

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of)	
)	
EMMIS TELEVISION LICENSE, LLC)	File Nos. BALCT-20050826AAB
)	BALCT-20050826AAE
and Various Assignees)	BALCT-20050825ABS
)	BALCT-20050825ADB
For Consent to the Assignment of)	BALCT-20050825AEB
the Licenses of Television Stations)	BALCT-20050825AEY
KGUN(TV), Tucson, Arizona)	BALCT-20050825AEZ
WFTX(TV), Cape Coral, Florida)	BALCT-20050825AFA
KRQE(TV), Albuquerque, New Mexico)	BALCT-20050825AFC
KBIM-TV, Roswell, New Mexico)	
KREZ-TV, Durango, Colorado)	
WALA-TV, Mobile, Alabama)	
WBPG(TV), Gulf Shores, Alabama)	
WLUK-TV, Green Bay, Wisconsin)	
WTHI-TV, Terre Haute, Indiana)	

To: Office of the Secretary, for the Chief, Media Bureau

OPPOSITION TO PETITION TO DENY

Emmis Television License, LLC (“Emmis”), by its attorneys and pursuant to Section 73.3584(b) of the Commission’s rules, hereby opposes the September 29, 2005, Petition to Deny (the “Petition”) filed by Broadcast Company of the Americas, LLC (“BCA”), against the captioned assignment applications. The Petition is patently improper and lacks a shred of basis for the relief it seeks. As shown below, BCA lacks standing to file the Petition. Moreover, BCA’s claims of misconduct by Emmis in a wholly unrelated Commission proceeding provide no basis for the Commission to delay, let alone deny, grant of the instant television assignment applications—even if those claims had any merit. BCA’s claims, however, are groundless, as we

will show below.¹ At its core, the Petition amounts to pure and simple retribution. The Commission should give the Petition the summary rejection it is due.

I. BCA Lacks Standing to File the Petition

By way of the captioned applications, Emmis seeks Commission consent to assign the licenses of nine television stations in Alabama, Arizona, Colorado, Florida, Indiana, New Mexico, and Wisconsin to various buyers. The premise for BCA's Petition is ongoing litigation before the FCC that concerns BCA's attempt to obtain Commission authorization to provide radio programming to San Diego, California, through radio stations located in Mexico. The vast chasm between these two proceedings is obvious.

It is unsurprising, therefore, that BCA makes only the feeblest of attempts to meet the rigorous requirements for establishing its standing to challenge the subject television assignments. In lieu of any specific allegations regarding the applications at issue here, BCA blithely and vaguely asserts in a footnote that "Emmis's misconduct directly and adversely affected BCA. It is thus an aggrieved party and has standing to file this Petition to Deny."² That is not enough.

As the Commission has frequently noted, 47 U.S.C. § 309(d)(1) allows only "parties in interest" to file a petition to deny.³ To satisfy "party in interest" status, BCA must satisfy a number of rigorous tests. First, it "must make specific allegations of fact sufficient to demonstrate that grant of the challenged application would cause the petitioner to suffer a direct injury."⁴ Secondly, BCA must draw "a causal link between the claimed injury and the

¹ The facts stated in this Opposition are based on the record of the XHBCE-FM proceeding, of which the Commission may take official notice. Thus, no personal knowledge declaration is necessary.

² Petition at 3 n.2.

³ See, e.g., *NextWave Personal Communications, Inc., Debtor-in-Possession*, 19 FCC Rcd 2570, 2579-80 (2004); *Alaska Native Wireless, L.L.C.*, 18 FCC Rcd 11640, 11644 (2003).

⁴ *Alaska Native Wireless, supra*, 18 FCC Rcd at 11644.

challenged action by demonstrating that the injury can be traced to the challenged action.”⁵ That is, BCA must show that granting the assignment applications will cause a specific and demonstrable injury. Thirdly, BCA must show that denying the assignment applications would “likely” prevent the alleged harm.⁶ Thus, BCA must specifically allege that granting the applications will cause it direct harm and show that denying the applications will prevent that injury from taking place.

BCA’s unelaborated and unsupported claim of standing utterly fails to meet these standards. BCA advances no specific harms that it will suffer from the grant of the assignment applications, it does not connect any purported harms to the applications at issue in this case, and it has not shown how denying the assignment applications would prevent the unspecified harms from occurring. As a would-be *radio* programmer in San Diego, BCA cannot and does not show how it would be harmed by allowing Emmis to sell *television* stations in other locations, or how that harm would somehow be remedied by denial of those transactions. As a result, BCA has completely failed to establish its standing to file the Petition—a failure so complete that the Petition should be summarily rejected on procedural grounds alone.

