

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

In the Matter of
Infinity Broadcasting Operations, Inc.
Licensee of Station WKRK-FM
Detroit, Michigan
File No. EB-01-IH-0633
NAL/Acct. No. 200432080013
FRN 0003476074
Facility ID No. 9618

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 8, 2004

Released: March 18, 2004

By the Commission: Commissioner Martin concurring and issuing a statement; Commissioner Adelstein issuing a statement; and Commission 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, we find that Infinity Broadcasting Operations, Inc., licensee of Station WKRK-FM, Detroit, Michigan, aired program material during the "Howard Stern Show" on July 26, 2001, that apparently violates the federal restrictions regarding the broadcast of indecent material. Based upon our review of the facts and circumstances of this case, we conclude that Infinity is apparently liable for a monetary forfeiture in the amount of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00), the statutory maximum in this context, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

II. BACKGROUND

2. The Enforcement Bureau received a complaint alleging that Station WKRK-FM aired indecent material during the "Howard Stern Show," on July 26, 2001, between 6:30 and 7:30 a.m. The complainant submitted an audio tape of this broadcast.

3. The Enforcement Bureau sent Infinity a letter of inquiry, and attached a transcript of a portion of the material included in the audio tape. In its response, Infinity states that "The Howard Stern

1 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

2 See 18 U.S.C. § 1464, 47 C.F.R. § 73.3999 and 47 U.S.C. § 503(b).

3 Letter from complainant to Federal Communications Commission, dated October 11, 2001.

4 Letter from the Chief, Investigations and Hearings Division, Enforcement Bureau, to Infinity Broadcasting Operations, Inc., dated June 3, 2003.

5 See Program Transcript, Attachment A.

Show” was aired on WKRK(FM) on July 26, 2001, and that it “has no knowledge at this time that the transcripts are materially different from what was actually broadcast by WKRK on July 26, 2001,” but because the station did not retain a tape or transcript of the actual broadcast, it cannot state conclusively whether the material reproduced in the complainant’s tape and in the transcript were broadcast over the station.<sup>6</sup> Infinity maintains, however, that the aired material was not actionably indecent and did not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.<sup>7</sup> In addition, Infinity argues that the Commission’s generic indecency definition is unconstitutional.

### III. DISCUSSION

4. 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>8</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>9</sup> In addition, section 73.3999 of the Commission’s rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.

5. 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>10</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>11</sup> The Commission will then issue a forfeiture

---

<sup>6</sup> See Letter from Steven A. Lerman, Dennis P. Corbett, and David S. Keir, Counsel to Infinity Broadcasting Operations, Inc., to the Investigations and Hearings Division, Enforcement Bureau, dated July 17, 2003 (“*Infinity Response*”), at 5. As part of its response, Infinity indicated that it did not know whether other Infinity stations broadcast the language alleged by the complainant. Because the only evidence in the record relates to WKRK-FM, we limit our action here to that station.

<sup>7</sup> *Id.* at 8-9.

<sup>8</sup> See 47 U.S.C. § 326.

<sup>9</sup> 18 U.S.C. § 1464.

<sup>10</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 18 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>11</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>12</sup> As we set forth in greater detail below, we conclude under this standard that Infinity is apparently liable for a forfeiture for its apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

### A. Indecency Analysis

6. 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>13</sup> The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent material, as well the Commission's interpretation and implementation of the governing statute.<sup>14</sup> Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.<sup>15</sup>

7. 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>16</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,

---

<sup>12</sup> See, e.g., *SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

<sup>13</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*”).

<sup>14</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*”); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) (“*ACT III*”). Moreover, we have previously rejected Infinity's constitutional challenges of the Commission's indecency definition. See, e.g., *Infinity Broadcasting Operations, Inc.(WKRR-FM)*, Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd 26360 (2003), recon. denied, Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004) (rejecting argument the indecency definition is vague and overbroad based upon *Reno v. ACLU*, 521 U.S. 844 (1997) and rejecting argument that the indecency definition is constitutionally invalid because no causal link has been demonstrated between indecency and harm to children based upon *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002) a case invalidating provision of the Child Pornography Prevention Act of 1996). We also reject Infinity's citation to *Interactive Digital Software Association v. St. Louis County, Missouri*, 329 F.3d 954 (8<sup>th</sup> Cir. 2003) in support of its argument that no causal link has been established between indecency and harm to children. This case invalidated an ordinance prohibiting certain sales, rental and provision of access to minors to graphically violent video games because there was no support that there was a strong likelihood of harm to the psychological well being of minors as a result of playing violent video games.

