

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

In the Matter of	)	
	)	
<b>CAPSTAR TX LIMITED PARTNERSHIP</b>	)	File No. EB-02-IH-0564-AHB
	)	NAL/Acct. No. 200432080012
Licensee of	)	FRN No. 0003474947
Station WAVW(FM)	)	Facility ID No. 14376
(Formerly WZZR(FM))	)	
Stuart, Florida	)	
	)	
and	)	
	)	
Station WCZR(FM)	)	Facility ID No. 41066
Vero Beach, Florida	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: February 20, 2004**

**Released: March 18, 2004**

**By the Commission:** Commissioners Martin and Adelstein issuing separate statements; Commissioner Copps dissenting and issuing a statement.

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the “Act”) and section 1.80 of the Commission’s rules,<sup>1</sup> we grant a complaint,<sup>2</sup> and find that Capstar TX Limited Partnership (“Capstar”), licensee of Stations WAVW(FM),<sup>3</sup> Stuart, Florida, and WCZR(FM) Vero Beach, Florida, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully and repeatedly airing indecent material over the stations on May 31, 2002. Based upon our review of the facts and circumstances in this case, we conclude that Capstar is apparently liable for a monetary forfeiture in the amount of Fifty-Five Thousand Dollars (\$55,000.00).

**II. BACKGROUND**

2. The Commission received a complaint alleging that Station WZZR(FM) aired indecent material at 7:15 a.m. on May 31, 2002.<sup>4</sup> The complainant included a detailed

<sup>1</sup> 47 U.S.C. § 503(b) (2002); 47 C.F.R. § 1.80 (2002).

<sup>2</sup> See Letter dated June 1, 2002, to Federal Communications Commission (“Complaint Letter”).

<sup>3</sup> On January 1, 2003, WZZR(FM) changed its call sign to WAVW(FM).

<sup>4</sup> See Complaint Letter.

description of broadcast material that the complainant believed depicted an actual or apparent sex act between a man and woman.<sup>5</sup> Because the complaint contained potentially indecent material that aired between 6 a.m. and 10 p.m., Enforcement Bureau (“Bureau”) staff issued a letter of inquiry to the licensee.<sup>6</sup> In its response to the staff’s inquiry, Clear Channel Communications, Inc. (“Clear Channel”), the indirect parent of Capstar, states that it has neither a tape nor a transcript and cannot determine whether the alleged material actually aired.<sup>7</sup> Nevertheless, Clear Channel does not deny that the material aired as stated in the complaint, and maintains instead that, even if it aired the material in question, it was not actionably indecent.<sup>8</sup> Specifically, Clear Channel states that the material consisted mainly of sounds of a woman moaning which was not patently offensive because the context of the sounds was unclear and because “any direct references to sex were isolated and brief” and not “lengthy, repetitive or explicit.”<sup>9</sup> On August 19, 2003, the staff sent a supplemental letter of inquiry to Clear Channel, to which Clear Channel responded on September 3, 2003, indicating that the broadcast material at issue was also simulcast on Station WCZR(FM), Vero Beach, Florida, on the date and at the time alleged in the complaint.<sup>10</sup>

### III. DISCUSSION

3. 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 Act prohibit the Commission from censoring program material and from interfering with broadcasters’ freedom of expression.<sup>11</sup> 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.”<sup>12</sup> In addition, section 73.3999 of the Commission’s rules provides that radio and television stations shall not broadcast

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<sup>5</sup> *Id.*

<sup>6</sup> See Letter dated July 22, 2002, from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Capstar.

<sup>7</sup> See Letter dated August 21, 2002, from Kenneth E. Wyker, Senior Vice President and General Counsel for Clear Channel, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Clear Channel Response to Inquiry I”).

<sup>8</sup> See *id.*

<sup>9</sup> *Id.* at 2-4.

<sup>10</sup> See Letter dated September 3, 2003, from Richard W. Wolf, Vice President for Clear Channel, to Marlene H. Dortch, Secretary, Federal Communications Commission (“Clear Channel Response to Inquiry II”).

<sup>11</sup> See 47 U.S.C. § 326.