II. BCA’s Charges Against Emmis Regarding the XHBCE-FM Proceeding Are Groundless

A. Even if Meritorious, BCA’s Allegations Provide No Basis for Delaying Grant of the Subject Applications

As noted above, BCA’s petition is premised on Emmis’s alleged “willful misrepresentation, lack of candor and abuse of the Commission’s processes”⁷ in opposing applications by BCA and a second entity for authority under Section 325(c) to provide radio

⁵ *Id.*

⁶ *Id.*

⁷ Petition at 1.

programming to the San Diego, California, area through stations located in Mexico. Even were there any merit to BCA's assertion, it still would not justify denial of or inaction on the subject assignment applications. BCA makes no allegations at all regarding the instant assignment applications or the operation of the television stations Emmis seeks to sell. Its Petition is entirely premised on Emmis's conduct in a dispute involving radio stations in southern California and Mexico. BCA's forum-leaping provides no basis for denying or delaying action on the instant applications. The Commission "rejects the presumption . . . that misconduct at one station is necessarily predictive of the operation of the licensee's other stations," and "even a record of serious lack of candor will necessarily terminate only licensee rights in the proceeding in which it occurred."⁸ Similarly here, even if BCA's assertions regarding Emmis's conduct in the cited Section 325(c) radio dispute had any merit at all, that would not be grounds for finding Emmis unfit to sell nine television stations elsewhere in the country.

B. In Any Event, BCA's Allegations Are Groundless

But in fact, BCA's charges regarding the Section 325(c) dispute have no merit. It would be inappropriate and unnecessary for Emmis to relitigate that dispute in the context of the instant assignment applications, as BCA appears determined to do. The Section 325(c) proceeding is ongoing, and its merits will be adjudicated by the International Bureau. Still, a modest amount of background on the dispute may be helpful in this proceeding.

BCA is seeking Section 325(c) authority to provide programming to two Mexican radio stations—XEKTT(AM) and XHBCE-FM—for transmission via those stations into the San

⁸ *KQED, Inc.*, 3 FCC Rcd 2821, 2828-29 (Rev. Bd. 1988), *aff'd*, 5 FCC Rcd 1784 (1990), *aff'd*, 6 FCC Rcd 625 (1991). *See also* Letter from W. Kenneth Ferree, Chief, Media Bureau, to Lee W. Shubert, Esq. *et al.* re WABZ-FM, Albemarle, NC, File No. BAPLH-20040810AAD (Nov. 3, 2004) (approving application to assign station, and rejecting petition to deny premised on character allegations in pending renewal proceeding involving assignee's stations in a separate market). Indeed, even where it denied renewal of a license because the licensee had filed a "strike petition" against a competitor, the Commission found the licensee qualified to continue owning its other radio stations. *See Faulkner Radio, Inc.*, 88 F.C.C.2d 612 (1981).

Diego radio market. BCA's "programming arrangements," as the Petition acknowledges,⁹ involve an entity called Quetzal Bilingual Communications, Inc. ("Quetzal"), which Commission records will show is directly or indirectly owned by one Mr. Jaime Bonilla Valdez.

Mr. Bonilla has something of a history before the Commission—a substantial and recent part of which concerns Mr. Bonilla's connections with Mexican radio stations operating with technical facilities that have not been coordinated with the U.S. government. In 2003, a Bonilla-owned company, Pacific Spanish Network, Inc. ("PSN"), obtained Section 325(c) permits to provide programming to XEKTT(AM) and two other Mexican AM stations. A few months later, the Commission began to receive complaints from U.S. broadcasters of interference from XEKTT(AM), and later, from a second of these stations which had begun operation. An ensuing Enforcement Bureau investigation made clear that the Mexican stations were operating on frequencies, at increased power levels, and/or from transmitter sites which had not received approval from the U.S. government, and that PSN had continued to provide programming to the stations knowing this. As a result of that enforcement proceeding, PSN voluntarily surrendered its Section 325(c) authorization for the three Mexican AM stations and was fined \$20,000 for supplying programming to XEKTT(AM) after becoming aware that that station's operation violated the applicable treaty and was interfering with U.S. stations.¹⁰

The dispute on which BCA rests its Petition is of a similar nature. BCA and Quetzal have filed a series of Section 325(c) applications and STA requests to provide programming to

⁹ Petition at 2-3.

