Federal Communications Commission
Washington, D.C. 20554

June 4, 1998

In reply refer to:
1800C1-CMW/JEE

Released: June 5, 1998

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Eagle Radio, Inc.
Licensee, Station KEGL(FM), Fort Worth, TX
601 California Street, Suite 2260
San Francisco, CA 94108

In re: KEGL(FM), Fort Worth, TX
BRH-970327XC
BRH-950331YB
BAPLH-970106GG

Dear Licensee:

1. This letter is in reference to: (i) the above-captioned applications for renewal of license of Station KEGL(FM), Fort Worth, Texas (File Nos. BRH-970327XC and BRH-950331YB);[1] (ii) the above-captioned application to assign the construction permit of Station KEGL from Eagle Radio, Inc. ("Eagle") to Nationwide Mutual Insurance Company ("Nationwide") (File No. BAPLH-970106GG);[2] (iii) a March 15, 1994, complaint against Station KEGL filed by Tom Blackwell ("Blackwell"), which we will treat as an informal objection to KEGL's 1995 renewal application; (iv) Blackwell's July 24, 1997, informal objection to KEGL's 1997 renewal application and the assignment application;[3] and (v) a July 12, 1995, informal objection to the 1995 renewal application, filed by the Dallas Association for Decency ("DAD"),[4] and the supplements thereto.[5]

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[1] Because of EEO issues, Eagle's 1990 application for renewal of license was granted for a short term, resulting in the filing of renewal applications in 1995 and 1997. Eagle Radio Inc., 9 FCC Rcd 836 (1994) (subsequent history omitted).

[2] An application to assign Station KEGL from Nationwide to Citicasters Co. is also pending (File No. BALH-971113EE). That assignment is part of an eighteen station transaction and will be acted upon by separate action. In this regard, we note that the Department of Justice, Antitrust Division, Merger Task Force has informed us that it has opened an investigation into Citicasters Co.'s acquisition of Nationwide's eighteen stations.

[3] Eagle filed an Opposition to Blackwell's informal objection on August 4, 1997, and Blackwell filed a reply thereto on August 14, 1997.

[4] Eagle filed a Response to DAD's informal objection on August 11, 1995.

[5] Additional informal objections were filed against Station KEGL's 1995 renewal. However, by letter dated October 16, 1995, those objections were dismissed because the objectors failed to provide audio tapes or transcripts

2. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the "Communications Act"), provide properly supported allegations of fact which, if true, would present a substantial and material question of fact as to whether grant of the application in question would be consistent with the public interest, convenience, and necessity. WWOR-TV, Inc., 6 FCC Rcd 193, 197 n.10 (1990). Blackwell and DAD both allege that Station KEGL aired indecent material. We have reviewed these allegations and conclude that they do not raise a substantial and material question of fact concerning the licensee's basic qualifications and, thus, do not preclude grant of the captioned renewal and assignment applications. Eagle Radio, Inc., 9 FCC Rcd 1294, 1295 (1994), reconsideration denied, 12 FCC Rcd 5105 (1997), aff'd Blackwell v. FCC, No. 97-1379 (D.C. Cir. filed Dec. 10, 1997).[6] As set forth below, we find that all but one of the broadcasts at issue are not actionably indecent. With respect to the one actionable broadcast, we have determined that a notice of apparent liability is the appropriate remedy and it is issued herein. In addition to indecency allegations, Blackwell also alleges that the station broadcast remarks designed to discourage listeners from filing complaints about the "Howard Stern Show." As discussed more fully below, we find that no substantial and material question of fact exists with respect to this allegation. Accordingly, we conclude that grant of the subject applications is consistent with the public interest. We therefore grant Blackwell's 1994 informal objection to the extent indicated herein, deny Blackwell's 1997 informal objection and DAD's informal objection, and grant the pending renewal applications and the application to assign Station KEGL to Nationwide.

I. BLACKWELL'S 1997 INFORMAL OBJECTION

3. Blackwell, who resides within the KEGL(FM) primary service area, argues that Station KEGL(FM) broadcast (1) indecent and/or obscene material and (2) threats against those who complain about the broadcast of such indecent and/or obscene material. He argues that Eagle's 1997 renewal and assignment applications should not be granted absent a hearing on these allegations. Eagle contends, in its response, that Blackwell has not raised a substantial and material question of fact warranting designation for hearing. It asserts that even if Blackwell's allegations were true, a hearing is not warranted because Blackwell has not met this threshold and that, to the extent necessary, the issues raised are considered more appropriately in an enforcement proceeding separate and apart from the pending applications.

A. Broadcast of Threats

4. Blackwell alleges that on June 12, 1997, threatening remarks were broadcast on KEGL(FM) during "The Howard Stern Show," a syndicated program which the station broadcasts in the morning. Specifically, he claims that Howard Stern threatened "those persons who might be inclined to file a complaint with the FCC or law enforcement (or with his sponsors) as to the indecent and obscene nature of the materials broadcast on his show." Informal Objection at 11. Blackwell contends that Stern's threatening remarks are "chilling," and would "scare off" individuals who might otherwise file complaints.

