the affected broadcast licenses be revoked.

5. If perverted and depraved non-broadcast activities of the licensee could be the justification for license revocation as was the case in *Contemporary*, then the totality of Infinity's perverted and depraved corporate broadcast record must therefore be fair game for the FCC to determine whether WKRK-FM's license can be renewed. As Judge Garland wrote in *Contemporary*, 214 F. 3d at 199:

The FCC revokes a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that the licensee is no longer qualified to hold it. See 47 U.S.C. §§ 303(f), 308, 312; Contemporary Media, 13 F.C.C.R. at 14,459-60. Revocation comes when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest. See, e.g., Syracuse Peace Council v. FCC, 867 F.2d 654, 659 n. 2 (D.C.Cir.1989); Leflore Broad. Co., 636 F.2d at 461-62.

6. We would respectfully point out that, under prior FCC decisions on broadcast renewal applications and

standing, the WKRK-FM renewal affords residents of the greater Detroit area their only opportunity to formally attempt to raise the issue that Infinity's serial pornographic broadcasts demonstrate that Infinity can no longer be trusted to deal with either the FCC or the public honestly, to follow FCC regulations and to operate in the public interest.

7. We think that Infinity's summary on page 3 of its Opposition of Petitioners' description of Infinity's corporate conduct (which it cobbled together clearly to poke fun at Petitioners) totally states the case against Infinity:

[Infinity] is a "recidivist violator of a federal felony criminal statute", has "orchestrated the desecration" of St. Patrick's Cathedral, fused "atheism" and "pornography", committed "hate crimes against Catholics, women and children" and allied itself with "stunning evil" and "virulently diabolical forces".

As far as the comparison of Infinity and the KKK (an organization devoted to bigotry and hatred against Blacks, Jews and Catholics), imagine the shock and outrage in this country had Infinity attempted to stage "Sex With Sam" in a synagogue, mosque or Buddhist shrine; such an invasion would have inevitably been called a "hate crime". Since anti-Christianity generally and anti-Catholicism specifically enjoys a special status among the "intellectual elite" such as those in control at Infinity, "Sex With Sam" at St. Patrick's Cathedral was no big deal to them—in fact, they

thought it was both funny and a business opportunity. How possibly can the FCC make a statutory finding that Infinity possesses the basic character qualifications to continue to be a Commission licensee?

The FCC/Infinity "Settlement"

8. Over two-and-one-half months after Petitioners filed their "Petition to Deny" in this case, the FCC announced that it and Infinity reached another settlement agreement; part of the terms of that agreement is that the FCC will not consider Infinity's serial violations of 18 U.S.C. §1464 in the context of its license renewal applications. *Viacom, Inc.*, FCC 04-268 (November 23, 2004).

9. Petitioners timely filed a "Petition for Reconsideration" of the FCC Order announcing and approving this settlement agreement. We will repeat our arguments here, to ensure that they are part of the record in the WKRK-FM matter.

10. Neither the Petitioners nor the undersigned were consulted by the Commission relative to its "negotiations" with Viacom relative to the "Settlement Agreement". Negotiations between Viacom and the FCC must have taken place between September 2 and November 9, 2004 (the date FCC 04-286 was adopted); it would strain credulity to claim that negotiations did not take place during that period. Such negotiations (or any presentations by Viacom to the FCC

going to the merits of the WKRK-FM renewal case) subsequent to September 1, 2004 would have been illegal "ex parte contacts" in violation of 47 CFR §1.1200 et seq. and would have, as shown below, "irrevocably tainted" the settlement agreement, thereby requiring its annulment and also requiring that the WKRK-FM renewal application either be dismissed or designated for a full, fair and transparent public hearing.

11. *The Settlement Agreement Is Ultra Vires.* Nothing in the Communications Act of 1934 as amended permits the Commission to sell the renewal of a broadcast license or to sell a "statutory finding" in 47 U.S.C. §309(a) that the "public interest, convenience and necessity" would be served by the granting of the renewal application. Rather, the Commission is required to fully consider an application for renewal of license, an application which may not be acted upon arbitrarily, capriciously or in a manner contrary to law. 5 U.S.C. §706(2)(a).

