

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

In the Matter of)	EB-04-IH-0660
)	
Emmis Communications Corporation)	NAL/Acct. No. 200432080193
)	FRN No. 0004161410
)	
Emmis Radio License Corporation)	FRN No. 0001529346
)	
Licensee of Station WKQX(FM), Chicago, Illinois)	Facility ID No. 19525
)	
Forfeiture Order rel. Jan. 8, 2002 (DA 02-26))	NAL/Acct. No. 200132080029
)	
Forfeiture Order rel. Nov. 1, 2002 (DA 02-2937))	NAL/Acct. No. 200232080008
)	
Forfeiture Order rel. Feb. 18, 2004 (DA 04-386))	NAL/Acct. No. 200232080014

ORDER ON RECONSIDERATION

Adopted: October 10, 2006

Released: October 17, 2006

By the Commission:

1. In this Order on Reconsideration, we deny a Petition¹ jointly filed by David Smith, the Illinois Family Institute, the Illinois Chapter of Concerned Women for America, and Julie Cordry (collectively, the “Petitioners”), seeking reconsideration of our Order² approving a Consent Decree settling enforcement actions against Emmis Communications Corporation and its subsidiaries that hold FCC authorizations³ for possible violation of broadcast indecency restrictions.

I. BACKGROUND

2. Emmis is the Commission licensee of various radio broadcast stations. The Commission received complaints that Emmis stations had broadcast indecent material over many of those stations, in violation of federal law and the Commission’s rules.⁴ As a result of these complaints, the Commission issued three forfeiture orders against Emmis, assessing monetary forfeitures against it for violation of the Commission’s indecency rule.⁵ Subsequently, the Commission and Emmis entered into the Consent

¹ Petition for Reconsideration jointly filed by David Smith, *et al.* (September 13, 2004) (*Petition*).

² *Emmis Communications Corp.*, Order, 19 FCC Rcd 16003 (2004) (“*Order*”). The Consent Decree is attached to and incorporated by reference in the *Order*.

³ We collectively refer to Emmis Communications Corporation and all of its direct and indirect subsidiaries that hold Commission broadcast licenses herein as “Emmis.”

⁴ See 18 U.S.C. § 1464 (prohibiting the utterance of “any obscene, indecent, or profane language by means of radio communication”); 47 C.F.R. § 73.3999.

⁵ *Emmis FM License Corp. of Chicago*, Forfeiture Order, DA 02-26, released January 8, 2002 (File No. EB-00-IH-0401), *review denied*, *Emmis Radio License Corp.*, Memorandum Opinion and Order, FCC 04-62, released April 8, 2004; *Emmis Radio License Corp.*, Forfeiture Order, DA 04-386, released February 18, 2004 (File No. EB-01-IH-

Decree resolving the three forfeiture orders, as well as other pending indecency complaints and ongoing indecency investigations against Emmis.

3. Pursuant to the Consent Decree, Emmis admitted that the programming at issue in the forfeiture orders, and certain programming that was the subject of the pending complaints and ongoing investigations, is indecent, in violation of section 73.3999,⁶ agreed to make a voluntary contribution of \$300,000 to the United States Treasury,⁷ and adopted a “company-wide compliance plan for the purpose of preventing the broadcast of material violative of the Indecency Laws.”⁸ In addition, Emmis waived “any and all rights” to contest the validity of the Consent Decree or the *Order*.⁹ In return, the Commission agreed to rescind, vacate and cancel the forfeiture orders, terminate its pending inquiries into possible indecency violations by Emmis stations, and dismiss any pending indecency complaints against Emmis.¹⁰ The Commission also agreed not to use the facts of the Consent Decree, the forfeiture orders, the pending inquiries or complaints, “or any similar complaints” regarding programming aired before the Consent Decree’s effective date for any purpose relating to Emmis or its stations, and to treat all such matters as null and void.¹¹

4. On August 12, 2004, the Commission released its *Order* adopting the Consent Decree. The Commission found that “the public interest would be served by approving the Consent Decree and terminating all pending proceedings against Emmis” relating to possible indecency violations.¹² Based upon its examination of the record, the Commission also concluded that there were “no substantial and material questions of fact in regard to these matters as to whether Emmis possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations.”¹³