<sup>15</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>16</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).

the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.<sup>17</sup>

8. As an initial matter, Infinity disputes that it aired material describing or depicting sexual and excretory activities and organs.<sup>18</sup> Specifically, Infinity argues that the material contains “brief and non-descriptive references to sexual practices that employ only clinical terms such as “evacuating” and “oral sex.”<sup>19</sup> We disagree. Infinity’s argument cites only one of the sexual practices described in the complained-of material.<sup>20</sup> In any event, the material at issue clearly describes named sexual practices<sup>21</sup> and also describes features of an excretory organ.<sup>22</sup> The 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>23</sup>

9. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”<sup>24</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 activities; and (3) whether the material appears to pander or is used to titillate or shock.<sup>25</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>26</sup> In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>27</sup> or, alternatively, removing the broadcast material from the realm of indecency.<sup>28</sup> In this case, we note that the complained-of material is similar to material broadcast by the same station that we previously found to be patently offensive as measured by contemporary community standards for the broadcast medium.<sup>29</sup> This finding was based upon an examination of all

---

<sup>17</sup> *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”),* 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (emphasis in original).

<sup>18</sup> *Infinity Response* at 9-10.

<sup>19</sup> *Infinity Response* at 10.

<sup>20</sup> *Id.* Infinity claims that discussion of a “blumpkin” involves only “brief and non-descriptive references to sexual practices that employ only clinical terms such as ‘evacuating’ and ‘oral sex.’”

<sup>21</sup> See Program Transcript, Attachment A, at 9-10, describing a “blumpkin” and at 10-11, describing the “David Copperfield.” See also, note 30, *infra*.

<sup>22</sup> See Program Transcript, Attachment A at 9-10, describing a “balloon knot” as the anal opening.

<sup>23</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* at 8002, ¶ 8 and n. 15.

<sup>24</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

<sup>25</sup> *Id.* at 8002-15, ¶¶ 8-23.

<sup>26</sup> *Id.* at 8003, ¶ 10.

<sup>27</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>28</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”).

three factors and a finding that each weighed in favor of a determination that the broadcast material was patently offensive. We find no reason to conclude that our analysis of the three principal factors should yield a different result with respect to the other material broadcast over Station WKRK-FM that is at issue here.

10. First, contrary to Infinity's argument, in context, the description of the sexual and excretory organs and activities in the complained-of material is graphic and explicit. There are descriptions of how specifically named sexual practices are performed, including references to an oral sexual practice that also involves excretory activity.<sup>30</sup> To the extent that the colloquial terms used, in part, to describe sexual activity involved in one of the sexual practices could be described as innuendo, they are nonetheless sufficient to render the material actionably indecent because the sexual import of the reference was "unmistakable."<sup>31</sup> Given the detailed and explicit manner in which the broadcast described the sexual and excretory organs and activities, there is no non-sexual meaning that a listener could possibly have attributed to the colloquial terms.<sup>32</sup>

11. Second, the broadcast contained repeated descriptions of sexual and excretory organs and activities.<sup>33</sup> Moreover, contrary to Infinity's argument that some of the descriptions used clinical terms,<sup>34</sup> the overall context in which the material was presented was used to pander, titillate and shock. The tone of the material is vulgar and lewd, not clinical.

12. We also reject Infinity's contention that this material cannot be found indecent because there are other cases referencing topics such as masturbation, and anal and oral sex in which no enforcement action was taken. In support of this argument, Infinity cites two unpublished Enforcement Bureau staff decisions, in which there were references to "giving head"<sup>35</sup> and "finger banging your

---

(...continued from previous page)

<sup>29</sup> See *Infinity Broadcasting Operations, Inc., (WKRK-FM)*, Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd 26360 (2003), *recon. denied*, Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004) (broadcast on Station WKRK on January 9, 2002 during the "Deminski & Doyle Show" that "described in detail how specifically named sexual acts are performed" and that "included explicit and graphic sexual references to anal and oral sex, as well as explicit and graphic references to sexual practices that involve excretory activities"). The complained-of material at issue here was broadcast on an earlier date, but includes similar descriptions of a "blumpkin," and the "David Copperfield," sexual practices among those at issue in the January 9, 2002, broadcast over Station WKRK-FM.