<sup>12</sup> 18 U.S.C. § 1464.

obscene material at any time, and, consistent with a subsequent statute and court decision,<sup>13</sup> shall not broadcast indecent material during the period 6 a.m. through 10 p.m.<sup>14</sup>

4. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>15</sup> In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>16</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>17</sup> As we set forth in greater detail below, we conclude under this standard that Capstar is apparently liable for a forfeiture for its apparent willful and repeated violations of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

#### A. Indecency Analysis

5. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.<sup>18</sup> The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent

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<sup>13</sup> Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the current safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1072 (1996) (“*ACT III*”) (affirming restrictions prohibiting the transmission of indecent material between the hours of 6 a.m. and 10 p.m.).

<sup>14</sup> *See* 47 C.F.R. § 73.3999.

<sup>15</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>16</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>17</sup> *See, e.g., SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

<sup>18</sup> U.S. CONST., amend. I; *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT I*”).

material, as well the Commission's interpretation and implementation of the governing statute.<sup>19</sup> Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.<sup>20</sup>

6. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.<sup>21</sup>

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.<sup>22</sup>

7. As an initial matter, Clear Channel does not dispute that it aired material describing or depicting sexual and excretory activities and organs.<sup>23</sup> That material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.<sup>24</sup>

8. In our assessment of whether broadcast material is patently offensive, “the full context in which the material appeared is critically important.”<sup>25</sup> 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

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<sup>19</sup> Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *ACT I*, 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*”); *ACT III*, 58 F. 3d at 657.

<sup>20</sup> *ACT I*, 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 potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.”).

<sup>21</sup> *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

<sup>22</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶¶ 7-8 (*emphasis in original*).

<sup>23</sup> See Clear Channel Response to Inquiry I at 1.

<sup>24</sup> The “contemporary standards for the broadcast medium” criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. See *Indecency Policy Statement* 16 FCC Rcd at 8002, ¶ 8 and n. 15.

<sup>25</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (*emphasis in original*).

activities; and (3) whether the material appears to pander or is used to titillate or shock.<sup>26</sup> In examining these three factors, we must 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.”<sup>27</sup> In particular cases, the weight of one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>28</sup> or, alternatively, removing the broadcast material from the realm of indecency.<sup>29</sup> We turn now to our analysis of the three principal factors in our decision.

9. First, the comments and dialogue carried on by the program hosts during the broadcasts contained graphic and explicit references to sexual activities, including repeated discussion and depiction of oral sex. The May 31 broadcast contains a dialogue between the hosts and a man and woman, purportedly husband and wife, just prior to, during and after an act of actual or simulated sexual intercourse.<sup>30</sup> Specifically, the complainant states that she heard sounds like “someone was eating” which are referenced later in the conversation as the woman having had “a mouthful” prior to the beginning of the actual or simulated sex act, both comprising clear references to oral sex.<sup>31</sup> In addition to these references and consistent with that tone, the broadcast features the sounds of a woman moaning which figure prominently throughout the segment.<sup>32</sup> There are other graphic references to oral sex, for example:

Then the DJ said to [the female participant] ‘I think you like giving oral as much as you like being on the receiving end, right?’ She said ‘yes.’ . . . She asked if she could bring some pictures of herself down to the station. The DJ said ‘yes and when you come down you can give me some oral’ to which she replied ‘yes’ and the DJ said ‘I’ll bet your husband is saying no right now.’<sup>33</sup>

To the extent that the sound effects or colloquial terms that the program hosts used to describe sexual activities could be described as innuendo rather than as direct references, they are nonetheless sufficient to render the material actionably indecent because the sexual import of

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<sup>26</sup> *Id.* at 8002-15, ¶¶ 8-23.

<sup>27</sup> *Id.* at 8003, ¶ 10.

<sup>28</sup> *Id.* 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).

<sup>29</sup> *Id.* 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”).

<sup>30</sup> See Complaint Letter.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

those sounds and terms was “unmistakable.”<sup>34</sup> Given the explicit references and the graphic manner in which the broadcasts described the activities of the subjects engaging in the purported sex acts, there is no non-sexual meaning that a listener could possibly have attributed to these terms.<sup>35</sup> Therefore, we find that the broadcast at issue described sexual activities through the use of direct references, simulation, and/or innuendo that were sufficiently explicit or graphic to be deemed patently offensive as measured by contemporary community standards for the broadcast medium.

