

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

In the Matter of) File Nos. EB-00-IH-0401
Emmis FM License Corp. of Chicago) NAL/Acct. No. 200132080029
) Facility ID #19525
Licensee of Station WKQX(FM),)
Chicago, Illinois)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 5, 2001

Released: April 6, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Emmis FM License Corp. of Chicago ("Emmis"), licensee of Station WKQX(FM), Chicago, Illinois, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully and repeatedly broadcasting indecent language. Based on our review of the facts and circumstances in this case, we conclude that Emmis is apparently liable for a forfeiture in the amount of fourteen thousand dollars (\$14,000).

II. BACKGROUND

2. The Commission received complaints dated March 20, 2000 and May 15, 2000, concerning broadcasts that aired on WKQX on the date of each letter. Each complaint argued that on the date of the letter the station had broadcast indecent material on "*Mancow Morning Madhouse*" ("*Mancow*") program. The March complaint alleged that the host aired a telephone conversation with an adult-film actress who described "fisting"¹ in graphic detail. The May complaint charges that the station aired a pre-recorded *Mancow* segment entitled "Bitch Radio." The segment allegedly featured an interview with three women who discussed their sex lives generally, and oral sex in particular. One of the questions allegedly asked and answered was whether the women spit or swallowed their partner's sperm. The complaint also charges that, during this question and answer session, sounds of women moaning were played in the background.

3. Because the two broadcasts contained apparently indecent material and aired between 6 a.m. and 10 a.m., we issued a letter of inquiry to the licensee. In its response, Emmis states only that it has neither a tape nor a transcript and cannot determine whether the alleged statements were made.

¹ According to the complainant, "fisting" is a procedure by which a female is sexually gratified by having an entire hand inserted into her sexual organ.

III. DISCUSSION

4. Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), provides in pertinent part:

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection to have ---

...

(D) 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.

18 U.S.C. § 1464 provides criminal penalties for anyone who “utters any obscene, indecent or profane language by means of radio communication.” As explained below, we believe that language broadcast during the two programs of “*Mancow*” was indecent and that the licensee’s broadcasts of that material were willful.

5. The Commission has defined indecent speech as language 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) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). The Commission’s authority to restrict the broadcast of indecent material extends to 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). Current law holds that such times begin at 6 a.m. and conclude at 10 p.m. *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996). Thus, to be actionably indecent, the material in question must not only meet the standard referenced above but also air after 6 a.m. and before 10 p.m. See 47 C.F.R. § 73.3999.

6. After carefully considering the record before us, it appears that Emmis has willfully and repeatedly violated our indecency rule. Emmis does not deny that it broadcast the material in question between 6 a.m. and 10 a.m. Each segment contains material that apparently describes sexual activities in patently offensive terms. Specifically, the March broadcast apparently described in explicit detail a sexual technique familiar to a female porn star, while the May program discussed specific aspects of fellatio and included the sounds of women moaning in the background. In a similar situation, we found indecent portions of a radio station’s interview of an adult-film actress who crudely relayed her fondness for oral sex. See *Regent Licensee of Flagstaff, Inc. (KZGL(FM))*, 15 FCC Rcd 17286 (Enforcement Bureau 2000). We have consistently deemed such material indecent, and we believe the same result is warranted here. See also *Rusk Corporation (KLOL(FM))*, 5 FCC Rcd 6332 (Mass Media Bureau 1990).

7. Section 503(b) of the Act and 47 C.F.R. § 1.80 both state that any person who willfully or repeatedly fails to comply with the Act or the Commission’s rules shall be liable for a forfeiture penalty. For purposes of 47 U.S.C. § 503(b), the term “willful” means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission’s rules.² In assessing a forfeiture, we take into account the nature, circumstances, extent and gravity of the

² See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

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.³

8. The Commission's *Forfeiture Guidelines* set a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.⁴ After considering all the facts and circumstances, we believe the base forfeiture amount is the appropriate sanction for each of the two violations described above and that neither an upward nor downward adjustment should be made.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to 47 U.S.C. § 503(b), and 47 C.F.R. §§ 0.111, 0.311 and 1.80, Emmis FM License Corp. of Chicago is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of fourteen thousand dollars (\$14,000) for willfully and repeatedly violating 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

10. IT IS FURTHER ORDERED THAT, pursuant to 47 C.F.R. § 1.80, within thirty days of this NOTICE OF APPARENT LIABILITY, Emmis FM License Corp. of Chicago SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. 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.

12. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁵

³ 47 U.S.C. § 503(b)(2)(D). See also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100-01 (1997), recon. denied, 15 FCC Rcd 303 (1999) ("*Forfeiture Guidelines*").

⁴ *Forfeiture Guidelines*, 12 FCC Rcd at 17113.

⁵ See 47 C.F.R. § 1.1914.

15. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail Return Receipt Requested to Emmis FM License Corp. of Chicago, 3500 West Olive Avenue, Suite 300, Burbank, California 91505; with a copy to John E. Fiorini, III, Esq., Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau