Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Applications of Emmis Radio License LLC for Renewal of License	
WFNI(AM), Indianapolis, IN	File No. BR-20040401AOH, Facility Id. No. 19521
WLHK(FM), Shelbyville, IN	File No. BR-20040401ARD, Facility Id. No. 19522
WIBC(FM), Indianapolis, IN	File No. BR-20040401AOO, Facility Id. No. 19524
WYXB(FM), Indianapolis, IN	File No. BR-20040401AOL, Facility Id. No. 51432
WWVR(FM), West Terre Haute, IN	File No. BR-20040401AJO, Facility Id. No. 68824
WTHI-FM, Terre Haute, IN	File No. BR-20040401AJH, Facility Id. No. 70652

To: The Chief, Media Bureau

OPPOSITION TO APPLICATION FOR REVIEW

EMMIS RADIO LICENSE LLC

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Dated: March 4, 2009

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Emmis Radio License, LLC ("Emmis"), by its attorneys, hereby submits this Opposition to the Application for Review filed by David Smith regarding the January 16, 2009, letter decision of the FCC's Media Bureau, which denied Mr. Smith's Petition for Reconsideration of the grant of the above-captioned license renewal applications over his Informal Objection ("Letter Decision"). In his Application for Review, Mr. Smith raises arguments that have been considered and rejected multiple times by the Bureau, the full Commission, and the United States Court of Appeals for the District of Columbia Circuit, and which have failed to improve with either age or repetition. As explained in more detail below, the Application for Review is barred both by the terms of a Consent Decree between Emmis and the Commission (which Decree has been upheld against legal challenge by Mr. Smith himself) and by the doctrines of *res judicata* and collateral estoppel, and is otherwise procedurally and substantively defective. Accordingly, the Application for Review must be dismissed or denied.

II. THE CONSENT DECREE BETWEEN THE FCC AND EMMIS, REAFFIRMED BY THE FCC ON RECONSIDERATION AND THEN APPROVED BY THE D.C. CIRCUIT ON APPEAL, BARS CONSIDERATION OF MR. SMITH'S APPLICATION FOR REVIEW.

Mr. Smith's Informal Objection, which the instant Application for Review claims should have resulted in the denial of Emmis' Indiana renewal applications, raised issues with respect to (1) certain programming aired on a Chicago radio station licensed to Emmis that Mr. Smith had alleged, in complaints filed with the FCC, violated the Commission's prohibition on broadcast indecency, and (2) a lawsuit that was filed against Mr. Smith (but later dismissed with prejudice) by Erich Muller (a/k/a "Mancow"), an independent contractor who previously hosted a program

on Emmis' Chicago station.[1] On August 11, 2004, however, the Commission entered into a Consent Decree with Emmis, under which the FCC: (1) agreed that it would not take any action against any application to which Emmis is a party based on complaints that stations licensed to it had aired indecent material; and (2) determined that Emmis had no involvement in the lawsuit.[2] Mr. Smith filed a Petition for Reconsideration of the *Emmis Consent Decree Order*, which the FCC denied on October 17, 2006.[3]

The Consent Decree, by its terms, precluded the Commission from taking any action against Emmis based upon the programming about which Mr. Smith complained in his Informal Objection, as the Bureau properly found in the Letter Decision.[4] In addition, in the Order adopting the Consent Decree, the Commission noted the dismissal of Mr. Muller's lawsuit against Mr. Smith and, based on a sworn declaration submitted previously by Emmis, found that Emmis had no involvement in the lawsuit.[5] Accordingly, the FCC rejected a request by Mr. Smith that Emmis' license for its Chicago station be designated for revocation or that its license renewal application for that station be denied on either of these grounds.[6] As the Letter Decision properly concluded, this holding compelled the same result with respect to the license renewal

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[1] *See* Informal Objection Against Emmis' Indiana Renewal Applications, FCC File Nos. BR-20040401AOH, BR-20040401ARD, BR-200401AOO, BR-20040401AOL, BR-20040401AJO, BR-20040401AJH (filed July 23, 2004).

[2] *See Emmis Communications Corporation*, Order, 19 FCC Rcd 16003, 16007 (Consent Decree, ¶ 8) (2004) ("*Emmis Consent Decree Order*"); *id.* at 16004 n.7 (Order, ¶ 8 n.7).

