

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

In the Matter of	)	
	)	
<b>CAPSTAR TX LIMITED</b>	)	Case No. 98070073
<b>PARTNERSHIP</b>	)	NAL/Acct. No. 200132080001
	)	Facility #9620
Licensee of Station KTXQ(FM),	)	JJS
Fort Worth, Texas	)	
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: October 5, 2000**

**Released: October 6, 2000**

By the Chief, Enforcement Bureau:

**I. Introduction**

1. In this Notice of Apparent Liability for Forfeiture, we find Capstar TX Limited Partnership ("Capstar"), licensee of Station KTXQ(FM), Fort Worth, Texas, apparently liable for a seven thousand dollar (\$7,000) forfeiture for an apparent violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999, by broadcasting indecent material.

**II. Background**

2. The Commission received a complaint concerning a broadcast during the station's morning show on June 8, 1998 between 6:38 a.m. and 10:00 a.m. We are attaching to this notice a transcript of the relevant portions of the program.

3. By letter dated June 8, 2000, we requested Capstar to comment on the complaint. Capstar, through its corporate parent Clear Channel Communications, Inc., filed its response on September 1, 2000. In its response, Capstar explains that it acquired control of KTXQ(FM) on May 29, 1998 and that within two months after it acquired the station, it replaced virtually the entire staff, including the disc jockeys identified as the male voices on the transcript, in connection with a format change. For those reasons, Capstar states that it cannot determine whether the transcript accurately reflects what was broadcast.

**III. Discussion**

4. Section 503(b)(1)(D) of the Act provides in pertinent part:

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--- violated any provision of section 1304, 1343, or 1464 of title 18, United States Code; shall be liable to the United States for a forfeiture penalty.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who “utters any obscene, indecent or profane language by means of radio communication.”

5. The Commission has defined 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) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The court subsequently concluded that a 10:00 p.m. to 6:00 a.m. "safe harbor" was justified as a properly tailored means of vindicating the government's compelling interest in the welfare of children. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

6. In its response, Capstar argues that the material does not “clearly and inescapably [describe] sexual or excretory activities and organs in patently offensive terms” and that, at worst, the material is in “bad taste.” We disagree. The material in question not only discusses sexual activities and organs, the disc jockeys’ comments and the context of the material demonstrate that the material was presented in a pandering and titillating, patently offensive manner, as opposed to a clinical discussion of sex. While we agree with Capstar that neither subject matter nor the use of particular words is sufficient to render material indecent, our conclusion that the material appears to be indecent is based upon the material as a whole and the context in which it is offered.

7. We also reject Capstar’s argument that this material cannot be found indecent because it was no more graphic or less graphic than material in cases where the Mass Media Bureau did not take enforcement action. In that regard, Capstar cites *Letter from Chief, Complaints and Investigations Branch, Mass Media Bureau to Gerald P. McAtee*, 8210-EJS (issued October 26, 1989), *Letter from Chief, Complaints and Investigations Branch, Mass Media Bureau to Mr. R.D. Merkel*, 8310-TRW, April 21, 1997 Memorandum from Thom Winkler to WIOD(AM) Complaint File (Control No. 97010196), and *Letter from Chief, Complaints and Investigations Branch, Mass Media Bureau to Mrs. Barbara Onisko*, 8310-TRW (issued May 15, 1997). We note that while material that is more graphic is more likely to be found indecent, the context in which material is offered is essential to making a determination as to whether material is indecent. For example, the “Geraldo” episode discussed in the *Letter to Gerald P. McAtee* was not patently offensive within the meaning of the statute because the program as a whole was a serious discussion of sex with people knowledgeable in the field. *See also King Broadcasting Co. (KING-TV)*, 5 FCC Rcd 2971 (1990) (broadcast of high school sex education class not indecent because material was clinical or instructional). In contrast, the material in this case cannot be said to be clinical or instructional.

8. Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(a) of the Commission’s rules, 47 C.F.R. § 1.80(a), both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

9. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.<sup>1</sup> The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the 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." See 12 FCC Rcd at 17110. While Capstar argues that the station has a history of compliance with the Commission's rules, such that any forfeiture should be lower than the base amount, we believe it is appropriate to look at the history of all stations controlled by Clear Channel Communications, Inc. ("Clear Channel"), Capstar's parent. We note that stations controlled by Clear Channel have recently committed indecency violations, as well as violations of the rule regarding broadcast of telephone conversations and the rule regarding licensee-conducted contests. See *Citicasters Co.*, DA 00-1640 (released July 26, 2000) (\$6,000 NAL for violation of Section 73.1206 of the Commission's rules, forfeiture paid), *Citicasters Co.*, DA 00-1435 (released June 28, 2000), (\$7,000 forfeiture order for violation of 18 U.S.C. § 1464, forfeiture paid), *Citicasters Co.*, 15 FCC Rcd 11906 (2000) (\$23,000 forfeiture order for violation of 18 U.S.C. § 1464, forfeiture paid), *Citicasters Co.*, DA 00-1016 (released May 9, 2000) (\$4,000 NAL for violation of Section 73.1216 of the Commission's rules, forfeiture paid), *Clear Channel Broadcasting Licenses, Inc.*, 15 FCC Rcd 2734 (EB 2000) (\$4,000 NAL for violation of Section 73.1216 of the Commission's rules, forfeiture paid). Under these circumstances, we reject Capstar's claim that it is entitled to a reduction based upon a record of overall compliance with the Commission's rules. Accordingly, after reviewing all of the circumstances, we believe a \$7,000 forfeiture is appropriate in this case.

#### IV. Ordering Clauses

10. ACCORDINGLY, IT IS ORDERED pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission's rules,<sup>2</sup> that Capstar TX Limited Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that within thirty days of the release of this Notice, Capstar SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. 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 should note the NAL/Acct. No. referenced above.

13. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 3-B443, Washington DC 20554 and MUST INCLUDE the file number listed above.

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<sup>1</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17113 (1997) recon. denied, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

<sup>2</sup> 47 C.F.R. § 0.111, 0.311 and 1.80.

14. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Capstar's counsel, Dorann Bunkin, Esq., Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

Radio Station: KTXQ-FM, Fort Worth, TX  
Date/Time Broadcast: June 8, 1998, between 6:38 a.m. and 10 a.m.  
Material Broadcast: Comments: Lex and Terry  
98070073  
KTXQ

MV: Male Voice  
M2: Second Male Voice  
FV: Female Voice  
FC: Female Caller

\* \*

FC: Christi, I have a boy friend who's really big and we've been together like for 3 years now and it's still, it's kind of painful to have sex. I was just wondering if you have any advice for me on how to.

M2: Yeah, send him over.

MV: Sam Kennison gave advice. (Unintelligible).

FV: Now you're talking for just straight intercourse?

FC: Intercourse and when I suck his (Bleep).

M2: Get that.

M2: Can't say that.

FC: Okay, sorry. Like when I go down (Bleep).

M2: Going to lose our jobs.

FC: He's too big, I mean, I get, I try.

FV: I have a small mouth also. (Laughter).

M2: Oh, okay.

FV: Listen, listen, listen, listen, just don't do it. (Laughter).

MV: Oh come on, I got better advice than that. And listen, in the words of Sam Kennison, have him lick the alphabet. Alright, if he gets you nice and ready by doing things orally, the girl can much better handle a big penis. (Unintelligible).

M2: Oh man, whoa. (Unintelligible). That's fine.

MV: The girl has to be lubricated. And the guy has got to do things to relax her muscles. These are the things you can say on radio, right?

M2: Sure. (Unintelligible).

MV: Once the girl is all ready and her muscles are nice and comfortable and they're moving, you know, and all. (Unintelligible). I mean, they give birth don't they? (Unintelligible). So where are you guys going when you got a new career?

\* \*

FC: I have another question, too.

MV: Okay.

FC: Some of these movies that I've seen, they have guys that have like deformities of their genitals. Do you guys have.

M2: Oh geez.

FC: Open calls for these people or how.

KTXQ-FM

2.

MV: Well, explain a deformity. Explain what do you mean?

FC: Okay there's one I saw a tape with one guy's.

M2: Thing.

FC: No.

M2: Things.

FC: His testicles looked as big as a soccer ball.

MV: Oh, I know what you're talking about, that's a (Unintelligible). They make those fake, that's all fake, it's for esthetics(?). They have two penises on one guy, one guy's got a basketball.

FC: That one too.

MV: That's all fake, that's, it's just a kinky thing. They want to see something out of the ordinary. (Unintelligible).

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