

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

FILED/ACCEPTED

FEB 17 2009

Federal Communications Commission
Office of the Secretary

In re Applications of)	
)	
EMMIS RADIO LICENSE, LLC)	
)	
WIBC (AM)	)	File No. BR-20040401AOH
Indianapolis, Indiana	)	Facility ID # 19521
)	
WENS (FM)	)	File No. BR-20040401ARD
Shelbyville, Indiana	)	Facility ID # 19522
)	
WNOU (FM)	)	File No. BR-20040401AOO
Indianapolis, Indiana	)	Facility ID # 19524
)	
WYXB (FM)	)	File No. BR-20040401AOL
Indianapolis, Indiana	)	Facility ID # 51432
)	
WWVR (FM)	)	File No. BR-20040401AJO
West Terre Haute, Indiana	)	Facility ID # 68824
)	
WTHI-FM	)	File No. BR-20040401AJH
Terre Haute, Indiana	)	Facility ID # 70652
)	
For Renewal of License)	
)	

TO: Honorable Marlene H. Dortch
Office of the Secretary

ATTN: The Commission

APPLICATION FOR REVIEW

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February 17, 2009

DAVID EDWARD SMITH

SUMMARY

David Smith, a concerned citizen from the Chicago area, seeks the Commission to grant *en banc* review to a letter ruling of the Media Bureau's Audio Division, DA 09-59, released January 16, 2009, which upheld over Mr. Smith's objection the granting of six license renewal applications to Emmis Radio License, LLC, a serial violator of 18 U.S.C. §1464. An Emmis employee tried to harass, intimidate and bankrupt Mr. Smith by filing a state court civil law suit seeking damages as the result of Mr. Smith informing the Commission that Emmis had repeatedly broadcast indecent (if not obscene) materials on its Chicago radio station.

Mr. Smith assigns the following questions for review:

a. Whether the Commission's staff illegally sold Emmis renewals of license requested in the above-captioned applications in violation of 47 U.S.C. §§308-309, where Emmis was a serial, willful and deliberate violator of 18 U.S.C. §1464?

b. Whether the Audio Division finding that Emmis had no involvement in the Mancow lawsuit has any basis in fact, or whether the Audio Division should have designated the case for

hearing before an Administrative Law Judge so that the facts could be impartially determined?

c. Whether the Commission's unwritten policy not to hold hearings on petitions to deny broadcast license renewal applications filed by citizens groups violated 47 U.S.C. §309(a-e)?

Mr. Smith seeks that the Commission vacate the orders granting the renewal applications and that it designate said applications on appropriate issues, and that Mr. Smith be made an intervenor in the hearing.

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APPLICATION FOR REVIEW

David Edward Smith (Smith), by his attorney, and pursuant to 47 CFR §1.115, hereby respectfully submits this Application for Review of the letter ruling of Peter H. Doyle, Chief, Audio Division, Media Bureau, DA 09-59, released January 16, 2009, affirming a letter ruling of the

Chief, Audio Division, Media Bureau, DA 07-3836, released September 5, 2007, denying Smith's "Informal Objection" and granting the above-captioned broadcast radio license renewal applications filed by Emmis Radio License, LLC (formerly Emmis Radio License Corporation) (Emmis). In support whereof, the following is shown:

I. QUESTIONS PRESENTED FOR REVIEW

1. Smith hereby states the questions presented for review herein:

a. Whether the Commission's staff illegally sold Emmis renewals of license requested in the above-captioned applications in violation of 47 U.S.C. §§308-309, where Emmis was a serial, willful and deliberate violator of 18 U.S.C. §1464?

b. Whether the Audio Division finding that Emmis had no involvement in the Mancow lawsuit has any basis in fact, or whether the Audio Division should have designated the case for hearing before an Administrative Law Judge so that the facts could be impartially determined?

c. Whether the Commission's unwritten policy not to hold hearings on petitions to deny broadcast license renewal applications filed by citizens groups violated 47 U.S.C. §309(a-e)?

