

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

In the Matter of)	
)	
INFINITY BROADCASTING)	File No. EB-00-IH-0009
CORPORATION OF WASHINGTON, D.C.)	NAL/Acct. No. X32080005
)	Facility #28625
Licensee of Station WJFK-FM)	JJS
Manassas, Virginia)	

FORFEITURE ORDER

Adopted: May 17, 2000

Released: May 17, 2000

By the Chief, Enforcement Bureau:

I. Introduction

1. In this forfeiture order, we impose a four thousand dollar (\$4,000) forfeiture against Infinity Broadcasting Corporation of Washington, D.C. (“Infinity”), licensee of WJFK-FM, Manassas, Virginia. We find that Infinity violated Section 73.1206 of the Commission’s rules, 47 C.F.R. § 73.1206, by broadcasting a telephone conversation live without first informing the other party to the conversation that it intended to broadcast the conversation.

2. On March 8, 2000, the Chief, Enforcement Bureau, issued a Notice of Apparent Liability for Forfeiture in the amount of four thousand dollars (\$4,000) against Infinity. Infinity filed its response (“Infinity Response to NAL”) on April 10, 2000.

II. Background

3. On December 14, 1999, the Commission received a complaint from Ms. Flora Barton, the National Latino Media Council, and Mr. Jose Armas. The complainants alleged that on August 17, 1999, during the “Don and Mike” radio show, broadcast over WJFK-FM and other radio stations, the hosts called city hall at El Cenizo, Texas, where Ms. Barton is a Commissioner. According to the transcript and tape submitted with the complaint, Ms. Barton answered the telephone, and the following exchange took place:

Ms. Barton: El Cenizo, how may I help you?

Don: Uh, ola.

Clerk: Hello?

Don: Ola? Ola, Senorita Ola?

Clerk: Yes.

Don: Hello, this is the Don and Mike Radio Show. We're doing a live, national radio show right now.¹

Don and Mike then engaged Ms. Barton in an extended discussion of El Cenizo's decision to conduct official business in Spanish that even Infinity describes as exceeding "the bounds of good taste in their treatment of Ms. Barton." *See Id.*, pp. 4-17; Letter Dated January 7, 2000 from Stephen A. Hildebrandt, Vice President of Infinity ("Infinity Response to Letter of Inquiry"), p. 5.

4. On December 23, 1999, the Investigations and Hearings Division, Enforcement Bureau, sent Infinity a letter of inquiry regarding the complaint. In its January 7, 2000, response, Infinity admits that it broadcast a conversation with Ms. Barton. While Infinity does not have its own recording of the show, it has no evidence that the transcript and tape are "materially different from what was actually broadcast" on Station WJFK-FM. Infinity Response to Letter of Inquiry, p. 1 n.2.

III. Discussion

5. Infinity denies that it violated Section 73.1206. It argues that it uses two Eventide BD-500 digital audio devices to delay the broadcast of matter by 16 seconds. It argues that when the station called Ms. Barton, it promptly notified her of its intent to broadcast the conversation. According to Infinity, if Ms. Barton had terminated the call or objected to the broadcast, any one of five individuals could have pushed a yellow button marked "DUMP" that would have caused the conversation to be "disintegrated." Infinity argues that because it uses the digital audio delay devices, its broadcasts are neither "simultaneously broadcast" nor "recorded" within the meaning of Section 73.1206. Infinity also believes that the NAL improperly interprets the rule to require a party's consent to the broadcast of a telephone conversation, when all that is required is notification. Infinity finally argues that even if a rule violation is found, a forfeiture is inappropriate because Infinity relied in good faith on three prior Mass Media Bureau rulings which it believes approved the use of the digital audio delay devices and because the NAL improperly relies on a new interpretation of the rule.

6. We reject Infinity's argument that it did not violate the rule. Infinity's interpretation of the rule ignores the fundamental purpose of the rule and is without any support in case precedent. We believe the rule clearly requires that whenever a station intends to broadcast a telephone conversation, the other party to the telephone conversation must receive prior notification of that intent, regardless of the technology that the station uses. In terminating a rulemaking proceeding that contemplated elimination of the rule, the Commission wrote, "we believe that it is reasonable and desirable to retain for individuals the right to answer the telephone without having their voice or statements transmitted to the public by a broadcast station in the absence of prior notice." *Amendment of Section 73.1206: Broadcast of Telephone Conversations (Report and Order)*, 3 FCC Rcd 5461, 5463 (1988). Under Infinity's interpretation, however, a broadcast station using a digital delay device could broadcast any telephone conversation without providing any notification because the broadcast would neither be "simultaneously broadcast" (which Infinity interprets literally) nor "recorded." *See Infinity Response to NAL*, pp. 8-10. Taken literally, under Infinity's interpretation of the rule, a station could avoid the rule by delaying a broadcast for one second, even though the other party to the telephone conversation would have no opportunity to object to the broadcast prior to having their voice being broadcast. As Infinity itself has admitted, the rule requires that persons called by stations have "an

¹ *See* "Transcript of Don and Mike Radio Show" (Complaint, Exhibit B), p. 3.

opportunity to object before any such call is broadcast.” Infinity Response to Letter of Inquiry, p. 3.