¹⁰ See *Pacific Spanish Network, Inc.*, Notice of Apparent Liability for Forfeiture, DA 04-2259 (July 30, 2004). On information and belief, the Mexican and U.S. governments ultimately coordinated XEKTT(AM)'s operation on another AM frequency. Following that coordination, Mr. Bonilla (this time through Quetzal) applied for and received Quetzal's current Section 325(c) authorization for that station. There remains pending a petition by various U.S. licensees to revoke Mr. Bonilla's domestic FCC licenses (including KURS(AM), San Diego, CA, licensed to Quetzal) based on PSN's conduct in the Section 325(c) matter and past violations of Commission rules by Bonilla-controlled FCC licensees. See "Request for Issuance of Order to Show Cause Why Licenses and Construction Permit Should Not Be Revoked," filed by KGO-AM Radio, Inc., KABC-AM Radio, Inc., and Owens One Company, Inc. (filed May 11, 2004).

XEKT(AM) and to XHBCE-FM, a station not involved in the 2003-04 PSN case. The U.S. and Mexican governments have coordinated the operation of two different facilities for XHBCE-FM—a Class B facility and a Class C1 facility—at two different sites. It is the belief of Emmis and its co-petitioner in the case, based on investigations and certified reports of their technical consultants, that neither the Class B facility nor the Class C1 facility of XHBCE-FM is being operated in accordance with the technical parameters that have been coordinated with the U.S.¹¹ Again, Emmis has no interest in relitigating the case before the Video Division in the context of television assignment applications. But a few brief points will illustrate the absurdity of BCA's suggestion that Emmis, in advocating its position, has been guilty of any sort of misrepresentation, lack of candor, or abuse of process:

- BCA claims that Emmis misrepresented the location of XHBCE-FM's Class B facilities to the Commission. It cites a helicopter inspection of its own chief executive officer, whose observations BCA apparently believes should be taken as irrefutable gospel.¹² Emmis's assertions regarding the Class B site location, however, are based on certified reports of a qualified engineer who conducted an aerial inspection of the land at the specific authorized coordinates for the Class B facilities.¹³ That inspection, verified by a photograph of the site, determined the site to be a ravine with no evidence of a radio facility having been built there, and no radio signal emanating from it. In the course of the proceeding, BCA also submitted a survey (which predated Emmis's consultant's aerial inspection by six months) purporting to show that the actual Class B facility is only 180 meters away from the authorized site—in other words, *admitting* that the Class B site is not where it is authorized to be.¹⁴ At bottom, there is no dispute that XHBCE-FM's Class B site is at an unauthorized location; the parties differ only in their views of how far distant the

¹¹ It is highly ironic that, while troubling to make only the weakest of attempts at establishing its standing here, BCA's Petition assails Emmis's standing to participate in the XHBCE-FM matter. Emmis is in fact a U.S. broadcaster with a stake in the integrity and reliability of notifications under international broadcast agreements designed to protect domestic stations from prohibited cross-border interference. Given the recent frequency of cases raising precisely that concern, Emmis's participation in the XHBCE-FM matter is more than justified.

¹² See Petition at 5.

¹³ *Id.*, Exhibit A at Exhibit 3 (*Report on Findings of Field Investigation of Radio Facilities XHBCE-FM, XESS(AM), XESDD(AM) & XEKT(AM). All Located in Baja California North, Mexico*; hereinafter "Saxberg 1") at 2-4; Exhibit B at Exhibit 3 (*Engineering Statement of Joel Saxberg*, hereinafter "Saxberg 2") at 1.

¹⁴ *Id.*, Exhibit D at Exhibit 1 (*Engineering Statement [of Lawrence L. Morton, P.E.]*, hereinafter Morton 2) at 5 and Attachments 12A-B and 13A-B.

site is (see below). It is a stretch indeed for BCA to accuse Emmis of misrepresentation under these circumstances.

- BCA suggests that Emmis persisted in misleading the Commission “[e]ven after [Emmis’s alleged] misrepresentation [concerning the Class B site] was pointed out.”¹⁵ While BCA’s allegation that Emmis “played games with the Commission” involving the Mexican name for the site location is difficult to decipher,¹⁶ the fact is that BCA’s own consultant described the site “at the peak” of Cerro Grande and offered up a photograph of a site identified as “Peak of Cerro Grande Transmitter Site of XHBCE-FM Class B Operating Facility.”¹⁷ Emmis’s consultant has supplied a topographical map showing that the “Peak of Cerro Grande” is located fully 2.55 kilometers from, and 1700 feet higher in elevation than, the Class B authorized location.¹⁸ Despite BCA’s “disturbed” assertion that Emmis’s consultant would necessarily have seen the constructed Class B facilities on his helicopter inspection,¹⁹ BCA/Quetzal’s own “Peak of Cerro Grande” identification actually confirms that the actual Class B site is nowhere in sight of the authorized location.²⁰
- Again as if its version of facts were the only one on earth, BCA takes issue with Emmis’s assertion that XHBCE-FM prematurely commenced operations at the Class C1 site. Notwithstanding what “BCA’s on-site inspection of the Class C1 facilities [allegedly] revealed,”²¹ on the day of Emmis’s consultant’s aerial inspection his equipment detected XHBCE-FM’s signal at the Class C1 site,²² which at the time was not authorized either under a Section 325(c) permit or an STA. According to Quetzal, the signal could not possibly have come from the Class C1 site because construction of the new facility was not yet completed. Its explanation for what Emmis’s consultant heard was that maintenance was being performed on the XHBCE-FM generator at the Class B site at the precise time the consultant flew over that site (and heard no transmissions). According to Quetzal, by the time the

