

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

In the Matter of)	File No. EB-00-IH-0401
)	
EMMIS RADIO LICENSE CORPORATION)	NAL/Acct. No. 200132080029
)	FRN: 0001-5293-87
Licensee of Station WKQX(FM))	Facility ID # 19525
Chicago, Illinois)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2004

Released: April 8, 2004

By the Commission: Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny an Application for Review filed on October 28, 2002, by Emmis Radio License Corporation, licensee¹ of Station WKQX(FM), Chicago, Illinois. Emmis seeks review, pursuant to 47 C.F.R. § 1.115, of a *Memorandum Opinion and Order* (the “*MO&O*”) ² issued by the Chief, Enforcement Bureau (the “Bureau”). The *MO&O* denied Emmis’s Petition for Reconsideration of a *Forfeiture Order*³ that imposed a monetary forfeiture penalty in the amount of Fourteen Thousand Dollars (\$14,000) against it for its willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, the latter of which prohibits the broadcast of indecent material between 6 a.m. and 10 p.m.

II. BACKGROUND

2. On March 20, 2000, between 8:13 and 8:16 a.m., Station WKQX(FM) (the “Station”) broadcast a telephone conversation between a porn star and the on-air staff of the “Mancow’s Morning Madness” show. The broadcast generated a complaint in which the complainant alleged that the Station’s staff and the porn star had talked in graphic detail about “fisting,” which the porn star reportedly described as a procedure by which a female is sexually gratified by having an entire hand inserted into her sexual organ.⁴ On May 15, 2000, between 7:45 and 8:00 a.m., the Station aired a pre-recorded segment of the program entitled “Bitch Radio.” It, too, generated a

¹ Emmis Radio License Corporation was the *pro forma* assignee of the license for Station WKQX(FM) from Emmis FM License Corporation of Chicago, the entity named in both the *Notice of Apparent Liability for Forfeiture* and the *Forfeiture Order* that are discussed herein. See FCC File No. BALH-20001121ADF, granted December 11, 2000. In this *Memorandum Opinion and Order*, “Emmis” will refer to either commonly-controlled entity.

² *Emmis FM License Corp. of Chicago*, 17 FCC Rcd 18343 (EB 2002).

³ *Emmis FM License Corp. of Chicago*, 17 FCC Rcd 493 (EB 2002) (“*Forfeiture Order*”). The *Forfeiture Order* assessed the forfeiture against Emmis, which was proposed in the *Notice of Apparent Liability for Forfeiture, Emmis FM License Corp. of Chicago*, 16 FCC Rcd 7829 (EB 2001) (“*NAL*”).

⁴ Letter from David Edward Smith to Linda Blair, Mass Media Bureau, Federal Communications Commission, dated March 20, 2000 (“March 20 Complaint”).

complaint. The complainant alleged that, during the segment, Heather, the show's female air personality, interviewed three women about their sex lives, specifically asking them whether they "spit or swallowed" their partners' sperm after engaging in oral sex. During the interviews, the Station played in the background the sounds of women moaning.⁵ The Bureau ultimately imposed, and affirmed on reconsideration, a forfeiture of \$7,000 for each of the two segments aired, resulting in a total forfeiture of \$14,000.

3. In its Application for Review, Emmis argues that the *MO&O* misapplied Commission precedent by concluding that the complaints provided sufficient detail to support the indecency determinations. Specifically, Emmis maintains that, because neither complaint provided a tape, transcript or significant excerpt of the complained-of broadcasts, the Bureau lacked the requisite information with which to make indecency findings and deviated from "established FCC precedent" in doing so.⁶ Emmis contends that the information supplied in the complaints constituted only "exceedingly brief" descriptions of the broadcasts.⁷ According to Emmis, the Commission characterized this type of evidence in its 2001 Policy Statement on broadcast indecency as the type of evidence which should be viewed "only as a research tool and should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide."⁸