10. Second, the program hosts, in their dialogue with each other and the callers, continuously focused on the sexual activities of the two subjects in graphic detail. The sexual discussion and references were not fleeting or isolated. Rather, discussions about and references to sexual activity pervaded, and were the subject of the May 31, 2002, broadcast. Thus, the sexual discussions and references were dwelled upon and repeated and constitute patently offensive material as measured by contemporary standards for the broadcast medium.

11. Finally, and perhaps most significantly, several characteristics of the manner in which the station presented this material establish that Capstar broadcast this material to pander to, titillate and shock listeners. The program hosts’ continued and repeated references to the couple’s sexual activities and comments about their specific sexual practices clearly evince the pandering nature and shock value of the material with regard to the listening audience. For example, one of the hosts asked the woman if she and her husband were both naked and whether “they were ready.”<sup>36</sup> The hosts also asked the woman if she had “climaxed” and whether she and her husband were “planning on having sex again.”<sup>37</sup> The hosts conclude the program by stating “we have been listening to Zoe and her husband having sex.”<sup>38</sup> During the broadcast, the program hosts geared their questions to the subjects to elicit specific information from them regarding their sexual practices, focusing on the topic of oral sex in particular.<sup>39</sup> By goading the couple into discussing their sexual activities in a pandering and offensive manner, the program hosts set out to pander and to shock listeners. In this regard, the program hosts’ broadcast of eating sounds when referring to oral sex and loud moaning sounds during other sexual activities demonstrates that, in context, this program was not a clinical discussion of a married couple’s sexual behavior. Further, the broadcast occurred at or about 7 a.m., when there was a reasonable risk that children, whom the government has a recognized and compelling interest to shield from indecent material,<sup>40</sup> would be in the audience, on their way to or getting ready for school. For these reasons, we find that the May 31, 2002, broadcast was patently offensive as measured by contemporary community standards for the broadcast medium.

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<sup>34</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8003-04, ¶ 12; see also *Telemundo of Puerto Rico License Corp. (WKAQ-TV)*, 16 FCC Rcd 7157 (EB 2001) (forfeiture paid); *Citcasters Co. (KEGL(FM))*, 15 FCC Rcd 19091 (EB 2000) (forfeiture paid).

<sup>35</sup> See *Sagittarius Broadcast Corporation*, 7 FCC Rcd 6873, 6874 (1972) (subsequent history omitted).

<sup>36</sup> See Complaint Letter.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *ACT III*, 58 F.3d at 660-63.

12. We disagree with Clear Channel's contention that the language used was not patently offensive or actionably indecent because the context in which the language appears is not readily apparent.<sup>41</sup> The material includes unmistakable references to sexual activity, including sexual intercourse and oral sex. In a similar situation, we found the broadcast of graphic descriptions of sexual and excretory activities between couples to be indecent.<sup>42</sup> Likewise, the staff determined that the interview of an adult-film actress who crudely relayed her fondness for oral sex was indecent.<sup>43</sup> We believe a similar result is warranted here.<sup>44</sup>

13. In sum, by broadcasting this material on May 31, 2002, within the 6 a.m. to 10 p.m. time period relevant to an indecency determination under section 73.3999 of the Commission's rules, Capstar apparently violated 18 U.S.C. § 1464 and the Commission's rule against broadcast indecency.

### B. Proposed Forfeiture

14. Based upon our review of the record in this case, we conclude that Capstar is apparently liable for a forfeiture for two willful and repeated violations of our rules for broadcasting indecent material over two stations. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000.00 for transmission of indecent materials.<sup>45</sup> The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>46</sup> In this case, taking all of these factors into consideration, we find that Capstar is apparently liable for a forfeiture reflecting the proposed imposition of the statutory maximum of \$27,500 for each broadcast of apparently indecent material over two stations, WZZR(FM) and WCZR(FM) (2 x \$27,500.00). Based upon our review of the entire record, we believe that this upward adjustment to the statutory maximum is warranted. There is a recent history of indecent broadcasts on stations controlled by Clear Channel, Capstar's corporate parent, which justifies imposition of the maximum forfeiture

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<sup>41</sup> See Clear Channel Response to Inquiry I at 3. Clear Channel also alleges that, because the sexual context is not apparent, the sound of a woman moaning, by itself, does not meet the Commission's indecency standard. *Id.*

<sup>42</sup> See *Rusk Corporation (KLOL(FM))*, Notice of Apparent Liability for Forfeiture, 5 FCC Rcd 6332 (MMB 1990) ("*Rusk Corporation*") (graphic descriptions that "focused on sexual and excretory activities in a lewd, vulgar, pandering and titillating manner" broadcast between 6:00 a.m. and 10 p.m. constituted violation of the Commission's restrictions on the broadcast of indecent materials).