¹⁵ *Id.* at 5.

¹⁶ *See id.* at 6.

¹⁷ *Id.*, Exhibit C at Exhibit 1 (*Engineering Statement [of Lawrence L. Morton, P.E.]*, hereinafter Morton 1) at 11-13.

¹⁸ *Id.*, Exhibit B, Saxberg 2 at Exhibit 2; *see also* attached Exhibit A at Exhibit 1 (*Engineering Statement in Support of Reply to BCA Opposition*) hereinafter Saxberg 3) at Exhibit E-2.

¹⁹ *See id.* at 5.

²⁰ What is truly “disturbing” is that BCA, while professing outrage that Emmis might take legitimate issue with its view of the facts, nonetheless manages to omit from Exhibit E of its Petition a full 27 pages of an engineering statement submitted by Emmis’s consultant in the XHBCE-FM case. The omitted pages include most of Emmis’s consultant’s comments addressing BCA/Quetzal’s proffered December 2004 site survey and its failure to substantiate the location of the Class B site, the irregularities regarding XHBCE-FM’s Class C1 site, and all exhibits and attachments. To complete the record and for ease of reference, an unabridged copy of the Lazer/Emmis Reply to Opposition and the Statement of Mr. Joel Saxberg is attached as Exhibit A hereto.

²¹ *See* Petition at 6.

²² *Id.*, Exhibit A, Saxberg 1 at 5; Exhibit B, Saxberg 2 at 1. *See* Exhibit A, Saxberg 3 at 15.

helicopter reached the Class C1 site, the generator at the Class B site was working again, and that is what the consultant's equipment detected.²³ However, in a further review of his photographs of the Class C1 site, the consultant detected the presence of yet another tower with 4-bay antenna which he identified as the probable source of the unauthorized signal he heard.²⁴

- BCA claims that Emmis attempted to mislead the FCC with regard to the orientation and directional capabilities of the Class C1 antenna. To the contrary, Emmis has had ample ground to question the antenna's ability to protect U.S. stations, regardless of orientation. Based on its consultant's photos, BCA's consultant's photos, and the antenna manufacturer's drawings, Emmis questioned whether the antenna could produce the required directional pattern.²⁵ BCA responded that the pattern is produced by "embedded elements" and "tuned slots" which "are not readily discernible unless the viewer knows the detail design of the antenna."²⁶ BCA, however, has refused to provide such details or any other evidence that would allow third parties or the Commission to independently verify the antenna's directional capabilities. Based on information provided by Quetzal and BCA and analyzed by Emmis's consultant and a leading U.S. antenna manufacturer, XHBCE-FM's Class C1 antenna does not have the characteristics needed to protect the relevant U.S. stations.²⁷
- BCA claims that Emmis's "by-word" in filing its petitions and other pleadings in the XHBCE-FM case has been "a concerted practice of persistent delay."²⁸ In fact, it was BCA's own counsel that sought an additional month (of which it used two weeks) in which to oppose Emmis's first petition in the case. The only extension sought by Emmis was for 15 days, with a supplemental 5-day extension (of which only two days were used), in which to file a reply pleading, due to co-counsel's two-week absence from the country in early July. The other Emmis submissions of which BCA complains were responsive to supplemental BCA filings attempting to bolster the record after the close of the pleading cycle.²⁹

²³ *Id.*, Exhibit C at 5, Morton 1 at 17.

²⁴ Exhibit A, Saxberg 3 at 15-16.

²⁵ *Id.* at 14, numbered paras. 1) and 2).

²⁶ Petition, Exhibit F, Declaration of Dr. Ali R. Mahnad, para. 7.