[3] *See Emmis Communications Corporation*, Order on Reconsideration, 21 FCC Rcd 12219 (2006) ("*Emmis Consent Decree Reconsideration Order*").

[4] Letter Decision, at 3.

[5] *See Emmis Consent Decree Order*, 19 FCC Rcd at 16004 (Order, ¶ 8 n.6). A copy of the declaration, which was originally filed on July 29, 2004 in connection with Emmis' opposition to Mr. Smith's Petition for Reconsideration regarding certain indecency complaints, *see* FCC File Nos. EB-02-IH-0694, *et al.*, is attached hereto as Exhibit A.

[6] *Emmis Consent Decree Order*, 19 FCC Rcd at 16004 (Order, ¶ 8 n.6).

applications that are at issue here.[7]

While Mr. Smith in the instant Application for Review attempts to mount a collateral attack on the FCC's decision to enter into the Consent Decree, he has already challenged that decision before the FCC on reconsideration and on appeal to the United States Court of Appeals for the D.C. Circuit, and lost in both fora.[8] Granting a motion filed by the Commission to dismiss Mr. Smith's petition for review of the Order adopting the Consent Decree, the D.C. Circuit held that "[t]he decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion."[9] The D.C. Circuit's decision in this regard was consistent with – and, indeed, compelled by – voluminous precedent establishing that a decision of the FCC to enter into a consent decree, a decision essentially not to exercise its power to prosecute, is entitled to so much deference that it is presumptively unreviewable.[10] The Consent Decree, which has now been finally adjudicated as valid by the

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[7] Letter Decision, at 3.

[8] *Smith v. FCC*, Order, No. 06-1381, at 1 (D.C. Cir. Mar. 29, 2007). A copy of the D.C. Circuit's decision is attached hereto as Exhibit B. As the deadline for Mr. Smith to seek rehearing or certiorari of the D.C. Circuit's decision has long passed, the Court's Order is final and no longer subject to review or revision.

[9] *Smith v. FCC* (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

[10] *See, e.g., Parents Television Council, Inc. v. FCC*, No. 04-1263, 2004 WL 2931357, *1 (D.C. Cir. Dec. 17, 2004) (unpublished); *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) ("an agency's decision to settle or dismiss an enforcement action is nonreviewable"); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) ("This Court has held that the *Chaney* presumption of nonreviewability extends not just to a decision whether to bring an enforcement action, but to a decision to settle."); *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 357 (D.C. Cir. 2000) (holding that a "settlement determination" was "nonreviewable"); *Starr v. FCC*, No. 96-1295, 1997 WL 362730, *1 (D.C. Cir. May 20, 1997) (unpublished) (granting motion to dismiss, noting presumption of nonreviewability of settlement decisions); *Operator Commc'ns, Inc. d/b/a Oncor Commc'ns, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 12506, 12514 (¶ 16) (1999) (rejecting petition for reconsideration of consent decree, citing *New York State Dept. of Law* for proposition that "a consent decree is nonreviewable"); *see also Heckler*, 470 U.S. at 831 ("an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion" and therefore is presumptively unreviewable); *Kisser v. Cisneros*, 14 F.3d 615, 621 (D.C. Cir. 1994) (finding HUD's decision not to initiate debarment proceedings

Court of Appeals, precluded any adverse action on Emmis' license renewal applications based on the alleged indecency- and litigation-related issues that Mr. Smith raised in his Informal Objection and continues to press in his Application for Review. As such, those issues certainly cannot form the basis for reconsideration of the grant of the renewal applications.

The Application for Review must not only be rejected under the terms of the Consent Decree and D.C. Circuit's decision, but is also barred by the doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata*, or claim preclusion, provides that "a valid and final judgment rendered against a plaintiff and in favor of a defendant in one action bars another action by the same plaintiff against the same defendant that seeks to assert *any* legal theory regarding any right to *any* remedy relating to the same transaction from which the first action arose."[11] Both the D.C. Circuit case, which as noted has long been final, and the instant Application for Review involve the same parties (Mr. Smith, the Commission, and Emmis) and arise out of the same principal transaction (the Consent Decree between Emmis and the Commission). It matters not that Mr. Smith now seeks a different remedy – reversal of the grant of Emmis' Indiana renewal applications – than before, because *res judicata* bars not only relitigation of a party's right to a remedy that he actually requested, but also all other remedies relating to a single set of facts.[12]

(Continued . . .)
unreviewable); *Warner v. FCC*, 990 F.2d 1378, 1378 (D.C. Cir. Mar 17, 1993) (No. 91-1571) (unpublished) (FCC decision not to commence license revocation proceedings not reviewable); *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985) (FDA's decision to allow a voluntary dismissal of an enforcement action and agree not to file any new action for 18 months "fell squarely within the confines of "[*Heckler v.*] *Chaney.*").