4. Emmis also contends that the First Amendment prohibits imposition of a forfeiture here based upon the limited degree of detail provided in each complaint.⁹ In this regard, it maintains that the March 20 Complaint, which included only the descriptive phrase "graphic detail," and the May 15 Complaint, which included only the descriptive phrases "both euphemistic and direct conversation about oral sex" and "pornographic sound effects (women moaning)," could not support the staff's determination regarding the explicitness or graphic nature of each broadcast. Further, according to Emmis, the staff had no basis to have determined whether the alleged broadcasts dwelled on or repeated at length descriptions of sexual organs or activities or contextual information to conclude that it was patently offensive.¹⁰ Emmis further submits that, notwithstanding the participation of the porn star in the March 20, 2000, broadcast, the complaint failed to provide a context from which the staff could possibly have concluded that Emmis had intended that the broadcast be pandering, titillating or shocking.¹¹ Finally, Emmis contends that the *MO&O* inappropriately shifted the burden of proof from the Commission to

⁵ Letter from David Edward Smith to Linda Blair, Mass Media Bureau, Federal Communications Commission, dated May 15, 2000 ("May 15 Complaint").

⁶ Application for Review at 1.

⁷ *Id.* at 2.

⁸ *Id.* at 5, quoting *In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8003, ¶ 11 (2001) ("*Indecency Guidelines*").

⁹ Emmis cites, without reference to any particular language, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACTP*").

¹⁰ Application for Review at 6.

¹¹ *Id.* at 7.

itself because, as a practical matter, the *MO&O* required Emmis to retain a tape or transcript of its broadcasts in order to be in a position to rebut the complaints.¹²

III. DISCUSSION

5. After reviewing Emmis's Application for Review and the record in this matter, we find no reason to reverse the *MO&O*. Consequently, we deny the Application for Review and affirm the forfeiture assessed by the Bureau.

6. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended (the "Act"), prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.¹³ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the United States Code, Section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."¹⁴ In addition, section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and, consistent with a subsequent statute and court decision, shall not broadcast indecent material during the period 6 a.m. through 10 p.m.¹⁵

7. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.¹⁶ The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well the Commission's interpretation and implementation of the governing statute.¹⁷ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.¹⁸

¹² *Id.* at 8-9.

¹³ U.S. CONST., amend. I; 47 U.S.C. § 326.

¹⁴ 18 U.S.C. § 1464.

¹⁵ *See* 47 C.F.R. § 73.3999.

¹⁶ U.S. CONST., amend. I. *See ACT I*, *supra* note 9, 852 F.2d at 1344.

¹⁷ 18 U.S.C. § 1464; *FCC v. Pacifica Foundation*, *supra* note 9. *See also ACT I*, *supra* note 9, 852 F.2d at 1339; *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 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*").

¹⁸ *ACT I*, *supra* note 9, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear."). *See id.* at 1340 n. 14 ("...the potentially chilling effect of the FCC's general definition of indecency will be tempered by the Commission's restrained enforcement policy.").

8. As Emmis acknowledges in its Application for Review,¹⁹ the *Indecency Guidelines* provide that, in order for the Commission to conclude that particular broadcast material is indecent, we must make two fundamental determinations. First, the material broadcast must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.²⁰ In determining whether material is patently offensive, the full context in which broadcast material depicting or describing sexual activities or organs appears is critically important in determining whether that material is patently offensive.²¹ 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.²² In examining these three factors, it is necessary to 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....”²³ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,²⁴ or, alternatively, removing the broadcast material from the definition of indecency.²⁵

9. After reviewing the record here, we conclude that the descriptions of the March 20 and May 15, 2000, broadcasts provided in the complaints were sufficient to support an indecency determination. Consequently, we conclude that the Bureau correctly determined that the material broadcast on those days was indecent and therefore actionable.