²⁷ In yet another of the Petition's numerous ironies, BCA complains that Emmis has "steadfastly refused" BCA's offers of cooperation in assuring that the XHBCE-FM facility is operating in accordance with international coordination. *See* Petition at 8-9. Yet Emmis's antenna consultant has gone on record with an offer to field-test XHBCE-FM's Class C1 directional antenna in the presence of all parties—an offer that BCA has publicly rebuffed as "unprecedented." *See* Petition, Exhibit G, Letter from Thomas B. Silliman, P.E.; BCA Letter dated September 9, 2005, attached as Exhibit B, at 3.

²⁸ Petition at 7.

²⁹ The pleading cycle in the XHBCE-FM proceeding closed on July 29, 2005. That same day BCA filed a letter urging grant of its request for STA to program the station's Class C1 facilities, and on August 5, 2005 it filed yet

The XHBCE-FM proceeding involves a hotly-contested factual dispute over the station's actual operating characteristics—where the station is actually located, and whether in fact it is constructed in compliance with requirements coordinated by the U.S. and Mexican governments. The facts are complex and technical in nature, and there is obvious disagreement between the parties' experts who have investigated the matter.³⁰ In the end, the International Bureau will decide the case; but it is sheer nonsense for BCA to accuse Emmis of disqualifying misrepresentation, lack of candor and abuse of process, simply for advocating its view of the facts.

It is not enough, in the context of the television assignment applications here at issue, simply for BCA to show that it is right on the facts of the XHBCE-FM dispute. To make any headway at all toward the relief it seeks, BCA must in essence show that Emmis has acted inconsistently with the “strike petition” policy. It “must make a strong showing that delay is a primary and substantial purpose behind” Emmis's challenge in the XHBCE-FM case.³¹ And to make such a showing, BCA must demonstrate (1) statements by Emmis principals or officers admitting an obstructive purpose, (2) withholding by Emmis of information relevant to a determination of the issues raised, (3) the absence of any reasonable basis for Emmis's allegations, (4) economic motivation indicating a delaying purpose, and (5) other conduct by

(Continued . . .)

another unauthorized letter challenging the engineering in Emmis's reply pleading. Emmis responded to those letters on September 7, 2005. BCA filed yet another letter on September 9, 2005, to which Emmis responded on September 15, 2005. BCA filed a fourth post-pleading cycle letter on September 22, 2005. This hardly can be considered a timetable reflecting delay on the part of *Emmis*.

³⁰ It is noteworthy that the “misrepresentation” and “lack of candor” allegations cited by BCA are leveled not against statements of Emmis principals, but against statements of its technical consultant. Obviously, Emmis is ultimately responsible for the statements of consultants made in its pleadings. But the highly technical nature of the XHBCE-FM case entitles Emmis to great latitude in relying upon the sworn observations of its consultant.

³¹ See *Radio Carrollton*, 69 F.C.C.2d 1139, 1149 (1978).

Emmis suggesting an abusive purpose.³² BCA has shown none of these things. Emmis has legitimate concerns that the actual operation of XHBCE-FM contravenes the requirements of U.S./Mexico coordination—concerns that are based upon sworn observations of its consultant. To suggest, as BCA does here, that Emmis is guilty of disqualifying misconduct simply by virtue of prosecuting these concerns in an appropriate forum smacks of abuse of process itself.

Conclusion

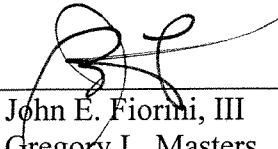
BCA's allegations have nothing to do with Emmis's sale of its television stations. Moreover, those allegations, even if found to be true, would not support denial of the above-captioned applications, but in any case the allegations are groundless. At its core, BCA's Petition represents a base attempt at retribution, which the Commission considers an inappropriate ground for filing a petition to deny.³³ The Petition should be dismissed or denied, and the subject assignment applications promptly granted.

Respectfully submitted,

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Dated: October 13, 2005

Its Attorneys

³² *Id.*

³³ See *William L. Fox*, 17 F.C.C.2d 876, 878 (1969) (“a retaliatory filing . . . is not a recognized ground for standing”).

CERTIFICATE OF SERVICE

I, Claudia L. Cartagena, a legal secretary of Wiley Rein & Fielding LLP, hereby certify that I have on this 13th day of October, 2005, send copies of the above "**Opposition to Petition to Deny**" by first-class, United States mail, postage prepaid, to the following:

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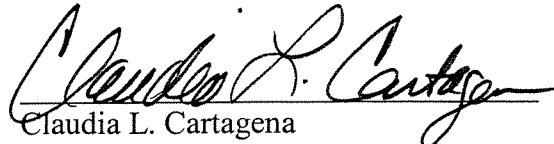
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