12. Section 308 of the Communications Act, 47 U.S.C. §308, in pertinent part sets forth the requirements as to the nature of a Commission broadcast license application:

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, **only upon written application** therefor received by it:

* * * * *

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

13. Section 309 of the Communications Act of 1934, as amended, states in pertinent part:

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * *

14. The Commission has no authority to sell a renewal of license to a party such as Viacom, nor does it have any authority to sell a party a finding of basic character qualifications. It is obligated under the Administrative Procedure Act to make a ruling based on the whole record. Yet, in the Settlement Agreement, at paragraph 10, the FCC has sold Viacom for the value price of \$3,500,000.00 something which is tantamount to a finding that Viacom has not engaged in recidivist violations of 18 U.S.C. §1464 on sixteen of its stations, including WKRK-FM, and, in the absence of such violations, possesses the basic character qualifications to be a Commission licensee:

As part of the Order, the Commission shall rescind, vacate and cancel the Forfeiture Orders and NALs, shall terminate the LOIs, and shall dismiss with prejudice the Complaints as to any Affected Licensee, with the exception of the *Super Bowl NAL*, which is excluded from the scope of this Consent Decree and will remain outstanding. In addition, the Notice of Apparent Liability for Forfeiture in *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, 18 FCC Red 6915 (2003) shall be rescinded, vacated and cancelled with respect to Infinity Broadcasting, as will any specific findings against it therein regarding the broadcast material at issue, but this Consent Decree shall not affect the general warnings to broadcasters set forth at paragraphs 12 and 13 of that NAL, which warnings shall remain in effect. The FCC shall also cause the Department of Justice to dismiss with prejudice its pending action to enforce the \$7000 forfeiture imposed against Infinity Radio License, Inc., licensee of Station WLLD(FM), Holmes Beach, Florida (File No. 99090433). From and after the Effective Date, the Commission shall not, either on its own motion or in response to any petition to deny or other third-party objection, initiate any inquiries, investigations, forfeiture proceedings, hearings, or other sanctions or actions against any Affected Licensee, or any pending or future application to which an Affected Licensee is a party (including, without limitation, any application for a new station, for renewal of license, for assignment of license, or for transfer of control), based in whole or in part on (i) the NALs, (ii) the Forfeiture Orders, (iii) the LOIs, (iv) the Complaints, (v) any other similar submissions alleging violation by any Affected Licensee of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date, or (v) the allegations contained in any of the foregoing. Without limitation to the

foregoing, the FCC shall not use the facts of this Consent Decree or any provision hereof, the NALs, the Forfeiture Orders, the LOIs, the Complaints, any other similar submissions alleging violation by any Affected Licensee of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date, or the underlying facts, behavior, or broadcasts that relate to any of the foregoing, for any purpose relating to any Affected Licensee, and shall treat all such matters as null and void for all purposes.

15. In *Policy Statement on Character Qualifications in Broadcast Licensing*, *supra*, repeat violations of the Communications Act and/or the FCC's Rules directly impact on whether the FCC can determine whether the applicant possesses the basic character qualifications to be a Commission licensee. Basic character qualifications have always been the *sine qua non* of a finding that the public interest, convenience and necessity would be served by a grant of a renewal application. See e.g. *RKO General, Inc. v. FCC*, 670 F.2d 215 (D. C. Cir. 1981).

16. By selling to Viacom/Infinity a "clean bill of health" relative to its many violations of 18 U.S.C. §1464 and taking them off the table during the present renewal cycle, the Commission has acted in an ultra vires manner. The Supreme Court has held that an administrative agency cannot grant itself powers not conferred upon it by Congress; and actions taken which are not consistent with Congressional grants of delegated authority are illegal. See e.g. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).

17. In *United Broadcasting Company, Inc. (WOOK(FM))*, 100 FCC 2d 1574 (1985), the Commission stated at ¶8 that, with respect to a renewal applicant, "we have examined the entire period since the last renewal"; see also *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206-07 (D. C. Cir. 1971). The Commission is not permitted by the Communications Act to ignore a significant portion of a broadcaster's record during the relevant renewal period in passing upon a renewal application. Yet, paragraph 10 of the Settlement Agreement provides for just that. Therefore, the **Order** is illegal as not consistent with past FCC practice and procedure, and the FCC has failed to give an explanation why in this case it has departed from past practice. See e.g. *Reeder v. FCC*, 865 F.2d 1298 (D. C. Cir. 1989).

18. Furthermore, the whole concept of the FCC giving Viacom/Infinity a pass for its continued and continuous, egregious violations of 18 U.S.C. §1464 seems silly in the extreme, since the FCC reached a similar settlement agreement with Infinity Broadcasting during the last radio renewal cycle, a settlement agreement which Infinity Broadcasting was breaching almost immediately thereafter. *Sagittarius Broadcasting Corp. et al*, 10 FCC Rcd 12245 (September 5, 1995). Indeed, when a party makes a

settlement agreement to induce the FCC to clear the way for the granting of its renewal applications, and then that party proceeds to breach said settlement agreement, how can the FCC as a matter of law find that the public interest, convenience and necessity be served by allowing that party to continue on as a "public trustee" for yet another license term?