[11] *Comsat Corp. v. IDB Mobile Commc'ns, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7906, 7911 (¶ 13) (2000) (emphases in original) (citing Restatement (2d) of Judgments §§ 19, 24, 25), *aff'd*, *Comsat Corp. v. IDB Mobile Commc'ns, Inc.*, Order on Review, 15 FCC Rcd 14697 (2000).

[12] *See id.*

The related doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues when the following circumstances are present: (1) a party raises an issue identical to one that was previously litigated and that was essential to the previous decision; (2) the prior adjudication resulted in a final judgment on the merits; (3) the party was a party to the prior litigation, or in privity with such a party; and (4) the party had a full and fair opportunity to litigate the issue in the prior proceeding.[13] In his Application for Review, Mr. Smith raises the same issues that he raised, and which the Commission rejected, on reconsideration of the *Consent Decree Order*.[14] The FCC's decision rejecting Mr. Smith's Petition for Reconsideration was also the subject of the D.C. Circuit's decision discussed above,[15] and that decision has long been final. Mr. Smith was clearly a party to the reconsideration proceeding – it was his Petition that initiated it. And there is no question that he had a full and fair opportunity to litigate: the FCC fully considered all of his arguments and rejected them in a written, officially published, decision.[16] Mr. Smith is thus collaterally estopped from raising these arguments again here.

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[13] *See, e.g.*, *Yates v. United States*, 354 U.S. 298 (1957); *Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

[14] Those issues include the following: *First*, the scope of the Commission's authority to enter into the Consent Decree and whether the negotiation of the Consent Decree violated the *ex parte* rules. *See* Application for Review, at 2, 7-10; Petition for Reconsideration, at 3-7. *Second*, the extent of Emmis' involvement in the lawsuit filed by Mr. Muller. *See* Application for Review, at 2, 10-12. While Mr. Smith did not raise this issue in his Petition for Reconsideration of the *Emmis Consent Decree Order*, he did raise it in a petition for reconsideration of a Bureau letter resolving several indecency complaints. *See* Petition for Reconsideration, FCC File Nos. EB-02-IH-0694, at 16-23 (July 16, 2004). And *third*, whether the failure to hold a hearing on Emmis' license renewal applications violated 47 U.S.C. § 309. *See* Application for Review, at 2, 13-14; Petition for Reconsideration, at 5, 7-8.

[15] *See Smith v. FCC*, Notice of Appeal, No. 06-1381, at 2 & Appendix B (D.C. Cir. filed Nov. 16, 2006).

[16] *Emmis Consent Decree Reconsideration Order*, 21 FCC Rcd at 12221 (¶ 6) (rejecting argument that the FCC lacked authority to enter into the Consent Decree); *id.* at 12221 n.22 (¶ 6 n.22) (rejecting argument that negotiation of the Consent Decree violated the *ex parte* rules); *id.* at 12221-22 (¶ 7) (explaining that the FCC had considered all potential character issues that had been raised); *id.* at 12221 & n.24 (¶ 7 & n.24) (explaining that the FCC is not obligated to

It is clear, then, that Mr. Smith's Application for Review represents nothing more than an improper attempt to take a third bite at the apple. But the terms of the Consent Decree itself, the D.C. Circuit's decision approving it, and the doctrines of *res judicata* and collateral estoppel preclude him from doing so.

III. MR. SMITH'S APPLICATION FOR REVIEW IS PROCEDURALLY DEFECTIVE.

A. The Application for Review Fails to Comply with 47 C.F.R. § 1.115.

Section 1.115 of the Commission's rules requires that an Application for Review "specify with particularity," from among a list of enumerated factors, those "which warrant Commission consideration of the questions presented" by the Application for Review.[17] While the Application for Review contains a perfunctory recitation of several of the factors contained in the rule, that alone is insufficient, and Mr. Smith has advanced nothing of substance that warrants further review or reconsideration of the Bureau's actions.