<sup>43</sup> See *Regent Licensee of Flagstaff, Inc. (KZGL (FM))*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 17286 (EB 2000). See also *Rusk Corporation*, 5 FCC Rcd 6332.

<sup>44</sup> See *Rusk Corporation*, 5 FCC Rcd at 6332.

<sup>45</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

<sup>46</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

amount.<sup>47</sup> We reiterate our recent statement that multiple serious violations of our indecency rule by broadcasters may well lead to license revocation proceedings.<sup>48</sup> We also remind broadcasters that separate utterances within a single broadcast may be considered separate violations for purposes of determining forfeitures under our indecency rules.<sup>49</sup>

#### IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,<sup>50</sup> that Capstar TX Limited Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Fifty-Five Thousand Dollars (\$55,000.00) for willfully and repeatedly violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.<sup>51</sup>

16. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, Capstar TX Limited Partnership SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. 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 Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Numbers ("FRN") referenced above and also should note the NAL/Account Number referenced above.

18. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If Capstar TX Limited Partnership qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this NAL, either in its response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether Capstar TX Limited Partnership, including its parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Clear Channel's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section

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<sup>47</sup> *AMFM Radio Licenses, LLC (WWDC(FM))*, FCC 03-233 (Oct. 2, 2003) (forfeiture paid); *Citicasters Co. (KEGL(FM))*, 16 FCC Rcd 7546 (EB 2001) (forfeiture paid); *Citicasters Co. (WXTB(FM))*, 15 FCC Rcd 25,453 (2000) (forfeiture paid); *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19,095 (EB 2000) (forfeiture paid); *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19091 (EB 2000) (forfeiture paid); *Citicasters Co. (WXTB(FM))*, 15 FCC Rcd 11,906 (2000) (forfeiture paid).

<sup>48</sup> See *Infinity Broadcasting NAL(WKRK-FM)*, 18 FCC Rcd 6915, 6919, ¶ 13 (2003); Forfeiture Order, FCC 03-302, rel. Dec. 8, 2003; see also *AMFM FM Radio Licenses LLC (WWDC(FM))*, 2003 WL 22251146 (2003) (forfeiture paid) ("*Infinity Broadcasting NAL*"). We note that the misconduct at issue here before us occurred prior to our warning regarding possible revocation proceedings.

<sup>49</sup> See *Infinity Broadcasting NAL*, 18 FCC Rcd at 6919, ¶ 13.

<sup>50</sup> 47 C.F.R. § 1.80.

<sup>51</sup> The amount is allocated on a basis of \$27,500.00 per station.



503(b) of the Communications Act. If Clear Channel has questions regarding any of the information contained in Attachment B, it should contact OCBO at (202) 418-0990.

19. The response, if any, must be mailed to William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>52</sup>

22. Accordingly, IT IS ORDERED, that the complaint filed against Station WAVW(FM)’s broadcast of May 31, 2002, IS GRANTED, and the complaint proceeding IS HEREBY TERMINATED.<sup>53</sup>

23. IT IS FURTHER ORDERED, that a copy of this Notice of Apparent Liability For Forfeiture shall be sent by Certified Mail, Return Receipt Requested, to Richard W. Wolf, Vice President, Clear Channel Communications Inc., 2625 S. Memorial Drive, Suite A, Tulsa, Oklahoma 74129; and to counsel for Clear Channel and Capstar, Eve J. Klindera, Esquire, Wiley Rein and Fielding, LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>52</sup> See 47 C.F.R. § 1.1914.

<sup>53</sup> Consistent with section 503(b) of the Act and with Commission practice, for the purposes of the forfeiture proceeding initiated by this NAL, Capstar shall be the only party to this proceeding.

