

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

In the Matter of)
)
)
Infinity Broadcasting Corporation of Los Angeles) Control No. 97050319
) NAL/Acct. No. 818ed0017
Licensee of Station KROQ-FM)
Pasadena, California)
Facility ID # 28622)
)

FORFEITURE ORDER

Adopted: June 12, 2000

Released: June 13, 2000

By the Enforcement Bureau:

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of two thousand dollars (\$2,000) against Infinity Broadcasting Corporation of Los Angeles ("Infinity"), licensee of Station KROQ-FM, Pasadena, CA, for willful violation of 18 U.S.C. § 1464, which prohibits the broadcast of indecent material.

I. BACKGROUND

2. On August 24, 1998, the Mass Media Bureau, by delegated authority, issued a Notice of Apparent Liability for Forfeiture to Infinity in the amount of two thousand dollars (\$2,000), for the broadcast of indecent material. *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 13 FCC Rcd 25349 (MMB 1998). Specifically, the Mass Media Bureau found that the broadcast of "You Suck" by the group Consolidated on March 28, 1997, at approximately 9:10 p.m., violated 18 U.S.C. § 1464. Infinity filed a response to the NAL on September 23, 1998.

3. Infinity admits that a version of the "You Suck" song was aired at approximately 9:10 p.m. on March 28, 1997. However, it asserts that because the complainant submitted a commercial CD of the song in question and not a tape or transcript of the song as broadcast, it is inconsistent with Commission policy to assess a forfeiture against it, particularly since Station KROQ-FM owned more than one version of the song in question at the time of the broadcast. Infinity also argues that in light of the Supreme Court's ruling in *Reno v. ACLU*, 521 U.S. 844 (1997), the Commission's indecency standard is constitutionally suspect.

II. DISCUSSION

A. Sufficiency of Allegation that the Station Aired Indecent Material

4. Infinity asserts that Station KROQ-FM possesses at least two versions of the song, one of which it contends does not contain any indecent material. It asserts that it is unable to determine which version of the song was aired. In support of its position, Infinity filed an affidavit from the station announcer who admitted that he played some version of the "You Suck" song on the day in question. The announcer states that he does not recall which version of the recording he aired and that he did not actually listen to the recording when it aired. Further, Infinity states that the station does not retain copies of its broadcasts. In such circumstances, absent "objective evidence" that the version cited in the NAL was aired, Infinity contends that issuance of an NAL is contrary to Commission precedent.

5. Infinity made these same arguments in response to the Mass Media Bureau's letter of inquiry regarding the complaint and supplied an edited version of "You Suck" which "may" have been the version that was aired. Because the Mass Media Bureau did not have a tape or transcript of the actual broadcast, on April 1, 1998, before it issued the NAL, it sent a letter to the complainant with a copy of the edited version of the "You Suck" song. The Mass Media Bureau asked the complainant to confirm whether she heard the edited version or the version on the CD that was submitted with her complaint. The Mass Media Bureau also asked her to explain the basis of her belief as to which version she heard broadcast on Station KROQ-FM. The complainant responded that she recalls hearing the words "pubic," "dick," "pussy," and "clit" broadcast, none of which were contained in the edited version of the song provided by Infinity.

6. Although our usual practice is to require a tape or transcript of the allegedly indecent material as broadcast, where "the goals of this internal Commission procedure can be achieved by other means, we will not be diverted from pursuing an otherwise legitimate complaint by the lack of direct, off-air recordings or transcripts." *Nationwide Communications, Inc. (KLUC-FM)*, 6 FCC Rcd 3695 (MMB 1990). In this case, the licensee admits that Station KROQ-FM does own a copy of the indecent version of the song "You Suck," and that it is possible that the indecent version of the song was broadcast. Thus, this case can be distinguished from the decision cited by Infinity, where an NAL was rescinded because the station's music library did not contain a copy of the unedited version of the song. *NPR Phoenix, L.L.C. (KPTY(FM))*, 13 FCC Rcd 14070, 14071 (MMB 1998), *distinguishing Waterman Broadcasting Corp. of Texas (KTFM(FM))*, 11 FCC Rcd 14547 (MMB 1996) (NAL rescinded by letter dated April 15, 1997). Further, the complainant has affirmatively stated that she heard specific words in the version of "You Suck" which was broadcast by Station KROQ-FM, none of which were contained in the edited version provided by Infinity. Where the station cannot deny the broadcast of the unedited version and the complainant has provided us with specific information to support her belief that the unedited version was aired, we believe that an NAL was appropriately issued.

B. Constitutionality of Indecency Standard

7. Infinity argues that the definition of indecency is unconstitutionally vague and that the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), "articulates a basis for reexamination in this proceeding of the FCC's generic 'broadcast indecency' definition." Response at 7 (emphasis in original). Although Infinity admits that the Court in *Reno v. ACLU* was looking at the indecency standard

for the Internet, it argues that the Internet definition is similar to the one used for broadcasting. The Commission ruled on a similar argument in *WQAM License Limited Partnership (WQAM(AM))*, 15 FCC Rcd 2518 (2000), *petition for reconsideration pending*. The Commission found that “the Court did not question the constitutionality of our broadcast indecency standard.” Rather, the Commission said, “the Court indicated that our broadcast indecency regulations were justified because of the significant differences between the Internet and the broadcast medium and between the standard employed in the statute under attack and our broadcast indecency standard.” 15 FCC Rcd at 2518-19, *citing Reno v. ACLU*, 521 U.S. at 868-70. Thus, we find no merit to Infinity’s argument that *Reno v. ACLU* invalidates the “foundation of the NAL” assessed against it.

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”),¹ and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s rules,² Infinity Broadcasting Corporation of Los Angeles IS LIABLE FOR A MONETARY FORFEITURE in the amount of two thousand dollars (\$2,000) for willfully violating 18 U.S.C. § 1464.

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s rules³ 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.⁴ 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. 20554.⁵

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

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹ 47 U.S.C. § 503(b).

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

³ 47 C.F.R. § 1.80.

⁴ 47 U.S.C. § 504(a).

⁵ See 47 C.F.R. § 1.1914.