



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

January 16, 2009

DA 09-59

In Reply Refer to:

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In re: WFNI(AM), Indianapolis, IN
Formerly, WIBC(AM)
Facility ID No. 19521
File No. BR-20040401AOH

 WLHK, Shelbyville, IN
Formerly, WENS(FM)
Facility ID No. 19522
File No. BRH-20040401ARD

 WYXB(FM), Indianapolis, IN
Facility ID No. 51432
File No. BRH-20040401AOL

 WWVR(FM), West Terre Haute, IN
Facility ID No. 68824
File No. BRH-20040401AJO

 WTHI-FM, Terre Haute, IN
Facility ID No. 70652
File No. BRH-20040401AJH

Petition for Reconsideration

Dear Counsel:

We have before us the petition for reconsideration ("Petition")¹ filed on October 5, 2007, by David Edward Smith ("Smith") directed to the action of the Chief, Audio Division, Media Bureau denying his informal objection (the "Objection") and granting the above-referenced applications (the

¹ Emmis filed an Opposition on October 18, 2007, and Smith filed a Reply on October 30, 2007.

"Applications") for renewal of the licenses of Stations WFNI(AM), Indianapolis, Indiana, WLHK(FM), Shelbyville, Indiana, WYXB(FM), Indianapolis, Indiana, WWVR(FM), West Terre Haute, Indiana and WTHI-FM, Terre Haute, Indiana (the "Stations").² For the reasons set forth below, we deny the Petition.

Background. On April 1, 2004, Emmis Radio License, LLC ("Emmis") filed the Applications to renew the Stations' licenses. On July 23, 2004, Smith filed an Objection alleging that Emmis had engaged in a pattern of willfully broadcasting indecent language, and that Emmis had abused the Commission's processes by allegedly supporting a "SLAPP" lawsuit filed against Smith by one of its Station announcers.³ On August 10, 2004, the Commission adopted a Consent Decree in settlement of Emmis' various indecency complaints,⁴ and on September 5, 2007, the staff denied Smith's Objection, stating that the Complaints are barred from consideration by the terms the *Consent Decree*.⁵ In rejecting Smith's claim based on the SLAPP suit, the *Staff Decision* stated that the Commission does not regulate the non-broadcast activities of station personnel or announcers.⁶ The *Staff Decision* also found, as noted by Emmis, that the Commission had already considered and rejected Smith's abuse of process arguments in the Order adopting the *Consent Decree* and that Emmis had no involvement in the lawsuit, based on a sworn declaration submitted by Emmis.⁷ On reconsideration, Smith argues that the *Consent Decree* was *ultra vires* in nature, "as it is nowhere contemplated in the Communications Act of 1934, as amended."⁸ He also argues that the *Staff Decision* violated the Constitution of the United States in failing to protect his right to notify the Commission of Emmis' airing indecent programming without fear of retaliation.

² See *Letter to David Edward Smith, et al., from the Chief, Audio Division, Media Bureau* (September 5, 2007). ("Staff Decision").

³ A "SLAPP" suit is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." 1 *Am. Jur. 2d Action* § 38 (2007). The acronym stands for "Strategic Lawsuit against Public Participation." *Id.*

⁴ See *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003, 16004 (2004) (the "*Consent Decree*"). The *Consent Decree* was entered into by the Commission and Emmis's parent corporation, Emmis Communications Corporation ("Emmis CC"). By the terms of the Consent Decree, Emmis CC agreed to undertake certain compliance measures and to pay the United States Treasury the sum of \$300,000 in consideration for the Commission rescinding, vacating and canceling certain forfeiture orders issued against Emmis CC-owned broadcast licensees terminating certain inquiries, and dismissing, with prejudice, pending indecency complaints against those licensees. In addition, the Commission agreed to refrain from taking any action against Emmis CC or any future application -- including renewal applications -- to which Emmis CC is a party, based in whole or in part on "any similar complaints alleging violation by any [station operated by Emmis CC] of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date." The Effective Date of the Consent Decree is August 12, 2004, the date of its public release. Petition at 3.

⁵ *Staff Decision* at 3.

⁶ See *Eagle Radio, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 1294, 1294-95 (1994); *Dale A. Owens*, Memorandum Opinion and Order, 54 FCC 2d 375, 378-79 (1975).

⁷ In dismissing Smith's Petition for Reconsideration of the Enforcement Bureau's June 16, 2004, letter disposing of certain of his indecency complaints against Emmis and addressing Smith's request that the Commission deny the renewal application for WKQX(FM), the Order adopting the Consent Decree states: "[W]e note that the lawsuit was dismissed by the Court, with prejudice, on July 26, 2004. Moreover . . . Emmis [CC] provides the Declaration of Charles DuCoty, General Manager of [WKQX(FM)], who represents that Emmis had no role, and provided no encouragement or assistance to Mr. Muller, in connection with the lawsuit." *Consent Decree*, 19 FCC Rcd at 16004 n.7.

