

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

In the Matter of)	
)	
THREE EAGLES OF COLUMBUS, INC.)	File No. 99040101
)	NAL/Acct. No. X32080013
Licensee of Station KROR(FM))	Facility #26649
Hastings, Nebraska)	JJS
)	

FORFEITURE ORDER

Adopted: August 23, 2000

Released: August 24, 2000

By the Chief, Enforcement Bureau:

I. Introduction

1. In this forfeiture order, we impose a six thousand dollar (\$6,000) forfeiture against Three Eagles of Columbus, Inc. (“Three Eagles”), licensee of KROR(FM), Hastings, Nebraska. We find that Three Eagles violated 18 U.S.C. §1464 and Section 73.3999 of the Commission’s rules, 47 C.F.R. § 73.3999, by broadcasting indecent material.

2. On April 28, 2000, the Chief, Enforcement Bureau, issued a Notice of Apparent Liability for Forfeiture in the amount of seven thousand dollars (\$7,000) against Three Eagles. *Three Eagles Broadcasting, Inc.*, DA 00-951 (released April 28, 2000) (“NAL”). Three Eagles filed its response (“Three Eagles Response”) on May 30, 2000.

II. Background

3. The Commission received a complaint alleging that Three Eagles broadcast indecent material on February 26, 1999 during the “Bob and Tom Show” between 6:00 a.m. and 9:45 a.m. A transcript of the broadcast in question is attached to the NAL. On October 27, 1999, the Mass Media Bureau requested that Three Eagles comment on the complaint. In its November 30, 1999 response, Three Eagles admitted broadcasting the material in question, but denied that the material was indecent.

III. Discussion

4. Three Eagles argues that a variety of factors compel the conclusion that no forfeiture should be imposed. First, Three Eagles claims that prior to this broadcast, KROR(FM) had an unblemished broadcast record under its ownership. Second, Three Eagles argues that the program in question was a syndicated program that Three Eagles monitored in good faith. Third, Three Eagles claims that the broadcast was “a short segment in a four-hour program early on a morning in February when most children who could intellectualize the broadcast would be in a school in the small community of Hastings.” Three Eagles Response, p. 2. Fourth, Three Eagles claims that the \$7,000 forfeiture proposed is inconsistent with forfeitures imposed in other cases. It finally argues

that the action in this case is inconsistent with the dismissal of an indecency complaint in *Letter to Benjamin Perez, Esq.*, File No. EB-00-IH-009 (EB May 18, 2000).

5. We reject Three Eagles' argument that a forfeiture is inappropriate. The Commission defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987), *affirmed* 3 FCC Rcd 930 (1987) (subsequent history omitted) (*citing FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). Three Eagles does not directly contest the finding in the NAL that the material appeared to fall within the statutory definition of indecency. It argues, however, that the language at issue in *Letter to Benjamin Perez, Esq.* "was more egregious by far than the tone and content of the KROR transmission." Three Eagles Response, p. 2. That argument has no merit because, in order for material to be indecent, it must not only be "patently offensive" but also must depict or describe "sexual or excretory activities or organs." While the material in *Perez* was highly offensive, it did not fall within the statutory definition of indecency. In contrast, the broadcast material in this case falls squarely within that definition. Moreover, while Three Eagles suggests that most children would be in school during the time of the broadcast, Congress has directed the Commission to enforce the ban on indecent broadcasts during the morning time period at issue in this case, and the United States Court of Appeals for the District of Columbia Circuit has upheld that directive. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1341 (D.C. Cir. 1988). Furthermore, while the program in question was a syndicated program, the Commission has emphasized "that the licensee is ultimately responsible for all programming aired on its station, regardless of its source." *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6401 (1992). While Three Eagles admits that it has monitored the program in question and has expressed concerns about program content to the program supplier, it does not claim to have taken any action with respect to this particular broadcast. We believe a forfeiture is appropriate because the broadcast meets the statutory definition of indecency, the material was broadcast at a time when the Commission has authority to regulate indecent programming, and Three Eagles has not demonstrated any special circumstances that would make a forfeiture inappropriate.

6. We also reject Three Eagles' argument that the amount of the proposed forfeiture (\$7,000) is inconsistent with forfeiture amounts in other indecency cases.¹ None of the cases Three Eagles cites applied the Commission's *Forfeiture Policy Statement*² because the violations in those cases predated the effective date of the *Forfeiture Policy Statement*. By establishing \$7,000 as the base forfeiture amount for indecency violations, the Commission made the judgment that, in the absence of mitigating or aggravating factors, \$7,000 was an appropriate amount. The fact that the Mass Media Bureau issued lower forfeiture amounts in cases not decided under the *Forfeiture Policy Statement*, which was adopted after notice and comment, is not a basis for arguing that the forfeiture amount in this case is too high. Three Eagles has not argued that the proposed forfeiture amount is inconsistent with the *Forfeiture Policy Statement* or any of the cases applying the statement. Our action is consistent with cases decided under the *Forfeiture Policy Statement*.

¹ The cases Three Eagles cites are *Clear Channel Radio Licensee, Inc.*, 13 FCC Rcd 17254 (MMB 1998), *Jacor Broadcasting Corp.*, 13 FCC Rcd 4152 (MMB 1997), *American Radio Systems License Corp.*, 8 CR 941 (MMB 1997), *Nationwide Communications, Inc.*, 6 FCC Rcd 3695 (MMB 1990), and *Guy Gannett Publishing Company*, 6 FCC Rcd 3702 (MMB 1989).

² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17107 (1997), *recon. denied* 15 FCC Rcd 303 (1999).

See, e.g., *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 22004 (1998), *forfeiture imposed* FCC 00-230 (released June 27, 2000) (\$23,000 forfeiture imposed for four indecent broadcasts), *Communicast Consultants, Inc.*, DA 00-1567 (released July 14, 2000) (\$7,000 forfeiture proposed for indecent conversation during a call-in show).

7. Three Eagles claims, and a review of the Commission's records confirms, that prior to the violation at issue here, Three Eagles had a history of compliance with the Commission's rules. Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), requires the Commission to consider "any history of prior offenses," among other factors, when establishing a forfeiture amount. We note, however, that Three Eagles was not authorized to hold the KROR(FM) license until September 5, 1997. See File No. BAL-19970701EB, granted September 5, 1997. Given the relatively short period of time between the time Three Eagles acquired the station and the date of the violation (February 26, 1999), we believe that Three Eagles can only receive limited credit for its prior record of compliance. Based upon our consideration of the record as a whole, we believe a \$6,000 forfeiture is appropriate.

IV. Ordering Clauses

8. 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 Three Eagles of Columbus, Inc. IS LIABLE FOR A MONETARY FORFEITURE in the amount of six thousand dollars (\$6,000), for its willful violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999.

9. 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.

10. IT IS FURTHER ORDERED that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to Three Eagles' counsel, Richard F. Swift, Esq., Swift Law Offices, 2175 K Street, N.W., Suite 350, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

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