## ATTACHMENT A

**FCC List of Small Entities**

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

<b>(1) Small Organization</b>	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
<b>(2) Small Governmental Jurisdiction</b>	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
<b>(3) Small Business</b>	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
<b>Industry Type</b>	<b>Description of Small Business Size Standards</b>
<b><i>Cable Services or Systems</i></b>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<b><i>Common Carrier Services and Related Entities</i></b>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

**Note:** With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<i>Mass Media Services</i>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – <b>Small Business</b> is less than \$40M in annual gross revenues for three preceding years
<i>Wireless and Commercial Mobile Services</i>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	1,500 Employees or Fewer
Broadband Personal Communications Services (Blocks A, B, D, and E)	
Broadband Personal Communications Services (Block C)	Auction special size standard - <b>Small Business</b> is \$40M or less in annual gross revenues for

Broadband Personal Communications Services (Block F)	three previous calendar years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - <b>Small Business</b> is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	<b>Small Business</b> is 1,500 employees or less <b>Small Government Entities</b> has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer

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

*Re: Capstar TX Limited Partnership, licensee of Stations WAVW(FM)(formerly WZZR(FM)), Stuart, Florida, and WCZR(FM), Vero Beach, Florida, Notice of Apparent Liability for Forfeiture*

In this case, two Clear Channel radio stations aired what was purportedly a couple engaging in sex and then discussed sexual activities with them. Clear Channel has been the subject of repeated indecency actions at the FCC, accounting for well over half the indecency fines since 2000. Yet, notwithstanding the repeated nature of Clear Channel's transgressions, the majority proposes a mere \$27,500 fine for each incident -- a "cost of doing business" to a media giant like Clear Channel.

For repeat offenders as in this case, I believe the Commission should have designated these cases for license revocation hearings. As I recognized in a prior case, Clear Channel has taken some steps in recent days to address indecency on its stations. A hearing would have provided the Commission with the ability to consider what actions the stations took in response to these broadcasts and to decide on the appropriate penalty.

I am discouraged that my colleagues would not join me in taking a firm stand here against indecency on the airwaves. The time has come for the Commission to send a strong message that it is serious about enforcing the indecency laws of our country.

Although I do not support this decision, I am pleased that the Commission is proceeding in this case without a tape or transcript. The complainant provided us with a description of what was heard on the radio. The Commission has decided that this description was sufficient for us to find that the licensee broadcast indecency. I hope the Commission will expressly and publicly overturn its general policy that a complainant must provide a tape, transcript, or significant excerpt of the programming at issue to support an indecency complaint. I have long expressed the view that this practice places an inordinate responsibility on the complaining citizen and that it is the Commission's responsibility to investigate complaints that the law has been violated, not the citizen's responsibility to prove the violations.

**STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: Capstar TX Limited Partnership, Licensee of Station WAVW(FM), Stuart FL, and Station WCZR(FM), Vero Beach, FL, Notice of Apparent Liability For Forfeiture*

I support this Notice finding that the two licensees at issue apparently violated our indecency rule. I write separately to emphasize that the complainant had no tape or transcript, but did provide us with a description of what she heard on the radio. I am pleased that the Commission has unanimously decided that this description was sufficient for us to find that the licensee broadcast indecency. Complaints should no longer be denied because of a lack of tape, transcript, or significant excerpt.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Capstar TX Limited Partnership, Licensee of Station WAVW(FM)(formerly WZZR(FM)), Stuart, Florida, and Station WCZR(FM), Vero Beach, Florida;  
Notice of Apparent Liability for Forfeiture*

I support this Notice of Apparent Liability for the broadcast of indecent material at a time when children may be in the audience. By issuing this NAL, we step up to our responsibility to enforce statutory and regulatory provisions restricting broadcast indecency. Once again, we impose statutory maximum fines and remind broadcasters that the Commission can and will avail itself of a range of enforcement sanctions. While I am pleased that today we affirmatively find that a tape or transcript is not necessary, I also remind complainants to provide a sufficient description on which we can understand the full context in which the material was broadcast. And I urge broadcasters to assist the Commission fully with its investigations.

Since I arrived at the Commission, we have greatly stepped up our enforcement against indecent broadcasts. I expect that these stepped-up actions will convince broadcasters that they cannot ignore their responsibility to serve the public interest and to avoid the broadcast of indecent material over the public airwaves.