

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

In re Application of	)	
	)	
<b>ENTERCOM LICENSE, LLC</b>	)	MB Docket No. 16-357
	)	
FM Broadcast Station KDND,	)	File No. BRH-20050728AUU
Sacramento, California	)	File No. BRH-20130730ANM
	)	Facility ID # 65483
	)	
For Renewal of License	)	
TO:		Office of the Secretary
ATTN:		The Commission

**APPLICATION FOR REVIEW**

Edward R. Stolz II (Stolz), by his attorney, by its attorney, and pursuant to Section 1.115 of the Commission's Rules and paragraph 30 and footnote 87 of the **Report and Order in GC Docket No. 10-44, Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization**, FCC 11-16, 26 FCC Rcd 1594 and 26 FCC Rcd 5945 (2011) ("**2011 Practice and Procedure Order**"), hereby respectfully submits this "Application for Review" of the **Order** of the FCC's General Counsel, DA 18-472, released May 8, 2018, denying Stolz's October 10, 2017 "Petition for Reconsideration" in the above-captioned matter. In support whereof, the following is shown:

### **Timeliness**

1. The text of DA 18-472 was released on Tuesday, May 8, 2018. As Thursday, June 7, 2018, is the thirtieth day subsequent to the release of said staff ruling, this pleading is timely filed. 47 C.F.R. §1.115(d).

### **Preliminary Statement**

2. Stolz filed its "Petition for Reconsideration" pursuant to 47 U.S.C. 405(a)(2), which required Stolz to file said pleading as a condition precedent to judicial review where a party is relying on questions of fact or law upon which the Commission has not been afforded an opportunity to pass.

3. Rather than the Commission acting on the "Petition for Reconsideration" *en banc*, thereby making this case ripe for Stolz to go to the United States Court of Appeals for the District of Columbia Circuit, the Petition was instead ruled upon by the General Counsel pursuant to Section 1.106(p)(1) of the Rules.

4. Paragraph 30 of the **2011 Practice and Procedure Order** which adopted Section 1.106(p)(1) states as follows:

Similarly, we do not believe that MAP's concern with respect to three of the enumerated categories is well-founded. MAP contends that questions about whether an argument has been fully considered and rejected in a proceeding, whether an argument is outside the scope of the order for which reconsideration is sought, and whether new facts or arguments could have been presented previously (categories (3), (4), and (5) above) "involve subjective determinations that can frequently become intertwined with the merits of a petition."<sup>1</sup> In such cases, MAP argues, petitioners should be entitled to Commission-level review. We disagree. It is true that deciding whether a petition fits within one of these categories (as well as the other illustrative categories) involves the exercise of some degree of subjective judgment. However, that is part and parcel of agency decision-making; our Part 0 delegations to staff cover many areas in which discretion must be exercised. **Here, we expect that staff will refrain from exercising this authority to dismiss petitions for reconsideration in close cases, and will avoid dismissal on procedural grounds when it is in the public interest to do so. Moreover, to the extent that a party is aggrieved by a staff dismissal or denial of a petition for reconsideration under this provision, that party may file an application for review with the full Commission.**<sup>2</sup> [emphasis supplied]

5. Therefore, in light of the foregoing paragraph 30 and footnote 87, we are obligated to file another Application for Review in order to be in a position to seek judicial review of the issues raised in the October 10, 2017 "Petition for Reconsideration". See e.g. *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D. C. Cir. 1997), requiring exhaustion of administrative remedies and dismissing an appeal of an FCC staff order.

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<sup>1</sup> MAP Comments at 1-2.

<sup>2</sup> See 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(a). **As noted in the Notice, in such cases, the filing of an application for review to the full Commission is a legal prerequisite for judicial review of the staff's action on reconsideration. See 47 U.S.C. § 155(c)(7); 47 C.F.R. § 1.115(k); see also *infra* Appendix A (detailing revisions to 47 C.F.R. § 1.106(c)).** [emphasis supplied]

6. It appears that an Application for Review of DA 18-472 is the correct procedural step for Stolz to take. **Warren C. Havens**, FCC 13-151, 28 FCC Rcd 16261 (2013) (FCC *en banc* ruling on an "Application for Review" of a staff action pursuant to Section 1.106(p)).