10. The March 20, 2000, Broadcast. The Station aired a conversation lasting up to (though not necessarily the full) three minutes between the on-air hosts and a porn star which was broadcast outside of the 10 p.m. to 6 a.m. indecency “safe harbor” period.²⁶ The broadcast conversation included a discussion of “fisting,” which the porn star described as a procedure for the sexual gratification of a female involving the insertion of an entire hand into her sexual organ. In its response to the Bureau’s letter of inquiry,²⁷ Emmis did not deny airing the programming as

¹⁹ Application for Review at 2-3.

²⁰ *Indecency Guidelines*, *supra* note 8, 16 FCC Rcd at 8002, ¶ 7.

²¹ *Id.*, 16 FCC Rcd at 8002, ¶ 9.

²² *Id.*, 16 FCC Rcd at 8003, ¶ 10.

²³ *Id.*

²⁴ *Id.*, 16 FCC Rcd 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)).

²⁵ *Indecency Guidelines*, *supra* note 8, 16 FCC Rcd 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”).

²⁶ *See id.*, 16 FCC Rcd at 8001, ¶¶ 5-6. *See also* 47 C.F.R. § 73.3999.

²⁷ Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Emmis FM License Corp. of Chicago, dated November 29, 2000 (“the “LOI”). In an attachment to the LOI, Emmis was provided the characterization of the broadcasts

alleged in the complaint and did not provide any additional facts that would indicate that the material was not indecent in context.²⁸ Thus, based upon this information, we agree with the Bureau that the material described a sexual activity.²⁹ In addition, in light of the complaint's description of what was discussed (sexual gratification of a female through insertion of a fist into her genitalia) and the identities of the participants (a "shock jock" and a porn star), we conclude that the material was sufficiently explicit, shocking and pandering to be patently offensive as measured by contemporary community standards for the broadcast medium.

11. The May 15, 2000, Broadcast. The Station broadcast three interviews outside of the "safe harbor," during the time period that our rule prohibits broadcast indecency, all of which dealt with sexual activities. Specifically, according to the May 15 Complaint, during each interview, the program's female air personality posed the same question to each of three different women, whether they "spit or swallowed" their partners' sperm.³⁰ Emmis did not challenge this characterization of its broadcast, merely asserting that it did not possess a recording of it.³¹ Thus, initially, we conclude that the material described a sexual activity, and that, through the three interviews aired, it did so repeatedly. Further, because the questioning of each interviewee regarding her sexual activities was initiated by the Station on-air host and the Station aired the sounds of women moaning while those questions were asked and answered, we also agree with the Bureau that the material was presented in a pandering and titillating manner intended to shock listeners. In light of the foregoing, we conclude that the May 15 program material described sexual activities in a patently offensive manner. Thus, we agree with the staff's determination that May 15 broadcast material was actionably indecent.

12. Other Matters. We reject Emmis's contention that the staff's decisions unfairly or improperly "shifted the burden of proof" or otherwise violated the Administrative Procedure Act.³² Before the staff issued the *NAL*, it sent copies of the allegations contained in the

contained in the complaints and was "directed to advise whether you broadcast the comments described in the attachment. If the identified material does not accurately reflect the broadcasts in question, note any inaccuracies."

²⁸ Letter from Charles H. Miller, General Manager, Station WKQX(FM) to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated January 25, 2001 ("Emmis LOI Response"). (Emmis's response to the complaints' allegations was, "We have neither a tape nor a transcript of the broadcasts in question and, having made inquiry of pertinent personnel (including those involved in the production and airing of the Mancow program), we have been unable to determine whether the alleged statements were in fact made.")

²⁹ *Indecency Guidelines.*, *supra* note 8, 16 FCC Rcd at 8002, ¶ 7.

³⁰ We recognize that the complainant did not quote the word or words that the Station broadcast which led him to conclude that what was "spit or swallowed" was sperm. Thus, we do not find that the description was explicit or graphic. However, in light of the words quoted by the complainant and the accompanying sound effects, which Emmis does not deny airing, and the complainant's unchallenged assertion that the conversations concerned the interviewees' sex lives, we believe that sufficient evidence exists to allow us conclude that the material repeatedly described a sexual activity, and that it did so in a pandering or titillating manner.