II. FACTORS WARRANTING COMMISSION CONSIDERATION

2. Smith assigns the following factors stated in 47 C.F.R. §1.115(b)(2) that warrant consideration of these matters by the Commission *en banc*:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

III. STATEMENT OF THE CASE

3. Smith is a resident of the Chicago, Illinois area. Smith has filed over 60 complaints with the FCC against Emmis' WKQX(FM), Chicago, Illinois, each detailing a different broadcast over that station during the 1996-2004 license term, which Smith believed violated the federal felony indecency, obscenity and/or profanity statute, 18 U.S.C. §1464. The FCC is the agency of the federal government responsible for investigation and enforcement of matters relating to 18 U.S.C. §1464; see **Monroe Communications Corp. v. FCC**, 900 F.2d 351 (D. C. Cir. 1990), and **Illinois Citizens Committee for Broadcasting v. FCC**, 515 F.2d 397, 404 (D. C. Cir. 1974).

3. All of these complaints have had to do with an Emmis morning show between 6 a.m. and 10 a.m. Central Time hosted by Erich Muller a/k/a Mancow Muller ("Mancow") and titled "Mancow's Morning Madhouse". On at least the following occasions, the FCC has agreed with Smith that certain portions of certain broadcasts violated 18 U.S.C. §1464: WKQX broadcasts of March 20, 2000 and May 15, 2000, March 6, 2001, March 7, 2001 and May 17, 2001, and March 12, 2001 (see Petition to Deny WKQX(FM) renewal application filed by Smith and others on November 1, 2004). Additionally, Emmis serially violated 18 U.S.C. §1464 at least nineteen times between July 16, 2002 and November 13, 2003.

4. In retaliation against the lawful activities of Smith in informing law enforcement officials of the federal government (namely, the FCC's Enforcement Bureau) that federal crimes and violations of federal regulations may have occurred, Emmis' employee Mancow, and two Delaware limited liability companies, American Pride, LLC ("AmPride") and American Patriot, LLC ("AmPat"), apparently with the full support of Emmis, filed a civil lawsuit in the Circuit Court of Cook County, Illinois, County Department-Chancery Division, Case No. 04CH05015, seeking (a) an injunction against Smith and Citizens for Community Values of Illinois, Inc. (CCVI) from *inter alia* "making spurious complaints to

the FCC or any other governmental agencies concerning the aforesaid Plaintiff's rights" and (b) civil damages totaling THREE MILLION DOLLARS (\$3,000,000.00) plus legal fees and costs under the tort theories of (i) "interference with business expectancy", (ii) "conspiracy" and (iii) "malicious prosecution". This lawsuit was filed with the Cook County state court on March 23, 2004, and was actually served on Smith on or about April 9, 2004.

5. Subsequent to March 23, 2004, Mancow sought and received a considerable amount of publicity for his lawsuit, which was clearly and admittedly conceived and filed in order to corruptly harass, intimidate and frighten potential witnesses to violations of 18 U.S.C. §1464. Because of the considerable amount of publicity surrounding Mancow's suit, Emmis must be presumed to have at the very least tacitly approved of its filing, if not having outright encouraged its filing, since the FCC sanctions were directed at Emmis, not at Mancow.

6. In order to apprise the Commission of the unconscionable abuse of civil process committed by Mancow with the full knowledge and tacit approval of Emmis, Smith on July 23, 2004 filed an "Informal Objection" against the above captioned applications. Shortly after Smith filed this pleading and made out a *prima facie* case as to Emmis' abuse of process and the federal criminal statute

violations), the Mancow lawsuit was magically dismissed. However, and as Smith has pointed out in these proceedings, as bank robbers are not let go because they returned the money, neither can Emmis obtain relief by this act.

7. This was not an isolated instance by Emmis and its minions to use attorneys to frighten and intimidate a potential witness against its feloniously criminal conduct. In the St. Louis, Missouri market, Emmis is licensee and operator of KPNT(FM), Ste. Genevieve, Missouri. A concerned citizen and listener to KPNT(FM), Ms. Julie Cordry, was threatened with a lawsuit by Emmis' St. Louis attorneys, Blackwell Sanders Peper Martin (see Petition to Deny against WKQX, Exhibit H).