**Questions of Law Presented**

7. Pursuant to Section 1.115(b) of the Rules, this is to state the questions of law presented by this Application for Review:

- a. Whether it was arbitrary, capricious and contrary to the law of administrative procedure for the General Counsel to usurp the role of the Commission *en banc* in acting on Stolz's October 10, 2017's "Petition for Reconsideration", thereby frustrating Stolz's ability to seek judicial review.
- b. Whether it was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §706(2) for the General Counsel to provide cover for the *en banc* Commission's failure to treat Entercom Communications Corporation in a manner consistent with its treatment of Michael Rice in ***Contemporary Media, Inc.***, *infra*.
- c. Whether it was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §706(2) for the General Counsel to provide cover for the *en banc* Commission's failure to find out how severe a sanction it "imposed" on Entercom by accepting its surrender of the KDND license, which was an abdication of the FCC's role in protecting the public interest, convenience and necessity

**Section 1.115(b)(2) Factors**

8. The rulings in this case must be reversed or vacated, because they implicate the following factors stated in 47 C.F.R. §1.115(b)(2):

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (v) Prejudicial procedural error.

**Argument**

9. Section 1.106(k) and (p). The existence of Section 1.106(p)(1) violates the right to administrative due process to which every party before the Commission is entitled. This is because the Commission's staff, not appointed by the President and not confirmed by the Senate, is permitted by rule to usurp the function of the duly appointed and confirmed members of the Commission. Without a decision by the Commissioners, a Commission ruling is not final and is not appealable to the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. §402(b).

10. In our view, the October 10, 2017 "Petition for Reconsideration" was not repetitious, but raised two narrowly focused issues that emerged from the Commission's orders refusing to deal with the unresolved issues in the KDND matter. The General Counsel's saying that Stolz's arguments were repetitious doesn't make that so. The General Counsel was clearly trying to frustrate

Stolz's attempt to exhaust his administrative remedies, which is a prerequisite to judicial review. Stolz has a statutory right to attempt to vindicate his position in the United States Court of Appeals for the D. C. Circuit. The General Counsel's order in DA 18-472 was an action taken to frustrate that right. The October 10, 2017 "Petition for Reconsideration" should have been presented to the Commission en banc for a vote. Therefore, as Sections 1.106(k)(3) and 1.106(p)(1) conflict with 47 U.S.C. §402(b) and case law such as *Richman Bros. Records, Inc. v. FCC*, *supra*, they violate the Administrative Procedure Act.

11. Treatment of Entercom Versus Michael Rice. At page 5, ¶14 of FCC 17-114, the FCC wrote:

We did not designate additional stations here, for example, for revocation. This is consistent with the policy reflected in the *Character Policy Statement* that deterrence is an important element of the character qualifications process and that the loss of a single station is generally an adequate sanction. [footnotes omitted].

12. Stolz's "Petition for Reconsideration" asserted that this does not square with the FCC's treatment of one its former regulatees, Michael Rice. *Contemporary Media, Inc.*, 12 FCC 14254 (ALJ, 1997), *affirmed*, 13 FCC Rcd 14437 (FCC en banc, 1998), *recon. den.*, 14 FCC Rcd 8790 (1999), *affirmed sub nom. Contemporary Media, Inc. v FCC*, 214 F.3d 187 (D. C. Cir. 2000), *cert. den.*, 532 U.S. 920 (2001).

13. Stolz pointed out in the "Petition for Reconsideration", based on FCC 17-114, that the FCC has one level of punishment for

an individual such as Michael Rice, and another, far more forgiving, level of punishment for Entercom Communications Corporation, a publicly traded entity. This could not have been raised until we saw the text of FCC 17-114. Stolz raised ***Melody Music, Inc. v. FCC***, 345 F.2d 730 (D. C. Cir. 1965), the famous case where the appellate court reversed the FCC which had thrown the book at game show producers Jack Barry and Dan Enright but had taken no action against the stations of the network which had carried the game show in question.

14. Stolz logically concluded that, to have one FCC and one body of communications law for individuals, and to have another FCC and another, separate and unequal body of communications law for publicly traded entities such as Entercom, is arbitrary and capricious and violates the Administrative Procedure Act, 5 U.S.C. §706(2)(A).

15. Did Entercom Suffer a Penalty By Surrendering the KDND License? Stolz's Petition for Reconsideration asserted that, from the text of FCC 17-114, the FCC never considered Stolz's argument that it isn't clear from the record how severe Entercom's "punishment" was, given that it is required to divest multiple stations in the Sacramento radio market in order to make its proposed merger with CBS Radio come into compliance with 47 C.F.R. §73.3555(a).

16. The Chief ALJ issued FCC 17M-09 terminating the above-captioned proceeding on March 16, 2017. The parties to the Entercom and CBS Radio merger filed their FCC Forms 314 and 315 applications electronically on March 20, 2017. Thus, the Chief ALJ would not have known as of March 16, 2017 that Entercom proposed to be the beneficial owner of some ten radio stations in Sacramento.