First, he states that "[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy."[18] In a similar vein, he claims that "[t]he action involves application of a precedent or policy which should be overturned or revised." [19] He identifies no pertinent statute or regulation that the Letter Decision purportedly "conflict[s] with." And, as just shown, the Letter Decision was entirely consistent with – and indeed compelled by – the Consent Decree and Order approving it, and the D.C.

(Continued . . .)
reconsider in a subsequent proceeding issues that have already been decided based on a full record).

[17] 47 C.F.R. § 1.115.

[18] Application for Review, at 3.

[19] *Id.*

Circuit's decision rejecting Mr. Smith's first unfounded challenge and voluminous additional precedent. Further, any action "overturn[ing]" or "revis[ing]" the terms of the long-final Consent Decree would constitute a breach of its explicit terms by the FCC and would be unlawful in its own right.[20]

Second, Mr. Smith states that the Letter Decision involves "[a]n erroneous finding as to an important or material question of fact."[21] Presumably, he intends here to emphasize his arguments regarding Emmis' supposed involvement in the lawsuit filed by Mr. Muller.[22] But far from being founded on "speculation and surmise,"[23] the Letter Decision's conclusion "that Emmis had no involvement in the lawsuit" was "based on a sworn declaration submitted by Emmis."[24] Mr. Smith offers nothing other than *his own* "speculation and surmise" to the contrary, which is wholly insufficient to establish that the Letter Decision's conclusion on this issue was erroneous.[25]

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[20] *See Emmis Consent Decree Order*, 19 FCC Rcd at 16006 (Consent Decree, ¶ 6) ("Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other orders of the Commission."); *id.* at 16008 (Consent Decree, ¶ 12) (contemplating that "Emmis [could] bring a judicial action to enforce the terms of the Adopting Order or . . . Consent Decree," and that in such action "the Commission will not contest the validity of this Consent Decree or the Adopting Order").

[21] Application for Review, at 3.

[22] *See id.* at 10-11.

[23] *Id.* at 10.

[24] Letter Decision, at 2 & n.7.

[25] *See, e.g., Red Hot Radio, Inc.*, 19 FCC Rcd 6737, 6744 (¶ 16) (2004) ("[A]pplications for review based upon Section 1.115(b)(2)(iv) must introduce, in the application for review, something that *establishes* an erroneous finding as to a material question of fact or the application for review will be denied. . . . Thus, [the Applicant] was required to concisely and plainly state not only that it disputed the Division's conclusion . . . but also to provide *factual references* in support of this contention.") (emphases added).

Third, Mr. Smith states that the Letter Decision was the product of "[p]rejudicial procedural error."[26] He identifies no procedural error inherent in the Letter Decision itself, and there could be none: he filed a Petition for Reconsideration, Emmis opposed it, he replied, and the Bureau resolved his Petition in a written decision. That is all of the "process" that is due in a reconsideration proceeding. To the extent that Mr. Smith intends this reference to procedure to refer to his persistent claim that negotiation of the Consent Decree violated the *ex parte* rules, he is clearly off base. As Emmis has established before, and as both the Bureau and the full Commission have previously found, the negotiation of the Consent Decree fell squarely within the exception to the general prohibition on *ex parte* communications in restricted proceedings for communications "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence or for the resolution of issues, including possible settlement."[27] There simply was no "procedural error" here.

The Application for Review thus fails to comply with the basic requirements of Section 1.115 of the Commission's rules, and is subject to dismissal on this ground as well.

B. Mr. Smith Lacks Standing.

As a party seeking full Commission review of a decision denying reconsideration, Mr. Smith must establish that he had standing to file the underlying petition for reconsideration in the first place, because Section 1.115 of the Commission's rules necessitates a showing that an applicant for review is "aggrieved" by the underlying decision.[28] It is well settled, however, that

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[26] Application for Review, at 3.

[27] 47 C.F.R. § 1.1204(a)(10).

[28] 47 C.F.R. § 1.115(a). Section 405 of the Communications Act of 1934, as amended, requires that a party filing a petition for reconsideration of an action by a designated authority demonstrate that he or she is a "party in interest," is "aggrieved," or that his or her "interests are adversely affected." 47 U.S.C. § 405.