5. Petitioners argue that the Commission “essentially allowed Emmis to purchase a finding of basic character qualifications.”¹⁴ More specifically, they contend that the *Order* is *ultra vires* because it prevents the Commission from considering Emmis’s apparent indecency violations in making the statutory determination whether grant of Emmis’s pending renewal applications would serve the public interest.¹⁵ They also maintain that the *Order* is arbitrary and capricious, and inconsistent with

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0121); *Emmis Radio License Corp.*, Forfeiture Order, released November 1, 2002 (File Nos. EB-01-IH-0124, EB-01-IH-0319, and EB-01-IH-0408, DA 02-2937).

⁶ Consent Decree, 19 FCC Rcd at 16008, ¶ 13.

⁷ *Id.* at 16007, ¶ 11.

⁸ *Id.* at 16007, ¶ 10. A summary of the Compliance Plan is attached to the Consent Decree.

⁹ *Id.* at 16008, ¶ 12.

¹⁰ *Id.* at 16007, ¶ 8.

¹¹ *Id.* The Commission further agreed not to “initiate any inquiries, investigations, forfeiture proceedings, hearing, or other sanctions or actions against Emmis, any Emmis Station, or any pending or future application to which Emmis is a party” based on the FOs, the inquiries, or the complaints pending prior to the Consent Decree’s effective date. *Id.* Petitioners are concerned about two license renewal applications pending before the Commission for Emmis stations: that for Station WKQX(FM), Chicago, Illinois, File No. BRH-20040802AQH, and that for Station KPNT(FM), Ste. Genevieve, Missouri, File No. BRH-20041001AHL. *Petition* at 3; *see infra*, n. 17.

¹² *Order*, 19 FCC Rcd 16004, ¶ 3.

¹³ *Id.* at 16004, ¶ 4.

¹⁴ *Petition* at 2.

¹⁵ *Id.* at 7. *See* 47 U.S.C. § 309(a).

Commission precedent, because it requires the agency to “ignore a portion of [Emmis’s] record in the license term immediately preceding a renewal application.”¹⁶

II. DISCUSSION

6. We disagree with Petitioners’ contention that we lack the requisite authority to have settled our indecency enforcement actions against Emmis.¹⁷ As a general matter, an agency is presumed to have the discretion to settle or dismiss an enforcement action.¹⁸ In addition, the Communications Act of 1934, as amended (the “Act”), provides the Commission “broad discretion” to settle enforcement actions.¹⁹ Here, we properly exercised that discretion by means of the Consent Decree, under which Emmis admitted that its stations had broadcast indecent material in violation of the Commission’s rules and agreed to substantial remedial obligations, including making a \$300,000 voluntary payment to the United States Treasury and adoption and implementation of a multi-year compliance plan designed to prevent future indecency violations.²⁰ Our agreement in return to terminate the pending enforcement actions against Emmis, and not to consider the facts related to such actions in connection with other Emmis applications, “simply represents the *quid pro quo* that the agency found necessary to procure” Emmis’s agreement to resolve these matters.²¹ These undertakings were within our broad discretion to settle enforcement actions. Thus, the *Order* represents a valid and appropriate exercise of our authority to settle enforcement actions.²²

7. We also disagree with Petitioners’ contention that we abused our discretion by approving the Consent Decree. First, we did not agree to ignore the character issues raised by Emmis’s apparent indecency violations, as Petitioners suggest. Rather, we fully considered all potential character qualifications issued raised by Emmis’s apparent indecency violations and specifically determined that they did not raise substantial and material questions of fact as to whether Emmis possesses the requisite qualifications necessary to be a Commission licensee.²³ Had we not so concluded, we could not have

¹⁶ *Petition at 2; see id.* at 7-8.