19. *Ex Parte Contacts.* Given the fact that some 70 days elapsed between Petitioners' filing of their formal "Petition to Deny" on September 1, 2004 and the adoption date on FCC 04-268 of November 9, 2004, it appears certain that Viacom and/or its representatives discussed the merits of matters raised in Petitioners' "Petition to Deny"—Viacom's serial violations of 18 U.S.C. §1464, including but not limited to its perpetration and broadcast of a sacrilegious desecration of St. Patrick's Cathedral in New York City—during that time period. The moment our "Petition to Deny" was stamped in as received by the Secretary's office, the WKRK-FM renewal matter became a "restricted" proceeding under the FCC's *ex parte* rules. This meant that, on and after September 2, 2004, the Petitioners (and the undersigned) had to be served with all communications relative to the merits, and had to be included in all oral presentations, including negotiations.

20. Since Viacom was successful in getting the FCC to make the grant of the WKRK-FM license renewal application a foregone conclusion by the FCC's agreement not to consider the effect of past violations of 18 U.S.C. §1464 on Viacom's basic qualifications to continue to own WKRK-FM, the ex parte contacts clearly went to the merits of Petitioners' "Petition to Deny", it is clear that the contacts irrevocably tainted the agency's decision-making process so as to make the "ultimate judgment of the agency unfair". *Press Broadcasting Co. v. FCC*, 59 F.3d 1365, 1369 (D. C. Cir. 1995).

21. The applicable judicial standard for whether the result in a federal administrative proceeding tainted by ex parte contacts are to be voided is an "equitable" one, involving the following factors, such as: (1) the gravity of the ex parte communications; (2) whether the contacts may have influenced the agency's ultimate decision; (3) whether the party making the improper contacts benefited from the agency's ultimate decision; (4) whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and (5) whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. *Professional Air*

Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 565 (D. C. Cir. 1982).

22. While we have no specific evidence of any individual contact between Viacom and the FCC, the negotiations between them did not occur by magic or through telepathy. Clearly, Viacom made contacts at the FCC which went to the heart of the merits, and which induced the FCC to enter into a settlement agreement very favorable to Viacom. Clearly, the negotiations by Viacom induced the FCC to accept this settlement. As the fair market value of an FM Broadcast Station in the Detroit, Michigan radio market is many times the total "voluntary contribution" agreed to by Viacom covering all of its stations, Viacom benefited greatly from its contacts with the agency. Petitioners had no knowledge that any contacts or negotiations between Viacom and the FCC were taking place until the FCC's release of its Daily Digest on November 23, 2004 which announced the settlement agreement between Viacom and the FCC. Vacation of the settlement agreement would serve a useful purpose, because the administrative due process rights of Petitioners demand it, and because the public deserves a full and fair determination by the FCC on all relevant issues whether a grant of the WKRK-FM renewal application would serve the public interest, convenience and necessity.

23. The Commission has the authority to dismiss applications where the applicant has violated the *ex parte* rules. 47 C.F.R. §1.1216; **Stearns County Broadcasting Company, Inc.**, 104 FCC 2d 688 (Rev. Bd. 1986). Viacom's apparent violation of the *ex parte* rules in this case, coupled with its blatant disregard for 18 U.S.C. §1464, which violations are punishable by license revocation pursuant to 47 U.S.C. §312(a)(6), require that the Commission dismiss the WKRK-FM renewal of license application.

Conclusion

24. This case is all about the right of private citizens to petition the government for a redress of grievances—that is, the FCC's acceptance of Infinity's long running violations of a federal felony criminal statute, and the FCC's abject failure to conduct a fair, open and public proceeding to determine whether Infinity should be given yet another eight year term to broadcast over the public airwaves. Infinity lacks the basic character qualifications to continue on as a public trustee. Furthermore, Infinity places the individual Commissioners in the position of voting on their support for anti-Catholic and anti-Christian bigotry. Clearly, a vote in favor of Infinity's basic character qualifications is a vote in favor of anti-Catholic

and anti-Christian bigotry. Petitioners can only hope that the Commissioners will vote on the side of right, and will vote to deny the above-captioned application.

WHEREFORE, it is urged that the application of Infinity Broadcasting East Inc. for renewal of license of WKRK-FM, Detroit, Michigan **BE DENIED**.

Respectfully submitted,

RIGHT TO DECENCY, INC.
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