³¹ See *Emmis LOI Response*.

³² Application for Review at 8.

complaints to Emmis and asked Emmis to state whether it had aired the material as alleged.³³ Significantly, in its LOI Response, Emmis did not deny broadcasting the material, but merely stated that it had no tape or transcript of the broadcasts in question and that its inquiries of pertinent personnel did not allow it to determine whether it had aired the material as alleged. Thus, Emmis neither disputed the accuracy of the complainant's allegations nor supplied any countervailing evidence, such as a denial from the air personalities, program's producers or Station management that the material was broadcast as had been alleged. Following the staff's issuance of the *NAL*, the *Forfeiture Order* and the *MO&O*, Emmis never contended, much less offered any evidence to establish, that the complainant's allegations were inaccurate in any way, although it had every opportunity to do so. Consequently, the complainant's allegations stand unchallenged, and the only issue for us to decide at this point is whether those allegations, standing alone, are sufficient to support indecency determinations.³⁴ As discussed above, we find that they are. In response to Emmis's generalized claim, we also find no First Amendment defect in relying on this level of proof.

13. Contrary to Emmis's contentions, neither the staff's handling of this matter nor our decision deviates from or alters our procedures or policies for assessing and resolving indecency complaints. "[O]ur practice is that [a complaint] must *generally* include: (1) a full or partial tape or transcript or *significant excerpts of the program*; [footnote omitted] (2) the date and time of the broadcast; and (3) the call sign of the station involved.³⁵ As explained above, we agree with the staff that the descriptions of the broadcasts provided in the complaints, the accuracy of which Emmis did not challenge, were sufficient to support the Bureau's ultimate conclusion that Emmis twice violated our indecency rule.

IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed on October 28, 2002, by Emmis Radio License Corporation IS DENIED.

15. 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 Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN: 0001-5293-87) referenced above, and also should note the NAL/Acct. No. (200132080029). If the forfeiture is not paid within thirty (30) days of the release of this Memorandum Opinion and Order, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

16. Requests for payment of the full amount of this *Memorandum Opinion and Order* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group,

³³ See Bureau LOI.

³⁴ Compare *Mr. Steve Bridges*, 9 FCC Rcd 1681 (MMB 1994) (indecency complaint denied where there was disagreement between the licensee and the complainant as to what had been broadcast) with *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 17 FCC Rd 9892 (2002) (indecency determination upheld where complainant alleged that she had heard certain words that appeared only on the unedited version of the song and the licensee could not say whether it had broadcast the edited or unedited version).

³⁵ *Indecency Guidelines*, *supra* note 8, 16 FCC Rcd at 8015, ¶ 24 (emphasis added).

445 12th Street, S.W., Washington, D.C. 20554.³⁶

17. IT IS FURTHER ORDERED that copies of this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to Emmis Radio License Corporation, 3500 West Olive Avenue, Suite 300, Burbank, California 91505, and to its counsel, John E. Fiorini, III, Esq., Wiley Rein & Fielding LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶ See 47 C.F.R. § 1.1914.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Emmis Radio License Corporation, Licensee of Station WKQX(FM), Chicago, Illinois, Notice of Apparent Liability for Forfeiture

I dissent from today's decision upholding an Enforcement Bureau decision that I believe is woefully inadequate. In response to complaints about five separate incidents aired on WKQX-FM, the Enforcement Bureau dismissed three of the complaints, including one in which sex between a 27 year old man and a nine year old child was discussed on the air. In the other two incidents – an interview with three women about oral sex and a discussion with a porn star about sexual activities – the Enforcement Bureau imposed a fine of \$7000 for each incident. I also note that since addressing these five broadcasts, we have received additional complaints about this same station and same program, and the Enforcement Bureau has continued to propose \$7000 fines on four different occasions. Such fines will be easily absorbed as a “cost of doing business.” Our enforcement actions should send a message that licensees cannot ignore their responsibility to serve the public interest and to protect children. The Commission's action today fails to do so.