"informal objectors are not parties in interest and thus have no standing to seek reconsideration," let alone full Commission review.[29] In order to establish cognizable "aggrievement" in the context of a broadcast license renewal proceeding, a member of public must show that he or she (1) "is a resident of the station's service area," or (2) "is a station listener or viewer whose contact with the station is not transient."[30] This means that a party "must 'plead 'injury in fact' fairly traceable to the conduct complained of and likely to be redressed by the requested relief.'"[31] Claims amounting to a "remote" or "speculative" injury are insufficient to confer standing.[32] Put another way, a party filing an Application for Review "must allege facts sufficient to show that grant of the application that it opposes would cause petitioner a direct injury."[33]

As an initial matter, because the instant Application for Review is, as discussed above, nothing more than a collateral attack on the FCC's decision to enter into the Consent Decree, the

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[29] *Sagittarius Broad. Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 22551, 22551, 22553-55 (¶¶ 1, 4-7) (2003) (rejecting application for review on the ground that the applicant had no standing).

[30] *Id.* at 22553-22554 (¶ 5). Furthermore, a petitioner for reconsideration generally must have filed a valid petition to deny against the application whose grant the petitioner seeks to have reconsidered. *E.g.*, *id.* at 22553 (¶ 5); *License Renewal Applications of Gulfcoast Broad., Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 483, 483 (¶ 2) (1993).

[31] *Applications of KQQK, Inc. for Renewal of License for KQQK(FM) Galveston, Texas*, Memorandum Opinion and Order, 14 FCC Rcd 18,550, 18,551 (¶ 4) (1999) (citations omitted); *see Application of MCI Commc'ns Corp. and Southern Pacific Telecomms Co.*, Memorandum Opinion and Order, 12 FCC Rcd 7790, 7794 (¶ 11) (1997) (applying Article III test to determine whether an entity was a "party-in-interest" under section 309(d)(1) of the Act); *see also Wireless Co., L.P.*, Order, 10 FCC Rcd 13233, 13235 & n.25 (¶ 7 & n.25) (1995) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)); *see Lawrence N. Brandt and Krisa, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 4082 (1988); *Nat'l Broad. Co.*, Memorandum Opinion and Order, 37 F.C.C.2d 897, 898 (1972).

[32] *E.g.*, *KIRV Radio*, Memorandum Opinion and Order, 50 F.C.C.2d 1010, 1010 (¶ 2) (1975).

[33] *E.g.*, *Mobile Relay Assocs., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4320, 4320 (¶ 2) (2001) (citing *AmericaTel Corporation*, 9 FCC Rcd 3993, 3995 (1995) (in turn citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972))).

D.C. Circuit's holding that Mr. Smith "lack[s] standing to challenge the orders approving the Consent Decree" conclusively answers the question whether Mr. Smith has standing in the negative.[34]

In addition, Mr. Smith, who resides in Chicago, Illinois, has no legal basis to challenge the renewal of the subject stations' licenses, all of which are located in Indiana. It is settled under FCC precedent that a party may not participate in license renewal proceedings unless he or she is a resident of the relevant station's service area or is a listener of the station whose contact with the relevant station is more than transient.[35] Mr. Smith does not live within the service areas of any of the stations that are the subject of this proceeding, nor does he even allege *ever* to have listened to them. It is therefore not surprising that each of Mr. Smith's arguments relates to programming broadcast on or activities involving WKQX, an Emmis station that is located outside of Indiana and that is not the subject of the instant Application for Review, and Erich Muller, a former contractor of that station who was never affiliated with any of the stations that are involved here. As the Commission has acknowledged, however, "Congress . . . has expressly limited the scope of the license renewal inquiry to matters occurring at the particular station for which license renewal is sought."[36] Mr. Smith's allegations are therefore completely irrelevant to the challenged license renewal applications and cannot possibly form the basis for a conclusion that he has suffered cognizable harm as a result of their grant. Indeed, Mr. Smith, perhaps recognizing his lack of standing to formally participate in this proceeding, filed an *Informal* Objection, and could not have filed either a petition to deny or a petition for

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[34] *Smith v. FCC*, at 1 (Exhibit B hereto).

[35] *Sagittarius Broad. Corp.*, 18 FCC Rcd at 22553-54 & n.20 (¶ 5 & n.20) (citing numerous cases).