8. Incredibly, and despite the apparent attachment of the ex parte rules of the Commission, 47 CFR §1.1200 et seq., Emmis was negotiating a "voluntary contribution" settlement of its 18 U.S.C. §1464 in some back room with Commission functionaries. Their settlement was announced on August 12, 2004. **Emmis Communications Corp.**, 19 FCC Rcd 16003, 16004 (2004). It has been Smith's position that any contact that took place between the Commission and Emmis or its lawyers, the Wiley Rein firm, between July 23 and August 12, was illegal, and therefore the "consent decree" is illegal. It needs to be pointed out that the Chairman of

the Commission at the time, Kevin Martin, was a former employee of the firm currently known as Wiley Rein.

9. Based on this "consent decree" that fails any kind of smell test, the Audio Division denied Smith's "Informal Objection" on September 5, 2007. Smith timely sought reconsideration of that ruling, DA 07-3836, *supra*.

10. The Audio Division denied the petition for reconsideration, holding that (1) as consent decrees constitute a non-reviewable exercise of agency discretion, Smith's raising of Emmis' serial violations of 18 U.S.C. §1464 were barred from consideration and (2) speculating and surmising that Emmis had "no involvement" in Mancow's lawsuit, the lawsuit "was not within the scope of Mueller's employment", and therefore was not grounds to vacate the grant to Emmis of the license renewal applications captioned above.

IV. ARGUMENT

Issue A: Illegal Sale of License Renewals

11. Quite clearly, the Commission sold Emmis its license renewals for a "voluntary contribution" to the federal treasury. This action is *ultra vires* in nature, as it is nowhere contemplated in the Communications Act of 1934, as amended. Further, it violated 47 C.F.R. §1.1200 in that the negotiations were conducted in apparent violation of the Commission's *ex parte* rules. Therefore, review must

be granted in accordance with 47 C.F.R. §1.115(b)(2)(i) and (b)(2)(v), in that the action taken conflicts with statute and case precedent, and constitutes prejudicial procedural error.

12. In **United States v. Beebe**, 180 U.S. 343 (1901), the Supreme Court unanimously held that where a district attorney had no statutory or regulatory authority to compromise a claim in which the United States was a party, the settlement agreement was null and void. **Beebe** was cited with approval in **Cobb v. Aytch**, 539 F.2d 297 (3rd Cir. 1976), cert. den. 429 U.S. 1103 (1977); **National Revenue Corp. v. Violet**, 807 F.2d 285 (1st Cir. 1986).

13. The FCC may not waive a statute—to do so is an **ultra vires** act. See e.g. **Reuters Ltd. v. FCC**, 781 F.2d 946 (D. C. Cir. 1986). The FCC itself has recognized this principle many times, for example recently in **Aleutians East Borough School District**, 19 FCC Rcd 2978, n. 16 (Wireline Comp. Bur. 2004), citing **Chrysler v. Brown**, 441 U.S. 281, 302 (1979).

14. In the instant case, the FCC by entering into a settlement agreement with Emmis took it upon itself to in essence waive the basic character qualifications provisions of 47 U.S.C. §308, emasculate the petition to deny

provisions of 47 U.S.C. §309 and to waive the Administrative Procedure Act, 5 U.S.C. §551 *et seq* by holding that it will not be reviewing the whole record with respect to Emmis, but only those portions of the record having nothing to do with 18 U.S.C. §1464. The "consent decree" or "settlement agreement" between the FCC, an agency of the United States, and Emmis is under **Beebe** null and void, because the FCC's execution of this settlement agreement was and is an **ultra vires** act¹.