7. In this case, Infinity did not provide Ms. Barton with notice of its “intention to broadcast” the telephone conversation prior to its occurrence. Intention means “a determination to act in a specified way.”² Don and Mike did not tell Ms. Barton that they were determined to go ahead and broadcast the telephone conversation *in the future*. Instead, they told Ms. Barton that she was on the air “live,” which communicated to Ms. Barton that she was on the air *at that moment in time*. As far as Ms. Barton knew, the only choices available to her were to terminate the conversation immediately before a national radio audience or to continue the conversation. The first option could have subjected her to embarrassment or ridicule. The purpose of requiring prior notification is to prevent individuals from being faced with those choices. Infinity argues that the NAL improperly relies upon an “imprecise statement” of the show’s hosts and Ms. Barton’s state of mind. Infinity Response to NAL, pp. 4-6. We reject that argument. The statements of Don and Mike were more than “imprecise.” They failed to provide the requisite notice of “intention to broadcast” required by the rule. Furthermore, while Infinity is correct that the rule only requires prior notification, as opposed to the consent of the called party (Infinity Response to NAL, pp. 7-8), our finding of a violation is not based upon Ms. Barton’s state of mind or the failure to obtain Ms. Barton’s consent.

8. We also reject Infinity’s argument that even if it did violate the rule, no forfeiture should be imposed. Infinity cites *Long Nine, Inc.*, DA 00-409 (EB released February 28, 2000) for the proposition that a forfeiture will be rescinded when a licensee makes a “good faith” effort to comply with a rule. Infinity Response to NAL, p. 11. Infinity contends that it relied in good faith on three prior Commission staff decisions where complaints against the station were dismissed after Infinity explained the operation of the digital delay system. Infinity Response, pp. 11-16, citing *Letter from Norman Goldstein to Bernard A. Solnik, Esq.*, Case No. 02120518 (MMB March 25, 1996), *Letter from Norman Goldstein to Kenneth C. Stevens, Esq.*, Case Nos. 96010161 and 96040220 (MMB June 4, 1996), and *Infinity Broadcasting Corp. of Washington, D.C.*, 14 FCC Rcd 5539 (MMB 1999). We do not consider calling an individual and informing that individual that they are on the air “live” to be a “good faith” attempt at compliance with the rule. Moreover, we do not hold that a digital delay system could never be used to facilitate compliance with Section 73.1206. The problem in this case is not the use of the digital delay system but Infinity’s failure to provide Ms. Barton with prior notice of its “intention to broadcast” the telephone conversation. We also disagree with Infinity that any of the cases it cites provided a reasonable basis for acting as it did in this case. None of the rulings Infinity cites discuss the digital delay devices in any manner. Given the important privacy interests that the rule serves, and the fact that Infinity’s conduct was exactly the type of conduct the rule was meant to prohibit, we conclude that the \$4,000 forfeiture proposed in the NAL is appropriate.

9. Finally, we reject Infinity’s argument that a forfeiture is improper because it results “from an agency’s novel interpretation or clarification of an existing rule” and is thus “inequitable and violates fundamental principles of administrative fairness.” Infinity Response to NAL, p. 16. In making this argument, Infinity primarily relies upon *Pfaff v. Department of Housing and Urban Development*, 88 F.3d 739, 748 (9th Cir. 1996). In *Pfaff*, the court held that reliance on adjudication to announce new interpretations of rules can be improper “where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.” The *Pfaff* holding is not applicable because we are not creating a “new standard” in

² Webster’s New World Dictionary, Pocket Edition, p. 317.

this case. Instead, we are simply applying established precedent concerning Section 73.1206 to a particular fact pattern. Moreover, even if we were presenting a “new standard,” such a standard would not be “very broad and general in scope.” The *Pfaff* court recognized that generally, “the choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion.” *Id.*, 88 F.3d at 747, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Infinity has wholly failed to show that there has been any abuse of that discretion in this case.

IV. Ordering Clauses

10. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s rules,³ Infinity Broadcasting Corporation of Washington, D.C. IS LIABLE FOR A MONETARY FORFEITURE in the amount of four thousand dollars (\$4,000), for its willful violation of Section 73.1206 of the Commission’s rules, 47 C.F.R. § 73.1206.

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s rules within 30 days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act, 47 U.S.C. § 504(a). Payment may be made by credit card through the Commission’s Credit and Debt Management Center at (202) 418-1995 or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554. *See* 47 C.F.R. § 1.1914.

12. IT IS FURTHER ORDERED that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to Infinity’s counsel, Dennis P. Corbett, Esq., Leventhal, Senter & Lerman P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

³ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).