[36] *Id.* 22555 (¶ 8).

reconsideration. As such, he cannot possibly have standing to pursue this Application for Review of the decision denying reconsideration.[37]

Furthermore, Mr. Smith does not – and cannot – establish the causation element necessary for standing. In *Huddy v. FCC*, for example, the D.C. Circuit found that television viewers who sought to challenge a transfer application based on allegations that the new owner had falsely certified his financial qualifications to the FCC lacked standing.[38] The Court determined that the viewers' theory of standing "br[oke] down on causation," because they had not offered any "plausible predictions about" the new owner's "likely programming decisions."[39] Mr. Smith makes no attempt to link his claims regarding either the now-dismissed lawsuit filed by Mr. Muller or Emmis' alleged violations of the indecency laws to any "plausible predictions" about Emmis' future programming decisions. In fact, Mr. Muller's program – the target of all of Mr. Smith's prior indecency allegations – is no longer aired on *any* Emmis station. In addition, the Consent Decree and compliance plan required thereunder provide powerful incentives and additional assurances that the programming aired on the Indiana stations (and all stations licensed to Emmis) will remain consistent with the FCC's rules.

Nor can Mr. Smith show redressability. The relief that he seeks will not remedy any harm that he has faced or likely will face, because the FCC has comprehensively dealt with the allegations that form the basis for his Application for Review. There is simply no reasonable likelihood of future harm to Mr. Smith that revocation of the grants of the Indiana license renewal applications could redress.

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[37] *Sagittarius Broad. Corp.*, 18 FCC Rcd at 22551, 22553-55 (¶¶ 1, 4-7) (dismissing application for review of party who demonstrated neither standing to file a petition to deny nor standing to file a petition for reconsideration).

[38] 236 F.3d 720 (D.C. Cir. 2001).

[39] *Id.* at 722.

IV. CONCLUSION

For these reasons, the Application for Review should be dismissed or denied.

Respectfully submitted,

EMMIS RADIO LICENSE LLC

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Its Attorneys

Dated: March 4, 2009

EXHIBIT A

DECLARATION OF CHARLES DUCOTY

1. I am General Manager of radio station WKQX(FM), Chicago, Illinois.

2. I have been provided with a copy of a Petition for Reconsideration filed by David Smith on July 16, 2004, regarding the dismissal of certain complaints alleging that indecent material was aired on WKQX.

3. This declaration is submitted in response to that Petition.

4. Mr. Smith's allegation in the Petition that Emmis had any involvement whatsoever in the filing of a lawsuit by Erich Muller (a.k.a. "Mancow") against Mr. Smith is absolutely incorrect. Emmis had no role, and provided no encouragement or assistance, in connection with the conception, preparation, filing or prosecution of the lawsuit. Emmis has not paid, and will not pay, any legal fees to Mr. Muller's counsel in the lawsuit. Emmis does not have any relationship with the attorney who represented Mr. Muller in the lawsuit or the law firm with which Mr. Muller's counsel is affiliated.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

7-28-04
Date

Charles DuCoty

EXHIBIT B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1381

September Term, 2006

Filed On:

David Edward Smith, et al.,
Appellants

v.

Federal Communications Commission,
Appellee

Emmis Communications Corporation and Emmis Radio License, LLC,
Intervenors

BEFORE: Randolph, Brown and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss and to defer filing of record and briefing schedule, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion. See Heckler v. Chaney, 470 U.S. 821 (1985). Furthermore, the appellants lack standing to challenge the orders approving the consent decree. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Branton v. FCC, 993 F.2d 906, 909 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion to defer filing of record and briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda Deutsch
Deputy Clerk/LD

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on October 18, 2007, I caused a copy of the foregoing **Opposition to Petition for Reconsideration** to be mailed via first-class postage prepaid mail to the following:

Dennis J. Kelly
Post Office Box 41177
Washington, DC 20018
Counsel for David Smith

Eve K. Reed

Eve Klindera Reed

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on March 4, 2009, I caused a copy of the foregoing **Opposition to Application for Review** to be mailed via first-class postage prepaid mail to the following:

Dennis J. Kelly
Post Office Box 41177
Washington, DC 20018
Counsel for David Smith

Eve K. Reed

Eve Klindera Reed