15. If, as new President Obama has proclaimed on the speaking trail many times, his is to usher in a new era of transparency in government, then the Commission, which is now operating under new management, must undo the sordid "consent decree" which most certainly reached after *ex parte* negotiations in a back room. The former administration had a 47 U.S.C. §309 statutory obligation to conduct this proceeding in public, in a hearing presided over by an independent, impartial Administrative Law Judge; it failed to do so. It cut a break to a serial law breaker. The former administration condoned the SLAPP lawsuit tactics employed to try to break the spirit and bankrupt a concerned citizen. If there is any transparency in government, the

¹Smith did not challenge the right of the FCC to reach a settlement as to the amount of money forfeitures; that is a separate matter from the renewal of license process.

"consent decree" needs to be dissolved as illicitly obtained, and the above-captioned applications, together with the renewal application of WKQX(FM), Chicago, which has been languishing for well over four years now, must be designated for hearing.

Issue B: Emmis' Involvement in Mancow Lawsuit

16. There is absolutely no basis, other than speculation and surmise, for the Audio Division chief to make a conclusion that Emmis had "no involvement" in Mancow's lawsuit. This conclusion is erroneous, since there is circumstantial evidence that Emmis induced Mancow to dismiss his lawsuit within days of the filing of Smith's Informal Objection. This conclusion is erroneous, because Emmis' had knowledge of and gave at least tacit approval of Mancow's lawsuit and the publicity it generated. Emmis, an experienced broadcaster, knew or should have known of the substantial legal precedents, and licensee consequences, for harassing and intimidating persons filing petitions and complaints at the Commission.

17. Not surprisingly, the Audio Division fails to discuss the Supreme Court precedent in the area, ***In re Quarles and Butler***, 158 U.S. 532 (1895), which states that it is inherent in the Constitution of the United States that an American citizen has an absolute, unfettered, privileged right to inform a federal law enforcement official of his

belief that a violation of federal law has taken place; and further, that an infringement of that right by others constitutes a felony violation of the statute now codified as 18 U.S.C. §241, which carries a penalty of five years' imprisonment in a federal penitentiary. Furthermore, Emmis' employee violated 18 U.S.C. §§241, 1505 and 1512. Sadly, under the former administration, the Commission did not care one iota about the rights of a private citizen who notified the federal government when laws were broken.

18. Incredibly and unconscionably, the Audio Division has come down on the side of the recidivist lawbreaker, and has given the back of its hand to a common citizen who has raised a most colorable question of fact and law relative to one of the agency's larger regulatees. The Commission's past policy has been clear that it is a clear violation of the Commission's policies relative to basic character qualifications of a licensee where a licensee (or its key employees) take actions to intimidate a citizen from making complaints to the FCC. ***Isothermal Community College***, DA 03-3638, 18 FCC Rcd - (November 14, 2003), citing ***Patrick Henry***, 69 FCC 2d 1305 (1978). See also ***Chronicle Broadcasting Company***, 19 FCC 2d 240 (1969). Also, the FCC

has time after time recognized the principle of *respondeat superior*.²

19. The Audio Division had a duty to uphold the Constitution of the United States. Mr. Smith had a constitutional right to notify the FCC that 18 U.S.C. §1464 was being violated. The very person who was committing the violations in question as a part of his employment to titillate listeners and increase ratings and revenues, a key employee of the licensee, filed a bogus retaliatory law suit in state court which threatened to bankrupt Mr. Smith. The Audio Division failed to uphold the Constitution, by making an erroneous finding as to a material issue of fact, permitting Commission *en banc* review pursuant to 47 C.F.R. §1.115(b)(2)(v). It needs to review this matter to make this right. The only way that this can be done with a modicum of fairness is to designate the above-captioned applications for hearing before an independent administrative law judge.

²A Commission licensee is responsible for the acts and omissions of its employees and independent contractors. **Eure Family Limited Partnership**, 17 FCC Rcd 7042 (2002), citing **MTD, Inc.**, 6 FCC Rcd 34, 35 (1991); **Wagenvoord Broadcasting Co.**, 35 FCC 2d 361 (1972); **SpectraSite Communications, Inc.**, 16 FCC Rcd 17668, 17669 (Enf. Bur. 2001); **Netcom Technologies, Inc.**, 16 FCC Rcd 9524, 9526 (Enf. Bur. 2001).