<sup>30</sup> See Program Transcript, Attachment A at 9-11.

<sup>31</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002-04, ¶¶ 9-12 (2001). See also, *Emmis Radio License Corporation (WKQX(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 5263 (EB 2002); Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 21697 (EB 2002), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 2697 (EB 2004)(where innuendo's "unmistakably sexual" meanings and contexts were established by lengthy surrounding discussion, the material was found to be actionably indecent). In this regard, "when you're goin' like a dog..." referred to the position employed during the "David Copperfield" sexual practice. Program transcript, Attachment A at 10.

<sup>32</sup> See *Sagittarius Broadcast Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6874 (1992) (subsequent history omitted).

<sup>33</sup> See, e.g., *Emmis Radio License Corporation (WKQX(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 5263, 5266 ¶¶ 10-11; Forfeiture Order, 17 FCC Rcd at 21699 ¶ 9.

<sup>34</sup> *Infinity Response* at 9-10.

<sup>35</sup> See *Infinity Response* at 12 citing Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated April 22, 2002, EB-01-IH-0407.

boyfriend.”<sup>36</sup> However, the material at issue here is more graphic and explicit than the language cited from these complaints. Moreover, the use of the term “finger banging” was brief and fleeting, which is not the case with the material at issue here.<sup>37</sup> Infinity also cites material at issue in an unpublished internal staff memorandum and unpublished staff decisions where the Mass Media Bureau, the predecessor to the Media Bureau, found that certain material was not actionably indecent.<sup>38</sup> To the extent that the staff may have erred by determining that the material in those cases was not indecent, these unpublished decisions are not binding on the Commission.<sup>39</sup> That is particularly the case here, where published decisions, including those cited in the Commission’s *Indecency Policy Statement*, provide guidance indicating that material such as that contained in this case is indecent.

13. Infinity argues that due to profound changes in social mores, the range of acceptable topics and words for broadcast discussion has changed dramatically, especially in light of widespread media coverage of sex scandals involving President Clinton and the Roman Catholic Church. Although contemporary community standards may change over time, the material at issue here is nevertheless patently offensive as measured by current contemporary community standards for the broadcast medium and is similar to other material that has been found to be patently offensive. We thus reject Infinity’s argument that the material broadcast over Station WKRK-FM on July 26, 2001, is consistent with contemporary community standards for the broadcast medium.

14. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission’s rules. Thus, because there was a reasonable risk that children may have been in the audience at the time that the material at issue was broadcast on July 26, 2001, the material broadcast is legally actionable.<sup>40</sup> By broadcasting this material, Infinity apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission’s rules against broadcast indecency.

## **B. Proposed Forfeiture**

15. Based upon our review of the record in this case, we conclude that Infinity is apparently liable for the willful violation of our rules. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent or obscene materials.<sup>41</sup> The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the

---

<sup>36</sup> See *Infinity Response* at 12 citing Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated February 12, 2002, EB-01-IH-0331.

<sup>37</sup> *Id.* at 4-5.

<sup>38</sup> See Memo from Thom Winkler to WIOD Complaint File, dated April 21, 1997, FCC Ref. No. 97010196; Letter from Norman Goldstein, Chief, Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau, dated May 15, 1997, FCC Ref. No. 94069521; Letter and Appendix from FCC Commissioner James H. Quello to The Honorable Senator Alfonse M. D’Amato, dated April 29, 1994.

<sup>39</sup> See, e.g., *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990), citing *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7<sup>th</sup> Cir. 1987). See also *Lorenzo Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998).

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

<sup>41</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). The Commission amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new rates apply to violations that occur or continue after November 13, 2000. See *Order, In the Matter of Amendment of Section 1.80(b) of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

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>42</sup> In this case, taking all of these factors into consideration, we find that an upward adjustment of the forfeiture amount to the statutory maximum of \$27,500.00 is warranted. Infinity’s recent history of indecent or apparently indecent broadcasts justifies the upward adjustment. We reiterate our previous statements that we may sanction a broadcaster for apparent, repeated violations of the indecency rules for separate utterances within one program<sup>43</sup> and that “additional serious violations by Infinity may well lead to a license revocation proceeding.”<sup>44</sup>

#### IV. ORDERING CLAUSES

16. 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>45</sup> that Infinity Broadcasting Operations, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.

17. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission’s rules, that within thirty (30) days of the release of this *NAL*, Infinity SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. 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 Number (“FRN”) referenced above and also should note the *NAL*/Account Number referenced above.

19. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> 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 *NAL* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C.

---

<sup>42</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

<sup>43</sup> *Infinity Broadcasting Operations, Inc., (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915, 6918-19, ¶ 12 (2003), *Apparent Liability for Forfeiture*, Forfeiture Order, 18 FCC 26360 (2003), *recon. denied*, Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004).

<sup>44</sup> *Id.* at 6919, ¶ 13. We note that the broadcast at issue here took place prior to the release of the WKRK-FM *NAL* in which this statement appeared.

<sup>45</sup> 47 C.F.R. § 1.80.

20554.<sup>46</sup>

22. 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 Infinity 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 Infinity, 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 B of this Notice of Apparent Liability. This information will be used for tracking purposes only. Infinity's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If Infinity has questions regarding any of the information contained in Attachment B, it should contact OCBO at (202) 418-0990.

23. Accordingly, IT IS ORDERED, that the complaint filed against Station WKRK-FM's broadcast of the "Howard Stern Show" on July 26, 2001, IS GRANTED to the extent indicated herein, AND IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.<sup>47</sup>

24. IT IS FURTHER ORDERED, that a copy of this *NAL* shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc., 2000 K Street, N.W., Suite 725, Washington, D.C. 20006; to Infinity's counsel, Steven A. Lerman, Esq., Dennis P. Corbett, Esq., and David S. Keir, Esq., Leventhal, Senter and Lerman P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809, and to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

---

<sup>46</sup> See 47 C.F.R. § 1.1914.

<sup>47</sup> Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, Infinity shall be the only party to this proceeding.



**ATTACHMENT A**  
**Program Transcript**

**Radio Station: WKRK-FM, Detroit, MI**

**Date/Time of Broadcast: July 26, 2001, 6:30 a.m. to 7:30 a.m.**

**Material Broadcast: The Howard Stern Show**

HS: Howard Stern

RQ: Robin Quivers

MV: Male Cast Member

HS: I said to Mark Wahlberg yesterday, had he ever gotten a blumpkin from a girl and everyone around here is acting like they don't know what it is.

RQ: You're the only nutcase who does.

MV: I said "blumpkin" on the "Norm Show" and the network censor, we told him we just made the word up. He goes, "that's definitely not a real word right?" We go, no,no,no. And I said it, I yelled out at a hooker in a cab.

HS: What do you say to her, "how about a blumpkin?"

MV: I go "honey, how much for a blumpkin?"

HS: Right.

MV: And uh the network censor never heard of it. And he goes if you just made it up it's fine but if it's a real thing we can't have it. So it's aired, it's been on ABC, it's like the dirtiest thing ever on television.

HS: Yeah, but nobody knows what it is. A blumpkin... I can explain it cleanly.

RQ: There's nothing clean about a blumpkin.

HS: Well, a blumpkin is receiving oral sex while you're sitting on a toilet bowl if you are a man. You're sitting on a toilet bowl and uh, while you're evacuating you receive your oral.

RQ: Ick.

HS: And uh, then, what did I say yesterday too you didn't understand? Balloon knot?

RQ: Yes, I don't know what that is. Somebody said to me "is that the funniest thing ever?" and I was like "what is that?"

HS: A balloon knot...

RQ: I didn't want to show my ignorance, I laughed too.

HS: A balloon knot... I'm gonna post these on a web site...

RQ: Yeah, we need a dictionary for this show.

HS: A balloon knot is when you bend over and I can see up right up your old...

RQ: Up the wazoo?

HS: Up the wazoo and uh, you know that's a balloon knot that you see. That's called a "balloon knot."

RQ: Really, I did not know that.

HS: Think about it, it looks like a balloon knot.

RQ: I don't know. Oh... you know what...

HS: Tie up a balloon.

RQ: I'm just thinking of a balloon knot...

MV: It all makes sense, Robin, come on.

HS: And uh, what else did I say? "Nasty Sanchez," you didn't know what that was.

RQ: Oh, I don't even want to know half the time what these things are...

HS: That I'd have to post on the internet.

RQ: 'Cause there've been a number of terms used lately. Would you do... 'cause KC's always blurtin' them out.

HS: "Strawberry shortcake"

RQ: "Strawberry shortcake" I've never heard of. "Dirty Sanchez"

HS: "Nasty Sanchez."

RQ: What is the others KC?

MV: I heard a new one the other day. It was the "David Copperfield."

HS/RQ: That's right.

MV: Okay, do you want to explain it, since I... When you're goin' like a dog...

HS: Right.

MV: ...and you're about to finish and instead you don't finish, you spit on her and then you turn around and when she turns her face around then you go... So it's kind of like an illusion...

HS: Right.

MV: to David Copperfield.

RQ: Sleight of hand.

HS: Misdirection.

MV: Classic misdirection.

HS: You trick her. There's a million of them, but uh, I'll post them on the web.

RQ: Yes, because people need to know. These aren't in the regular dictionary.

\*\*\* \*\*

October 2002

## ATTACHMENT B

**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>
<i>Cable Services or Systems</i>	
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	
<i>Common Carrier Services and Related Entities</i>	
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	

International Public Fixed Radio (Public and Control Stations)	\$12.5 Million in Annual Receipts or Less
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	
<b>Mass Media Services</b>	
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
<b>Wireless and Commercial Mobile Services</b>	
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	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - <b>Small Business</b> is \$40M or less in annual gross revenues for 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)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	Auction special size standard - <b>Small Business</b> is \$15M or less average annual gross revenues for three preceding calendar years
800 MHz Specialized Mobile Radio	
900 MHz Specialized Mobile Radio	1,500 Employees or Fewer
Private Land Mobile Radio	
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
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	<b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years
39 GHz Service	<b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
Multipoint Distribution Service	Auction special size standard (1996) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – <b>Small Business</b> has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
218-219 MHz Service	First Auction special size standard (1994) – <b>Small Business</b> is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	<b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
<b>Miscellaneous</b>	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer

---

Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

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

*Re: Infinity Broadcasting Operations Inc., licensee of WKRK-FM, Detroit Michigan, Notice of Apparent Liability for Forfeiture*

I dissent from the Commission's decision today to provide a slap on the wrist rather than take serious action to address the indecency on our airwaves. In this decision, the Commission proposes a fine of \$27,500 against this multi-billion dollar media conglomerate.

I am troubled by several aspects of this decision that demonstrate the Commission is not yet taking a strong stand against indecency on the airwaves. First, the Commission fined this very same station last year for airing some of the most vulgar and disgusting material I have had the misfortune to examine since I joined the Commission. In both that decision and this Order, the Commission warned Infinity that additional violations may well lead to the initiation of a license revocation proceeding. Some may argue that the program at issue today pre-dated the broadcast addressed last year, which only serves to demonstrate the need to consider complaints in a more timely manner. Moreover, the statute does not require notice to begin a license revocation hearing.

Second, the Commission recently reaffirmed that its indecency enforcement will address not only the station that is the subject of a complaint, but also any other station that aired the same programming. Yet here, the Commission proposes a fine against only WKRK-FM in Detroit notwithstanding that this program airs on numerous stations across the country.

The time has come for the Commission to send a message that it is serious about enforcing its indecency rules.



**CONCURRING STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN,**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK(FM), Detroit, MI, Notice of Apparent Liability for Forfeiture*

This Order emphasizes the importance of the Commissioner responding to complaints in a more timely fashion. This is the same licensee that we have previously fined for “egregious” indecency violations and warned against future violations.<sup>1</sup> This broadcast, however, actually pre-dates the broadcast that incurred those warnings.

---

<sup>1</sup> *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan, Notice of Apparent Liability*, 18 FCC Rcd. 6915, 6919 (2003).

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit,  
Michigan; 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. This NAL furthers our responsibility to enforce statutory and regulatory provisions restricting broadcast indecency. While this case predates another case in which this station aired some of the most egregious broadcast indecency that I have yet encountered, we impose the statutory maximum fine here and remind broadcasters that the Commission can and will avail itself of a range of enforcement sanctions. I am also concerned that the Commission did not take more steps to address other stations which likely aired the same programming.

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.