17. Therefore, the Chief ALJ could not have known, one way or the other, whether Entercom was in fact "willingly accepting the severest penalty in a renewal case" (FCC 17M-09 at 2). Because of potential tax and accounting maneuvers, Entercom may not have suffered any kind of a penalty at all. This is so because Entercom must divest certain stations it would otherwise be receiving in its merger with CBS Radio to get down to the maximum allowed by 47 CFR §73.3555(a).

18. Sadly, it appears that the Commission *en banc* is unwilling to find out how severe a sanction it "imposed" on Entercom by accepting its surrender of the KDND license. This, simply stated, is an abdication of the FCC's role in protecting the public interest, convenience and necessity. Stolz requested that that the Commission *en banc* grant this Petition for Reconsideration and order an accounting of Entercom to determine the actual economic penalty suffered by it. It necessarily must do this to build a complete record on whether the Entercom - CBS

Radio merger would serve the public interest, convenience and necessity.

Conclusion

19. President Trump promised the American people that he would "drain the swamp". The action of the FCC General Counsel, DA 18-472, preventing a vote by the *en banc* Commission on the narrowly tailored issues raised by Stolz in his October 10, 2017 Petition for Reconsideration, is antithetical to the concept of draining the swamp. The General Counsel ran interference for two powerful communications companies in an attempt to deny a citizen the statutory right to seek judicial review of an adverse agency order. This not only aggrieved Stolz but it was also an affront to some 62,984,825 citizens who voted for President Trump in 2016<sup>3</sup>.

**WHEREFORE**, Edward R. Stolz II urges that the foregoing Application for Review **BE GRANTED**, the **Order**, DA 18-472, **BE VACATED**, and that the *en banc* Commission rule on the merits on Stolz's October 10, 2017 "Petition for Reconsideration".

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<sup>3</sup><https://www.cnn.com/election/2016/results>

Respectfully submitted,

**EDWARD R. STOLZ II**

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

By \_\_\_\_\_  
Dennis J. Kelly  
His Attorney

LAW OFFICE OF DENNIS J. KELLY  
Post Office Box 41177  
Washington, DC 20018  
Telephone: 202-293-2300  
E-mail: dkellyfcclaw1@comcast.net

DATED: June 6, 2018

## **CERTIFICATE OF SERVICE**

It is hereby certified that true copies of the foregoing "Application for Review" were served by first-class mail, postage prepaid, on this 6<sup>th</sup> day of June, 2018 upon the following:

David H. Solomon, Esquire  
J. Wade Lindsay, Esquire  
Danielle K. Thumann, Esquire  
Wilkinson Barker Knauer LLP  
1800 M Street, NW, Suite 800N  
Washington, DC 20036  
Counsel for Entercom License, LLC

Steven A. Lerman, Esquire  
Lerman Senter  
2001 L Street, NW, Suite 400  
Washington, DC 20036  
Counsel for Entercom License, LLC

Dennis P. Corbett, Esquire  
Telecommunications Law Professionals, PLLC  
1025 Connecticut Avenue, NW, Suite 1011  
Washington, DC 20036  
Counsel for Entercom License, LLC

Jane E. Mago, Esquire  
4154 Cortland Way  
Naples, FL 34119  
Counsel for Entercom License, LLC

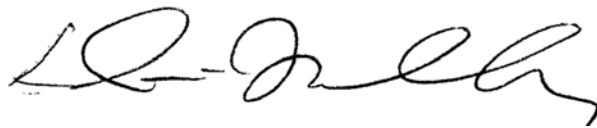
Michael Couzens, Esquire  
Michael Couzens Law Office  
6536 Telegraph Avenue, Suite B201  
Oakland, CA 94609  
Counsel for Media Action Center and Sue Wilson

Roger D. Smith  
6755 Wells Avenue  
Loomis, CA 95650

Pamela A. Kane, Esquire  
Enforcement Bureau  
445 12<sup>th</sup> Street, SW, Room 4-C330  
Washington, DC 20554

Michael Engel, Esquire  
Enforcement Bureau  
445 12<sup>th</sup> Street, SW, Room 4-C366  
Washington, DC 20554

Rachel Funk, Esquire  
Attorney Advisor  
Office of Administrative Law Judges  
Federal Communications Commission  
Washington DC 20554

A handwritten signature in black ink, appearing to read "D. Kelly", with a stylized, cursive script.

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Dennis J. Kelly