

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

In the Matter of)	
)	
Three Eagles of Columbus, Inc.)	Control No. 99040101
)	NAL/Acct. No. X32080013
Licensee of Station KROR(FM),)	ID# 26649
Hastings, Nebraska)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 27, 2000

Released: April 28, 2000

By the Chief, Enforcement Bureau

I. Introduction

1. In this Notice of Apparent Liability for Forfeiture, we find Three Eagles of Columbus, Inc. (TEC), licensee of Station KROR(FM), Hastings, NE, apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000) for a violation of 18 U.S.C. § 1464 and Section 503(b)(1)(D) of the Communications Act of 1934, as amended, (the "Act")¹ 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 information indicating that Station KROR(FM), Hastings, NE, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the "Bob and Tom Show" on February 26, 1999, between 6 a.m. and 9:45 a.m. A transcript of those portions of the allegedly indecent broadcast that are the subject of this action, taken from a tape submitted by the complainant, is attached. By letter dated October 27, 1999, we requested TEC to comment on the complaint. TEC filed its response on November 30, 1999.

III. Discussion

3. 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,

¹ 18 U.S.C. § 1464, 47 U.S.C. § 503(b)(1)(D).

or 1464 of title 18, United States Code; shall be liable to the United States for a forfeiture penalty.

4. 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. TEC's response to our October 27, 1999, letter of inquiry indicates that the "Bob and Tom Show" is a syndicated program carried by station KROR(FM). During the broadcast of the program, the station has a local announcer on the "board" to allow for editing of material the station believes to be indecent, obscene or otherwise offensive. TEC contends the cited material was not indecent but constituted, "in the major, innuendo or double entendre" which at the worse could be considered to be in bad taste. Moreover, it contends that the broadcast was an isolated occurrence during a four-hour program. We are unpersuaded by TEC's arguments. The cited language dwells at length on sexual innuendoes and cannot be considered fleeting. Moreover, the fact that this is only one segment of a four-hour program is not decisionally significant. We find that the material relies principally on innuendo to convey a sexual meaning which is unmistakable and therefore, is actionably indecent. *Great American Television and Radio Company, Inc. (WFBQ-FM)*, 6 FCC Rcd 3692 (MMB 1990).

7. It appears that the subject excerpts are indecent in that they contain language that describes sexual and/or excretory activities or organs in patently offensive terms. Because the material aired between 6:00 a.m. and 9:45 a.m., when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on February 26, 1999, Station KROR-FM, violated 18 U.S.C. § 1464 by airing indecent programming.

8. Section 503(b) of the Act and Section 1.80(a) of the Commission's Rules 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 Communications 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.²

9. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.³ 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,⁴ 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.”⁵ After reviewing all of the circumstances, we believe a \$7,000 forfeiture appears to be 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,⁶ that Three Eagles of Columbus, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating Section 503(b)(1)(D) of the Communications Act of 1934, as amended, and Section 73.3999 of the Commission’s rules.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules,⁷ that within thirty days of the release of this Notice, TEC 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 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 Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Act. No. referenced above.

13. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications

²See *Southern California Broadcasting Co.*, FCC Rcd 4387 (1991).

³The 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*).

⁴ 12 Fcc Rcd . at 17110.

⁵47 U.S.C. § 503(b)(2)(D).

⁶47 C.F.R. § 0.111, 0.311 and 1.80.

⁷47 C.F.R. § 101.53.

Commission, 445 12th Street, S.W, Room 3-B443, Washington DC 20554 and MUST INCLUDE the file number listed above.

14. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Three Eagles of Columbus, Inc.'s counsel, Richard F. Swift, Esq., Suite 350, 2175 K Street, N.W., Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

Attachment

Radio Station: KROR-FM, Hastings, NE
Date/Time Broadcast: February 26, 1999, between 6 a.m. and 9:45 a.m.
Material Broadcast: Bob and Tom Show
99040101

MV: Male Voice
M2: Second Male Voice
M3: Third Male Voice
FV: Female Voice
GS: Girls Singing

* *

MV: Hi Felicia, gee, I love your dress and your hair looks so shiny and manageable, are you still shampooing with Head and Shoulders?
FV: Gosh Chick, I stopped using Head and Shoulders a long time ago. I mean honestly, who grows hair on their shoulders anyway?
MV: Yeah, right. So what are you using now?
FV: Well, it's like Head and Shoulders only without all those additives. It's just called Head. Let's tell them about it girls.
GS: If you're tired of old shampoo and (Unintelligible) and feeling blue, yeah, yeah, just remember what I said, yeah, yeah, you'll feel better if you get some Head.
MV: Wow. Where can I get Head?
FV: Lots of places Chick, you can stop by my place later and I'll be happy to give you some Head. (Laughter). In 15 minutes I'll have you shampooed, styled and blown dry.
MV: Gee, you don't miss a lick do you? Head sounds great but is it expensive?
FV: Not at all Chick, my brother says there are places downtown where you can get Head for less than 10 dollars.
MV: Golly, at that price everyone should be getting Head.
M2: That's right Chick, when you say Head, you've said a mouthful. Hi, I'm Dr. Raymond Falot-ee-oh from Frig Them All Industries here to tell you why you should get Head. First it lubricates each limp hair follicle leaving an erect glistening shaft. Then the scalp's natural oils are sucked out of the root, leaving your hair soft, shiny and exhausted. Nothing does the job like Head.
M3: Great, can I get Head from my hairdresser Bruce?
M2: Probably, but you might want to try your girlfriend first.
GS: So ask and get some Head today, yeah, yeah, little squirt goes a long, long way, yeah, yeah, you'll look better and you'll feel terriff(?) yeah, yeah, when you get Head you're a lucky stiff.
MV: Want hair with lots of volume, nothing gets it up like Head. Available at a price you won't find hard to swallow. And it's going down every day.
FV: Honey, we're out of shampoo, can you go out and get some Head?
MV: What did you say?
FV: I said, I want you to go out and get Head.
MV: Oh thank you sweet Jesus. I'm going downtown.
M2: And Head makes a great holiday gift. Last Christmas my wife gave me some Head. Then I gave her a pearl necklace. I've never seen her so choked up.
M3: My girlfriend used to give me Head, then we got married. Now I'm lucky if I get Jergen's lotion and a National Geographic. (Laughter).

GS: Once you start you won't want to stop, Head feels so good you might blow your top, give Head in the shower you'll want to come, give Head. Mm mm mm mm. If you're tired of your old shampoo, yeah, yeah, frustrated and feeling blue, yeah, yeah, just remember what I said, yeah, yeah, you'll feel better if you get some Head, you'll feel better if you get some Head.

MV: Oh yeah, oh, oh. Head Shampoo, come on give it a shot.

M2: My hair looks great. (Laughter). Use a nap.

MV: A little Head shampoo for you.

M2: By request here on the Bob and Tom program.

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