¹⁷ Petitioners Smith and Cordry have standing before us to seek reconsideration, having filed indecency complaints against Emmis Stations WKQX(FM), Chicago, Illinois and KPNT(FM), Ste. Genevieve, Missouri, that have been dismissed by operation of the Consent Decree. *Petition at 3; see Order*, 19 FCC Rcd at 16004, n. 7. Accordingly, we need not address whether the other Petitioners have standing before us based on their expressed intent to file a petition to deny the license the Emmis renewal application for Station WKQX(FM). *Petition at 3.*

¹⁸ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”) (citations omitted); *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985) (FDA’s decision to take a voluntary dismissal of an enforcement action and to agree not to file a new action for eighteen months “[f]ell squarely within the confines of *Chaney*.”).

¹⁹ *Parents Television Council, Inc. v. FCC*, 2004 WL 2931357 (D.C. Cir. 2004) (holding that decision to enter into the Consent Decree at issue in that case was a nonreviewable exercise of agency discretion); *NY State Dep’t of Law v. FCC*, 984 F.2d 1209, 1215 (1993) (citing S.Rep. No. 580, 95th Cong., 1st Sess. 25 (1977)).

²⁰ See Consent Decree, 19 FCC Rcd at 16007-08, ¶ 10-13.

²¹ *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985).

²² We note that Petitioners’ suggestion that the settlement discussions leading to the Consent Decree violated the Commission’s *ex parte* rules lacks merit. *Petition at 3-4.* The settlement discussions fall within the exception to the general prohibition of *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.” 47 C.F.R. § 1.1204(a)(10); see *NY State Dep’t of Law*, 984 F.2d at 1217-18.

²³ *Order*, 19 FCC Rcd at 16004, ¶ 4.

agreed to the provisions of the Consent Decree regarding our use of the facts here in connection with future applications. Having already fully considered those matters, we need not reexamine the same issues in a different proceeding.²⁴ Moreover, our determination was consistent with the record before us. Generally, the Commission's concern in evaluating the impact of wrongdoing on a licensee's character is the licensee's probable future behavior.²⁵ Emmis's acknowledgment in the Consent Decree of responsibility for violating indecency restrictions is a step towards ensuring that it does not repeat such violations.²⁶ Likewise, the company-wide compliance plan that Emmis agreed to implement as part of the Consent Decree will help to avoid future violations.²⁷

III. ORDERING CLAUSES

8. IT IS ORDERED, that the Petition for Reconsideration jointly filed by David Smith, the Illinois Family Institute, the Illinois Chapter of Concerned Women for America, and Julie Cordry is hereby DENIED.

9. IT IS FURTHER ORDERED, that copies of this Order on Reconsideration shall be sent by Certified Mail, Return Receipt Requested, to Dennis J. Kelly, Esquire, counsel for David Smith, Illinois Family Institute, Illinois Chapter of Concerned Women for American and Julie Cordry, Post Office Box 41177, Washington, DC, 20018, and John E. Fiorini, III, Esquire and Eve Klindera Reed, Esquire, counsel for Emmis Communications Corp., Wiley Rein & Fielding LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁴ See *Stockholders of Infinity Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 5012, 5057 n.1 (1996) (challenges to the applicant's character qualifications based on past apparent indecency violations were moot where the Commission previously determined that such violations were not disqualifying and agreed to expunge them from the applicant's record for all purposes under the terms of an agreement settling indecency enforcement proceedings).

²⁵ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1183, ¶ 7 (1986) *recon. denied*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987) ("Character Policy Statement"). (character inquiries "focus on the likelihood that an applicant will . . . comply with the Communications Act and our rules and policies."); *id.* at 1189, ¶ 21 (character inquiries "should be narrowly focused on specific traits which are predictive of an applicant's propensity to . . . comply with the Communications Act or the Commission's rules and policies.") See also *Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, Policy Statement and Order, 5 FCC Rcd 3252 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd 3448 (1991), *modified*, 7 FCC Rcd 6564 (1992) ("1990 Modifications of Character Policy Statement").

²⁶ See *id.* at 1129, ¶ 106 ("rehabilitation is significant. We find that the factors which we have already determined to consider, including . . . efforts to remedy the situation, are good evidence of whether rehabilitation has occurred.").

²⁷ See *id.* at 1227-28, ¶ 102 (whether corrective action has been taken is an appropriate factor for analysis in character inquiries).