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of the broadcast material in question. Letter from Linda Blair, Chief, Audio Services Division, to Informal Objectors (Oct. 16, 1995).

[6] On October 2, 1997, the Bureau issued a letter ruling to Blackwell stating that the indecent material which was at issue in the previous KEGL decisions was not actionable. Letter from Norman Goldstein, Chief, Complaints and Political Programming Branch, to Tom Blackwell (October 2, 1997). Blackwell filed a Petition for Reconsideration of that letter which remains pending.

He contends that such remarks violate the Commission's policy that a broadcast licensee may not engage in actions designed to harass a member of the general public.

5. Blackwell attaches a copy of a transcript of the alleged broadcast to his informal objection. In pertinent part, the transcript provides:

> MM [Matt Mangas]: The American Family Association . . . have, ah, staged a letter writing campaign to our advertisers, so they are getting in our face a little bit down here.
>
> . . .
>
> Voice: Well we invited them to the press conference but they were afraid that you'd beat up on them.
>
> HS: Beat up on them? Well of course I would beat up on them. . . .
>
> . . .
>
> HS: . . . I've read some of their literature and I'm contemplating a lawsuit against them 'cause they've actually made up stuff about what I've said on the air and I'm, I'm probably going to teach them a lesson and give them a little spanking. Because if you gonna talk about what I've done, you'd better damn well get it right. If you're going to attempt, if you're going to attempt to get me thrown off the air through, uh, less than uh, honest means, then you better have your whole story straight. You better have everything . . . you better stop paraphrasing and you better start quoting, and you better start, ah, telling what it is I did exactly. Because, uh, I will take your money, I'll bankrupt you.
>
> . . .
>
> HS: And I will sue not the organization, I'll sue the individuals who run the organization. I'll find out the names of whoever is printing that crap out of their basements, on their computers, and I'll wreck their lives, I'll take their homes.

6. A finding of "[i]ntimidation or harassment of witnesses requires threats of reprisals or some other unnecessary and abusive conduct reasonably calculated to dissuade a witness from continuing his or her involvement in a proceeding." Kaye-Smith Enterprises, 98 FCC 2d 675, 682 (Rev. Bd. 1984), recon. denied, 98 FCC 2d 670 (Rev. Bd. 1984), review denied, FCC 85-192, released April 19, 1985, aff'd by judgement sub nom. Hoffart v. FCC, 787 F.2d 675 (D.C. Cir. 1986) (table), citing Chronicle Broadcasting Co., 19 FCC 2d 240, 244 (Rev. Bd. 1969)(subsequent history omitted). Howard Stern's alleged remarks do not appear to have been calculated to threaten or intimidate the American Family Association, or any other party, from complaining about his broadcasts. Rather, they seem to have been "off-the-cuff" comments complaining about those listeners who allegedly have paraphrased his material inaccurately. Such comments do not rise to the level of intimidation or harassment and are more appropriately characterized as a display of bad temper, similar to those comments at issue in Federal Broadcasting System, Inc., 62 FCC 2d 861 (Rev. Bd. 1977). In that case, the Review Board ruled that a threat of a civil suit was nothing more than an "unseemly display of bad temper . . . rather than a calculated effort" to intimidate or harass. 62 FCC 2d at 869. The Review Board consequently found that a character qualifications issue was not warranted. Compare Patrick Henry, 69 FCC 2d 1305 (1978), where the Commission found substantial and material questions of fact because the licensee threatened suit, actually brought suit, and conflicting facts existed as to a motive for filing suit. In the absence of evidence of a calculated attempt to threaten or harass complainants, and given that there is no evidence before us that Howard Stern actually filed suit, we find that no substantial and material questions of fact exist with respect to Howard Stern's broadcast.

B. Broadcast of Obscene or Indecent Material

7. Blackwell also alleges that Eagle violated 18 U.S.C. § 1464 when KEGL(FM) broadcast material on April 3, 1995; June 24, 1997; June 26, 1997; and July 15, 1997, that Blackwell considers to be obscene and/or indecent. We have thoroughly reviewed the material submitted in support of Blackwell's allegation. On the basis of that review, we conclude that this broadcast material, alleged to violate 18 U.S.C. § 1464, is not actionably indecent.

II. BLACKWELL'S 1994 INFORMAL OBJECTION

8. Blackwell asserts, in his 1994 informal objection, that Eagle violated 18 U.S.C. § 1464 when KEGL(FM) broadcast indecent material. Blackwell submitted twelve hours of excerpts, taped over a number of days, in support of his contention. We have thoroughly reviewed the material contained on the tapes and determined all but one broadcast to be not actionably indecent. We find that KEGL(FM) apparently violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the "Howard Stern Show" on September 30, 1993, between 6 a.m. and 11 a.m.[7] A transcript of the allegedly indecent broadcast, taken from a tape submitted by Blackwell, is attached.

9. Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

10. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. See Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). The court subsequently concluded that a 10:00 p.m. to 6:00 a.m. "safe harbor" was justified as a properly tailored means of vindicating the government's compelling interest in the welfare of children. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 701 (1996).

11. We believe that the subject excerpt is indecent in that it contains language that describes sexual and excretory activities or organs in patently offensive terms. Because the material aired at a time when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on September 30, 1993, Station KEGL(FM) violated 18 U.S.C. § 1464 by airing indecent programming.

[7] The same broadcast material at issue here was the subject of two NALs, both issued on February 1, 1994, to: (1) Americom Las Vegas Ltd. Partnership, licensee of KFBI(FM), Pahrump, NV, (9 FCC Rcd 1753); and, (2) Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, Infinity Broadcasting Corporation of Washington, DC, and Infinity Broadcasting Corporation, licensees of stations WXRK(FM), New York, NY; WYSP(FM), Philadelphia, PA; WJFK(FM), Manassas, VA; and WJFK(AM), Baltimore, MD, respectively. (9 FCC Rcd 1747).

12. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, Eagle is hereby advised of its apparent liability for a forfeiture of Two Thousand Dollars ($2,000), for its apparent violation of 18 U.S.C. § 1464 on September 30, 1993. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

13. In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

III. DAD'S 1995 INFORMAL OBJECTION

14. DAD alleges in its 1995 Informal Objection that KEGL(FM) aired indecent and/or obscene material and submitted thirty-three audiotapes which contained thirty-one days of broadcasts in support of its contention. Because DAD failed to provide sufficient context to enable us to determine whether some of the material about which it complains meets the Commission's definition of indecency, we dismiss the portion of DAD's complaint that pertains to the following broadcast dates: May 12, 24, 29, 30, 1995; and, June 7, 9, 14, 16, 19, 20, 21, 22, 30, 1995. The remainder of DAD's complaint, which includes the following broadcast dates: April 3, 1995; May 1, 4, 5, 8, 10, 18, 19, 25, 26, 31, 1995; and June 2, 6, 15, 23, 26, 27, 29, 1995; is dismissed as not actionably indecent.

15. For the reasons set forth above, Blackwell's 1994 informal objection IS GRANTED IN PART, to the extent indicated herein, and a Notice of Apparent Liability for $2,000 is issued to Eagle (see paragraphs 12-13, supra) for the broadcast of indecent material about which Blackwell complained. Additionally, Blackwell's 1997 informal objection and DAD's informal objection are DENIED.

16. We find that the applicants are qualified and that grant of the pending renewal applications and application for assignment of Station KEGL(FM) to Nationwide Mutual Insurance Company would serve the public interest, convenience and necessity. Accordingly, it is ORDERED, that the pending applications for renewal of license of Station KEGL(FM) (File Nos. BRH-970327XC and BRH-950331YB) ARE GRANTED. It is FURTHER ORDERED, that the application for assignment of license

of Station KEGL(FM) from Eagle Radio Inc. to Nationwide Mutual Insurance Company (File No. BAPLH-970106GG) IS GRANTED.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

Attachments

cc: Donald Zeifang, Esq.
Edward W. Hummers, Jr., Esq.
Dennis J. Kelly, Esq.
Elvin F. Arnold

Radio Station: KEGL(FM), Ft. Worth, TX
Date/Time Broadcast: September 30, 1993
Material broadcast: Howard Stern Show

9/30/93 at 9:18

* *

HS: The legs, rolling around on a Jaguar all sexed up. That Jaguar must have stunk for three days. I'm watching.
RQ: I don't think she's a smelly person.
HS: No, but you know girls have a special scent, that they leave, when they're all hot and they're not wearing panties and they're laying all over a car. Panty juice. I always look at my wife's panties. There's always something going on there too.
RQ: Oh.
HS: She always.
RQ: (Unintelligible).
HS: What do you mean, boy oh boy?
RQ: Panties.
HS: These women have all kind of stuff going on.
RQ: Like yours are crystal clean.
HS: I never liked, there's always like junk going on in my wife's panties.
RQ: Let me see yours right now.
HS: Fine. What are you saying?
RQ: I want to see yours right now.
HS: I'll tell you, I don't have the stuff, you know, I have some leakage I'll admit.
RQ: (Laughs).
HS: I think she's leaking from everywhere.
RQ: (Laughs).
HS: No sometimes I look at my wife's underpants and I go, yeah, I shouldn't really look at her underpants cause it's kind of a turn off. You know what I mean? There's lots going on.
RQ: I don't know why you're doing that.
HS: She always has pads and stuff. I don't know what's going on. It's always a two-sided surprise. You got, like stuff going on in your underpants right?
RQ: Everybody does.
HS: Really? God, it's disgusting.

* *