⁸ Petition at 2.

Discussion. In support of his indecency claim, Smith claimed that he "filed over 60 [indecency] complaints with the FCC" (the "Complaints") regarding a program broadcast on the Stations called, "Mancow's Morning Madness" (the "Program"). He further pointed to several Notices of Apparent Liability for Forfeiture and Forfeiture Orders (collectively, the "Orders") released between 2002 and April of 2004, in which the Commission determined that portions of the Program contained indecent material. In rejecting Smith's indecency claims, the staff stated that the broadcasts that were the subject of the Orders and of Smith's Objection were aired before the Effective Date of the Consent Decree.⁹ Although Smith argues that the Consent Decree was beyond the scope of the Commission's authority under the Act, the Commission has considered similar arguments and has concluded that it has requisite authority to settle an indecency enforcement action by means of a Consent Decree.¹⁰ Moreover, the Court of Appeals for the District of Columbia Circuit has held several times, including in Smith's own challenge to the *Consent Decree* in this case, that such Consent Decrees constitute a "nonreviewable exercise of agency discretion."¹¹ Accordingly, Smith's indecency allegations are barred from consideration in connection with the Applications by the terms of the *Consent Decree*.

In support of his Abuse of Process claim, Smith asserted that Emmis had abused Commission processes by allegedly condoning a "SLAPP" lawsuit filed against Smith by Erich "Mancow" Muller ("Muller"), the Program's host, in retaliation against Smith for filing the Complaints with the Commission. Specifically, Smith alleged that Emmis violated numerous federal laws by interfering with his right to participate in the Commission license renewal process, and stated that the lawsuit was filed "in order to corruptly harass, intimidate and frighten potential witnesses to violations of [the Commission's indecency rules.]"¹² Smith states that Muller's conduct in filing the "bogus" lawsuit "was clearly broadcast related," and that the staff is complicit in Mueller's attempt to deny Smith his constitutional right to bring an indecency claim before the Commission, citing *Isothermal Community College and Chronicle Broadcasting Company*.¹³ Smith also asserts that the staff relied on, but "conveniently ignored" the ruling in *Eagle Radio, Inc., supra*, that:

The Commission finds it of utmost importance that broadcasters maintain effective control over station operations and personnel. *Trustees of University of Pennsylvania*, 69 FCC2d 1394, 1396-97 (1978). Consistent with this requirement, we will hold a broadcast licensee responsible for rule violations by station employees acting within the scope of their employment. *See generally Pacifica Foundation*, 95 FCC 2d 750,764 (1983).

⁹ *Id.*

¹⁰ *See Viacom Inc.*, Order on Reconsideration, 21 FCC Rcd 12223 (2006).

¹¹ *See David Edward Smith et al. v. FCC*, No. 06-1381, Order, (D.C. Cir. Mar. 29, 2007); *Parents Television Council, Inc. v. FCC*, No 04-1263, Order, 2004 WL 2931357 (D.C. Cir. Dec. 17, 2004).

¹² *Staff Decision* at 3, citing July 23, 2004, Informal Objection at 4.

¹³ Petition at 3. *See also Isothermal Community College*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23932 (EB 2003) (Commission policy prohibits retaliatory conduct by licensees), *citing Patrick Henry*, 69 FCC 2d 1305 (1978) (where the Commission, concerned with the "chilling" effect licensee reprisals might have on potential complainants, found a substantial and material question of fact as to the licensee's motivations for threatening and bringing a civil suit against a complainant); *Chronicle Broadcasting Company*, Memorandum Opinion And Order, 19 FCC 2d 240 (Rev. Bd. 1969) (petition to enlarge issues granted to determine whether licensee engaged private investigators, who sought to intimidate, coerce, and harass the petitioners).

Smith's reliance on the cited cases is misplaced. In both *Isothermal* and *Chronicle*, it was undisputed that the licensee had, to some degree, participated in the alleged prohibited conduct, thereby providing the necessary "involvement" nexus. In the instant case, the *Staff Decision* explicitly found that Emmis had no involvement in the lawsuit.¹⁴ *Eagle Radio* also is inapposite here. The filing of the alleged SLAPP lawsuit was not within the scope of Muller's employment.

Conclusion/Action. Accordingly, IT IS ORDERED, that the October 5, 2007, Petition for Reconsideration of David Edward Smith IS HEREBY DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Emmis Radio License, LLC

¹⁴ See n.6, *supra*.