

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File Nos. EB-01-IH-0124,
)	EB-01-IH-0319 and EB-01-IH-0408
Emmis Radio License Corporation)	NAL/Acct. No. 200232080008
)	FRN 0001529346
Licensee of Station WKQX(FM))	Facility ID No. 19525
Chicago, Illinois)	

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 2004

Released: February 18, 2004

By the Chief, Enforcement Bureau:

1. In this *Memorandum Opinion and Order*, issued pursuant to section 405 of the Communications Act of 1934, as amended (the “Act”),¹ and section 1.106 of the Commission’s rules,² we deny a Petition for Reconsideration filed on December 2, 2002, by Emmis Radio License Corporation, (“Emmis”), licensee of Station WKQX(FM), Chicago, Illinois, of a *Forfeiture Order*³ imposing a Twenty-One Thousand Dollar (\$21,000.00) monetary forfeiture penalty against it for willful and repeated violations of 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules, the latter of which prohibits the broadcast of indecent material during the period from 6 a.m. through 10 p.m. Specifically, in the *Forfeiture Order*, we found that the complained-of material broadcast over Station WKQX(FM) on March 6, 7 and May 17, 2001, during the “*Mancow’s Morning Madhouse*” (“*Mancow*”) program met the Commission’s indecency definition, and thus that Emmis’s broadcast of this material violated the statute and the Commission’s rule.

2. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁴ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.⁵ Emmis presents a number of repetitious arguments that have been thoroughly considered and rejected, and thus do not support reconsideration of our *Forfeiture Order*.⁶

¹ 47 U.S.C. § 405 (2002).

² 47 C.F.R. § 1.106 (2002).

³ *Emmis Radio License Corporation (WKQX(FM))*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 21697 (EB 2002).

⁴ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, 15 FCC Rcd 18257, ¶ 2 (EB 2000), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

⁵ *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257, ¶ 2.

⁶ See Petition for Reconsideration of Emmis Radio License Corporation, filed December 2, 2002. (“Petition for Reconsideration”). Specifically, Emmis repeats its arguments that the complained-of material broadcast over WKQX(FM) on March 6 does not depict or describe sexual activity, and relies solely on innuendo that is

3. However, Emmis's Petition for Reconsideration also raises new arguments that we have not previously addressed.⁷ Emmis argues that the material broadcast on March 6 and 7, 2001, is less explicit than a parody of a Britney Spears song that the staff found not actionably indecent.⁸ Unlike the material at issue here, the Britney Spears song parody had been edited by the radio station over which it was broadcast, so that it was not possible for the staff to determine what the omitted terms were or derive from the surrounding text what meaning was intended. In contrast here, the *Mancow* material broadcast on March 6 and 7, 2001, was not edited, and it relied on innuendo, including colloquial terms used to describe sexual and excretory organs and activities, the sexual and excretory import of which is unmistakable.⁹ There is no non-sexual meaning that a listener could have attributed to these terms.¹⁰ Consequently, the material at issue was sufficiently explicit or graphic to be deemed patently offensive as measured by contemporary community standards for the broadcast medium.

4. Emmis also argues that the Commission has not sufficiently articulated precisely how it determines whether particular material is patently offensive to the average broadcast listener under contemporary community standards for the broadcast medium, and thus that broadcasters are unable to make informed decisions as to whether material will be found to be indecent. However, as set forth in the *Forfeiture Order*, we evaluated the complained-of material based upon the Commission's indecency definition, which has been specifically upheld by federal courts.¹¹ The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.¹²

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must

not patently offensive. Emmis also again asserts its argument that the sexual references in the March 6, 2001 broadcast are fleeting. In addition, Emmis again argues that the March 7, 2001, broadcast relies solely on innuendo and that the March 17, 2001, broadcast relies heavily on innuendo, and that neither is pandering, titillating or shocking.

⁷ Petition for Reconsideration at 3-4, 5.

⁸ See Letter from Charles W. Kelley to Cathy Levin, EB-01-IH-0326 (May 3, 2002).

⁹ *Emmis Radio License Corporation (WKQX(FM))*, 17 FCC Rcd at 21699-700, 21702-08.

¹⁰ See *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency ("Indecency Policy Statement")*, 16 FCC Rcd 7999, 8003-04, ¶ 12.

¹¹ *Emmis Radio License Corporation (WKQX(FM))*, 17 FCC Rcd at 21698-99, ¶¶ 6-7, citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*"); and *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987).

¹² *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)(subsequent history omitted)(citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.¹³

In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”¹⁴ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.¹⁵ In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”¹⁶ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹⁷ or, alternatively, removing the broadcast material from the realm of indecency.¹⁸ The Commission judges material by drawing on its “knowledge of the views of the average viewer or listener”¹⁹ and its “general expertise in broadcast matters.”²⁰ Published decisions, including those in the *Indecency Policy Statement*, provide guidance indicating the analytical process by which the Commission determines whether material is patently offensive as measured by contemporary community standards for the broadcast medium. We accordingly find Emmis’s argument to be without merit.

5. Emmis’s new arguments do not demonstrate that the *Forfeiture Order* contains material error or omissions, and we have already considered and rejected its other arguments. Therefore, we deny Emmis’s Petition.

¹³ *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶¶ 7-8. (2001) (emphasis in original).

¹⁴ *Id.* at 8002, ¶ 9.

¹⁵ *Id.* at 8002-15, ¶¶ 8-23.

¹⁶ *Id.* at 8003, ¶ 10.

¹⁷ *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same)).

¹⁸ *Id.* at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

¹⁹ *Id.*

²⁰ *Id.*

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED THAT, pursuant to section 405 of the Communications Act of 1934, as amended, and section 1.106 of the Commission's rules, Emmis Radio License Corporation's Petition for Reconsideration, filed December 2, 2002, IS HEREBY DENIED.

7. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, within thirty (30) days of the release of this Forfeiture Order. *See* 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN)(0001529346) referenced above, and also should note the NAL/Acct. No. (200232080008). If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

8 IT IS FURTHER ORDERED THAT a copy of this *Memorandum Opinion and Order* shall be sent by Certified Mail Return Receipt Requested to J. Scott Enright, Vice President, Associate General Counsel and Assistant Secretary, Emmis Radio License Corporation, 40 Monument Circle, Indianapolis, Indiana 46204 and to Emmis's counsel, John E. Fiorini, III, Esquire and Eve Klindera Reed, Esquire, Wiley Rein & Fielding LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau