

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

In the Matter of)	
)	
Infinity Broadcasting Operations, Inc.)	
)	File No. EB-02-IH-0109
Licensee of Station WKRK-FM)	NAL/Acct. No. 200332080010
Detroit, Michigan)	FRN 0003476074
)	Facility ID # 9618
)	
)	

FORFEITURE ORDER

Adopted: November 24, 2003

Released: December 8, 2003

By the Commission: Chairman Powell and Commissioner Adelstein issuing separate statements, Commissioner Martin concurring and issuing a separate statement, and Commissioner Copps dissenting and issuing separate statements.

I. INTRODUCTION

1. In this order, we impose a monetary forfeiture of twenty-seven thousand five hundred dollars (\$27,500) against Infinity Broadcasting Operations, Inc. (“Infinity”), licensee of Station WKRK-FM, Detroit, Michigan, for the willful broadcast of indecent language, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, during the “Deminski and Doyle Show” on January 9, 2002 between 4:30 p.m. and 5:00 p.m.

II. BACKGROUND

2. In response to a complaint, we issued a Notice of Apparent Liability (“NAL”) on April 3, 2003.¹ We found the material broadcast, attached hereto in the Appendix, to be apparently indecent. In particular, applying the standards described in the Commission’s *Indecency Policy Statement*², we said:

The inquiry under the first key factor relevant to a determination of patent offensiveness is whether the sexual and excretory references are graphic or explicit. The complained of broadcast of the “Deminski & Doyle Show” invited listeners to call in to discuss sexual practices. There were separate discussions with nine individuals who called the show to talk about sexual activities. Callers and the show’s hosts described in detail how specifically named sexual acts are performed. The broadcast included explicit and graphic sexual references, including references to anal and oral sex, as well as explicit and graphic references to sexual practices that involve excretory activities.

¹ *Notice of Apparent Liability*, 18 FCC Rcd 6915 (2003).

² *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 (2001).

With respect to the second factor, the complained of material dwelled on sexual and excretory organs and activities and the sexual and excretory references were repeated. Thus, the sexual and excretory references cannot be considered fleeting. Under the third factor, we find that the graphic and explicit descriptions of the sexual practices at issue in the broadcast, which were identified in descriptive, non-clinical terms, and the comments of the on-air personalities demonstrate that the material, in context, appears to have been used to pander, titillate and shock. The tone of the material broadcast is extremely vulgar and extremely lewd, and is similar to other program that has found to be indecent or apparently indecent.¹

Because of the egregious nature of the apparent violation, we proposed a forfeiture for the statutory maximum -- \$27,500:

Based upon our review of the entire record, we believe that imposition of a forfeiture that is higher than the base amount is warranted. The violation was egregious in that the indecent material was extensive, and included discussions with nine callers.²

3. In addition to proposing a forfeiture for the broadcast at issue in this case, we provided future guidance on two subjects. First, we indicated that, in the future, we may treat situations like this as multiple, repeated violations with the accompanying increase in forfeitures. In addition, we stated that given the egregiousness of this violation, additional serious violations by Infinity may well lead to the initiation of a revocation proceeding. Moreover, we placed other broadcasters on notice that the Commission will not hesitate to adopt strong enforcement actions in the future, including the potential initiation of revocation proceedings. *See, e.g.*, 47 U.S.C. § 312(a).³

4. Infinity responded to the NAL on June 4, 2003.⁴ Infinity does not challenge that it broadcast the language that is the subject of the NAL. It also does not challenge that the language it broadcast is indecent under 18 U.S.C. § 1464. Rather, with respect to whether a forfeiture should be imposed in this case, it claims only that the Commission's long-standing indecency standard is unconstitutional on its face under the First Amendment. With respect to the amount of the forfeiture, Infinity claims that the increase from the \$7,000 base amount in the *Forfeiture Policy Statement*⁵ to the statutory maximum of \$27,500 is not justified. Infinity also claims that the Commission has adopted a new "serious violation standard." With respect to future cases, it also claims that the guidance provided by the Commission regarding multiple violations within a program and regarding revocation is unconstitutional.

¹ *Id.* at 6917 (footnote and citations omitted).

² *Id.* at 6919.

³ *Id.* (quoting 14 U.S.C. § 1464).

⁴ Response to Notice of Apparent Liability for Forfeiture ("Infinity Response").

⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"), *codified at* 47 C.F.R. § 1.80(b)(4) Note.

III. DISCUSSION

A. This Case

5. **Imposition of the Forfeiture:** As noted above, Infinity does not dispute that it broadcast the material or that the material meets the Commission's well-established indecency definition. Accordingly, and for the reasons set forth in the NAL, we conclude that Infinity willfully violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. We also reject Infinity's argument that the Commission's definition of indecency is unconstitutional under the First Amendment. This issue has already been decided in the Commission's favor by the courts. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1072 (1996); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Infinity's reliance on the more recent Supreme Court decision in *Reno v. ACLU*, 521 U.S. 844 (1997) is misplaced. In that case, the Supreme Court specifically distinguished broadcast indecency in striking down an Internet indecency statute.¹

6. **Amount of the Forfeiture:** Infinity does challenge the Commission's decision to increase the proposed forfeiture from the \$7,000 base amount set forth in the Commission's *Forfeiture Policy Statement* to the statutory maximum of \$27,500.² Under the Communications Act, in determining the amount of a forfeiture, the Commission is instructed to take into account 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."³ Consistent with the *Forfeiture Policy Statement*, which includes an upward adjustment factor from the base amounts for "egregious misconduct,"⁴ the NAL proposed a forfeiture of \$27,500. We have little difficulty concluding that this is an egregious violation justifying imposition of the statutory maximum. The material that Infinity broadcast was extremely graphic, lewd and offensive and continued over an extended period of time and included conversations with nine callers over a 30-minute period. While Infinity is correct that other cases in recent years have involved a forfeiture of only \$7,000 for each indecent broadcast,⁵ we believe the egregious nature of the violation here justifies a more severe sanction. In addition, we disagree with Infinity that the fact that this is the first cognizable indecency violation at WKRK justifies a lower forfeiture.⁶ Whatever benefit should accrue to Infinity from this fact is outweighed by the egregious nature of the broadcast here. Finally, we disagree with Infinity that it is unconstitutional under the First Amendment for the Commission to increase the amount of an indecency forfeiture based on the

¹ In *Reno*, the court articulated three distinctions between regulation of Internet indecency and broadcast indecency as upheld in *Pacifica*: (1) unlike the situation with broadcast indecency, the Internet statute at issue involved "broad categorical prohibitions [that] are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet"; (2) the Commission's action in *Pacifica* did not involve a criminal prosecution; and (3) "the Commission's order applied to a medium which as a matter of history 'had received the most limited First Amendment protection,' [citation omitted], in large part because warnings could not adequately protect the listener from unexpected program content." 521 U.S. at 867. See also *id.* at 868. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), on which Infinity also relies, is similarly distinguishable.

² 47 U.S.C. § 503(b)(2)(A).

³ *Id.* § 503(b)(2)(D).

⁴ 47 C.F.R. § 1.80(b)(4) Note.

⁵ Infinity Response at 35.

⁶ *Id.* We note that, contrary to Infinity's suggestion, *id.*, the NAL did not increase the base forfeiture amount because of prior indecent broadcasts by Infinity at other stations, although the Commission could have done so. See *Forfeiture Policy Statement Reconsideration Order*, 15 FCC Rcd 303 (1999).

seriousness of the violation.¹ The Communications Act permits a forfeiture of up to \$27,500 for a single indecency violation and we find nothing in the case law cited by Infinity to suggest that the First Amendment requires that, unless the Commission articulates detailed standards regarding the appropriate sanction in specific circumstances, it may never issue an indecency forfeiture for \$27,500. Accordingly, we reiterate that, depending on the facts, the Commission may impose a forfeiture of up to the statutory maximum for indecency violations that are “egregious” and we find that this is such a violation.²

B. Future Cases

7. We do not address Infinity’s arguments regarding the constitutionality of revocation or imposition of separate forfeitures for multiple violations because we do not impose those sanctions in this case.

IV. CONCLUSION AND ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to 47 U.S.C. § 503(b), and 47 C.F.R. §§ 0.111, 0.311 and 1.80, Infinity Broadcasting Operations, Inc. FORFEIT to the United States the sum of twenty-seven thousand five-hundred dollars (\$27,500) for willfully and repeatedly violating 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

9. 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, within thirty (30) days of the release of this Forfeiture Order. *See* 47 C.F.R. § 504(a).

¹ Infinity Response at 35. On August 6, 2003, a group of broadcasters and public interest groups filed “Comments of the First Amendment Coalition in Response to Notice of Apparent Liability,” similarly arguing that the Commission’s indecency standard violates the First Amendment. We will treat these Comments as an *amicus curiae* brief. Nothing in the Comments alters our decision here or leads us to conclude that the Commission should initiate a broader proceeding to reconsider our indecency policies in light of the First Amendment issues raised by the Comments.

We will likewise treat as an *amicus curiae* brief comments filed on September 15, 2003 by The Office of Communications of the United Church of Christ, Inc. (OCI). In its comments, OCI also argues that the Commission should initiate a broader proceeding to reexamine the indecency standard, especially in light of our statement in the underlying decision that in the future, for egregious cases, we “will not hesitate to adopt strong enforcement actions ..., including the potential initiation of revocation proceedings.” *See para. 3, supra*. OCI argues that one unintended consequence of the use of revocation in indecency cases would be an increase in market barriers to new broadcast entrants because, given the uncertainty potential revocation will produce, lenders and investors will simply choose to invest their money elsewhere. Again, nothing in these comments leads us to conclude that a far-ranging reexamination of our indecency policies is appropriate. We also note that on May 19, 2003, Chairman Powell announced the formation of the Advisory Committee on Diversity Communications to assist the agency in formulating ways to create opportunities for new entrants in the communications sector, including broadcasting. Issues concerning barriers to entry will be appropriately considered in that forum.

² We note that an indecency forfeiture could be increased from the \$7,000 base amount for other reasons as well, e.g., a history of prior violations.

10. IT IS FURTHERED ORDERED THAT a copy of this FORFEITURE ORDER 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.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Stations WKRK-FM, Detroit, Michigan,
Forfeiture Order*

I fully support the Commission's decision to levy the statutory maximum forfeiture amount against Infinity Broadcasting Operations for the broadcasting of indecent language stemming from the Deminski and Doyle show out of WKRK-FM in Detroit. The blatant broadcasting of filth of this extreme nature has no place on our nation's airwaves. Broadcasters should take this latest action as yet another sign that the Commission will continue to rigorously enforce our indecency regulations.

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

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan,
Forfeiture Order*

I dissent from this forfeiture order because I believe it is inadequate to address the serious nature of this station's actions. As I stated in the attached dissent when we issued the Notice of Apparent Liability, a fine of \$27,500 is not even a slap on the wrist to Infinity for airing what can only be described as vulgar and disgusting indecency. This Commission should have conducted a hearing on revocation of this station's license.

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

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

In this case, WKRK-FM in Detroit aired some of the most vulgar and disgusting indecency that I have had the misfortune to examine since I joined the Commission. The station presented graphic descriptions of violent sexual acts against women as entertainment at a time when children likely composed a significant portion of the audience. The extreme nature of this broadcast – among the worst we have faced in the Commission’s history – and the fact that it was broadcast in the middle of the day, gives the FCC the responsibility to take serious action. I dissent from the majority’s decision because I believe that a financial slap on the wrist does not adequately reflect the seriousness of the station’s actions. To fulfill our duty under the law, we should initiate a hearing to determine whether the WKRK-FM license should be revoked.

I am deeply disappointed that the majority proposes a mere \$27,500 fine against this station. Such a fine will easily be absorbed by the station as a “cost of doing business.” While I am encouraged that the Commission has at least, and at last, found such programming to be indecent, I am discouraged that it does so little about it.

Would anyone who reads the transcript of this program argue that the United States should subsidize such material by giving WKRK-FM free spectrum through their broadcast license? Can anyone read the indecency law that Congress has given us and conclude that any station could broadcast such material on the public’s airwaves consistent with the law? The majority admits that WKRK-FM appears to have violated egregiously and extensively the statutory ban on the broadcast of indecent material. The majority presumably recognizes the seriousness of the offense. And, importantly, this Commission has agreed for the first time that it may revoke the license of a station owner that broadcasts indecent material. But the Commission does not take this step.

Our tepid action today will not dissuade these types of broadcasts in the future. The message to licensees is clear: Even egregious violations will not result in revocation of a license. The majority does warn Infinity that another similar action could result in a revocation hearing, but it fails to mention that this is not the first action against a station owned by Infinity. Infinity stations were fined \$1.7 million by a previous Commission in 1995 to settle a series of indecency cases. As part of that settlement, Infinity agreed to take steps to prevent further broadcast of indecent material. But more complaints involving other broadcasts followed. Last August, for example, another Infinity station aired the “Opie & Anthony” program allegedly involving sex acts performed in or near St. Patrick’s Cathedral. That investigation is still pending without action by the Commission.

The majority may say that this is the largest fine we are allowed to impose under our guidelines. But fines are not the only tool Congress gave us to enforce the law. The Commission would be more credible by moving immediately to a hearing to determine whether the station’s license should be revoked. We would be well within our statutory authority to do this under Section 312(a)(6) of the Communications Act, which specifically provides such a remedy.

I wonder when this Commission will finally take a firm stand against broadcast's "race to the bottom" as the level of discourse on the public's airwaves gets progressively coarser and more violent. The time has come for this Commission to send a message that it is serious about enforcing its indecency rules. Our enforcement actions should convince broadcasters that they cannot ignore their responsibility to serve the public interest and to protect children. The FCC's actions today fail to do so.

**SEPARATE STATEMENT
COMMISSIONER KEVIN J. MARTIN
CONCURRING**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan,
Forfeiture Order*

I am disappointed with today's decision.

I agree that Infinity Broadcasting Operations, Inc. violated our indecency rule during the broadcast of the "Deminski and Doyle Show" on January 9, 2002. As I noted when we issued the Notice of Apparent Liability, however, I believe the fine of \$27,500 is inadequate, and therefore I concur in this Order.

As the attached Order explains, the indecent broadcast included conversations with nine callers over a 30-minute period. I believe each of these 9 calls could be separate "utterances" or "material" for purposes of the statute and our rules.¹ Because of the extremely graphic, lewd and offensive nature of this broadcast, I would have applied the statutory maximum fine for each call, for a total of \$247,500.

¹ See 18 U.S.C. § 1864 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both"), 47 C.F.R. § 73.3999 ("No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent").

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan, Forfeiture Order

I strongly support the imposition of the statutory maximum forfeiture amount against Infinity Broadcasting Operations, Inc., licensee of station WKRK-FM, Detroit, Michigan, for the willful broadcast of grossly indecent language during the Deminski and Doyle show. The egregious nature of the material broadcast clearly warrants the statutory maximum fine.

In addition, as I stated in April, the Commission has now given fair notice to broadcasters that it can and will avail itself of a range of enforcement sanctions when broadcasters violate our indecency rules. These sanctions include the potential initiation of revocation proceedings for serious, repeated violations of our rules. Broadcasters are also on notice that the Commission may find them liable for multiple violations that occur in a single program where statements can be viewed as separate indecent utterances. This approach could result in substantially higher forfeiture amounts in the future.

I am disappointed that the licensee in this case continues to challenge this sanction rather than accept responsibility for such an extreme violation of our rules.