Issue C: Failure to Hold Hearings

20. There apparently was an unwritten rule under former Commission management--never hold a hearing before an Administrative Law Judge based on a citizen complaint. This apparently was so, despite situations that might occur where the Commission could not with a straight face make the statutory finding required under 47 U.S.C. §309 that the grant of a broadcast renewal application would serve the public interest, convenience and necessity.

21. Here is a classic case--large corporate licensee uses an employee's SLAPP lawsuit to intimidate, harass and attempt to bankrupt a citizen who files colorable complaints with the Commission and backs them up with audio tapes. In one of the final acts of the former management of the Commission, an erroneous finding of fact is ginned up--that Emmis had "no involvement" with the Mancow lawsuit, to give any justification, no matter how weak, to dismiss Smith's "Petition for Reconsideration".

22. The only way we could have known for sure whether or not Emmis had any involvement in the Mancow lawsuit was to have designated the case for hearing before an independent and impartial Administrative Law Judge. This went against former management, which tried to control every aspect of Commission activity through the "eighth floor". Administrative Law Judge "proposed findings of fact", based

on a review of documentary and circumstantial evidence and viewing of live fact witnesses could be very inconvenient for such a control scheme. Smith clearly alleged enough information to be entitled to a hearing, under ***Citizens for Jazz on WRVR, Inc. v. FCC***, 857 F.2d 1556 (D. C. Cir. 1988).

23. Review is warranted under the Commission's Rules, 47 C.F.R. §1.115(b)(2)(i) and (b)(2)(iii), since failure to hold a hearing in this case violated 47 U.S.C. §309(a-e), and any policy discouraging the holding of hearings in cases like these must be overturned.

Conclusion and Prayer for Relief

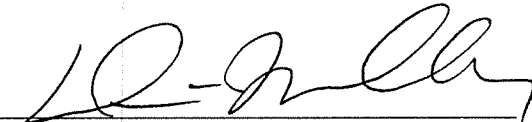
WHEREFORE, David Edward Smith urges that his Application for Review **BE GRANTED**, that the above-captioned applications **BE DESIGNATED FOR HEARING** upon at least the following issues, and that he **BE GRANTED STATUS AS AN INTERVENOR** in such hearing:

1. To determine the facts and circumstances relating to the motivation of Erich Muller et al in filing the civil damage suit against David Edward Smith, et al.; and what effect, if any, the foregoing facts and circumstances have upon the qualifications of Emmis Radio License Corporation to be a Commission licensee;
2. To determine the facts and circumstances of the supervision of Erich Muller and the "Mancow Morning Madhouse" program by Emmis Radio License Corporation; and what effect, if any, the foregoing facts and circumstances have upon the qualifications of Emmis Radio License Corporation to be a Commission licensee;
3. To determine whether Erich Muller, Emmis Radio License Corporation or any person or entity under their control or direction have violated 18 U.S.C. §§ 241, 1505 or 1512, and, if so, what effect that would have upon the qualifications of Emmis Radio License Corporation to be a Commission licensee;
4. To determine what effect the recidivist violations of 18 U.S.C. §1464 by Emmis Radio License Corporation have upon its qualifications to be a Commission licensee; and

5. In light of the evidence adduced pursuant to the foregoing issues, whether the applications for renewal of license of WIBC(AM), WENS(FM), WNOU(FM), WYXB(FM), WWVR(FM) and WTHI-FM should be denied, and whether the license of WKQX(FM) should be revoked.

Respectfully submitted,

DAVID EDWARD SMITH

By 
Dennis J. Kelly
His Attorney

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DATED: February 17, 2009

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Application for Review" was served by first-class United States mail, postage prepaid, on this 17th day of February, 2009 upon the following:

John E. Fiorini, III, Esquire
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Counsel for Emmis Radio License LLC


Dennis J. Kelly