

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

In the Matter of	)	File No. EB-00-IH-0401
	)	
Emmis FM License Corp. of Chicago	)	NAL/Acct. No. 200132080029
	)	FRN: 0001-5293-87
Licensee of Station WKQX(FM), Chicago, Illinois	)	Facility ID #19525
	)	

**FORFEITURE ORDER**

**Adopted: January 7, 2002**

**Released: January 8, 2002**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Forfeiture Order, we impose a forfeiture of \$14,000 on Emmis FM License Corp. of Chicago (“Emmis”), licensee of Station WKQX(FM), Chicago, Illinois, for willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. We take this action pursuant to 47 U.S.C. § 503(b)(1)(D) and 47 C.F.R. § 1.80(f)(4).

**II. BACKGROUND**

2. The Commission received letters dated March 20, 2000, and May 15, 2000, complaining about material aired on Station WKQX(FM) on each of those dates during the “*Mancow Morning Madhouse*” (“*Mancow*”) program. The March complaint alleged that the station broadcast a conversation between 8:13 a.m. and 8:16 a.m., which the complainant deemed indecent. The May complaint alleged that the station broadcast interviews between 7:45 a.m. and 8:00 a.m., which the complainant believed indecent. After reviewing the complaints, Enforcement Bureau (“Bureau”) staff issued a letter of inquiry to Emmis, licensee of the station involved. In its response to the staff’s inquiry, Emmis stated that it had neither a tape nor a transcript and could not determine whether the alleged material actually aired. Emmis does not deny that the material aired as stated in the complaints.

3. On April 6, 2001, the Bureau issued a Notice of Apparent Liability (“NAL”),<sup>1</sup> which found that the material apparently violated the Commission’s indecency rule. To redress the apparent rule violations, we concluded that a monetary sanction in the base forfeiture amount of \$7,000 appeared appropriate with respect to each broadcast. Accordingly, the NAL proposed a forfeiture of \$14,000.

4. Emmis challenges the NAL’s findings. Emmis argues that the factual record is inadequate because it lacks objective evidence as to what was actually broadcast. Emmis notes that the complaints do not include a tape or transcript, and it contends that the information actually provided can only be characterized as a summary or brief description. Emmis argues that

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<sup>1</sup> *Emmis FM License Corp. of Chicago*, Notice of Apparent Liability, 16 FCC Rcd 7829 (Enforcement Bureau 2001).

the complaint's descriptions contain even less detail and context than the majority of the segments appearing in the Commission's indecency guidelines,<sup>2</sup> which, as Emmis notes, the Commission "intended only as a research tool" and not as a "meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide." *Indecency Policy Statement, supra*, 16 FCC Rcd at 8003 ¶ 11. Emmis concludes that our finding of apparent liability, based on the complainant's characterizations, has effectively shifted the burden of proof to the licensee, contrary to the Administrative Procedure Act and due process. In light of the above, Emmis requests cancellation of the forfeiture.

### III. DISCUSSION

5. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of "any obscene, indecent or profane language by means of radio communication." Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the "Act"), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress's authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.<sup>3</sup> In contrast, federal courts have held that indecent speech is protected by the First Amendment.<sup>4</sup> Nonetheless, the federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well as the Commission's interpretation and implementation of the statute.<sup>5</sup> However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.<sup>6</sup> Consistent with a subsequent statute and case law,<sup>7</sup> under the Commission's rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. See 47 C.F.R. § 73.3999.

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<sup>2</sup> See *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Indecency Policy Statement*").

<sup>3</sup> See *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>4</sup> *Sable Communications of California, Inc. v. FCC, supra* note 3, 492 U.S. at 126.

<sup>5</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) ("*ACT III*").

<sup>6</sup> *ACT I, supra* note 5, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear."). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

<sup>7</sup> Public Telecommunications Act of 1992, Pub. L. No. 356, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. (1992); *ACT III, supra* note 5.

6. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.” *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)). This definition has been specifically upheld by the federal courts.<sup>8</sup> 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. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.<sup>9</sup>

7. The Commission’s indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts. *Indecency Policy Statement, supra*, 16 FCC Rcd at 8015, ¶ 24. “Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.” *Id.* In evaluating the record to determine whether the complained of material is patently offensive, three factors are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. *See Indecency Policy Statement, supra*, 16 FCC Rcd at 8003 ¶ 10.

8. In the NAL, we found that the material allegedly aired was apparently indecent. With respect to the March 20, 2000 broadcast, based on the uncontradicted facts set forth in the complaint, the *Mancow* program featured a telephone conversation with a porn star. The program talked in graphic detail about “fisting,” which, according to the complainant, the porn star described as a procedure by which a female is sexually gratified by having an entire hand inserted into her sexual organ. With respect to the May 15, 2000 broadcast, the *Mancow* program featured interviews with three women about their sex lives. The interviewer asked each woman (and each answered) whether she “spit or swallowed” her partner’s sperm. During the questions and answers, the station played in the background sounds of women moaning.

9. There is no question that the material broadcast referred to sexual activities and that it aired between 6 a.m. and 10 p.m. As discussed below, the uncontradicted excerpts and descriptions provided by the complainant lead us to conclude that both broadcasts violated the Commission’s indecency rule.

10. March 20, 2000 broadcast. With respect to the key factors set out in the *Indecency Policy Statement*, we conclude that the language aired was sufficiently graphic or explicit to meet the patently offensive standard. The complainant’s unchallenged assertions reflect that the station aired a telephone conversation with a porn star; that the show talked in graphic detail about “fisting;” and that the porn star described “fisting” as noted above. The information provided

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<sup>8</sup> In *FCC v. Pacifica Foundation*, the Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation, supra* note 5, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I, supra* note 5, 852 F.2d at 1339; *ACT II, supra* note 5, 932 F.2d at 1508; *ACT III, supra* note 5, 58 F.3d at 657.

<sup>9</sup> *ACT III, supra* note 5.

makes plain that the activity described left nothing to the imagination as to how the people involved interacted and that the purpose of such interaction was sexual gratification. With regard to the second factor, we further conclude that we have sufficient information to determine that the material broadcast dwelled on the sexual activity identified as “fisting” as opposed to being a mere fleeting reference. Again, the information before us reveals that the activity was not merely adverted to, but described in such detail that one knew exactly not only what “fisting” was but what it was intended to do. Finally, there is nothing in the record that suggests that the context of the program was educational.<sup>10</sup> Indeed, the fact that a porn star was involved suggests that the material was pandering, titillating and/or presented for shock value. We thus conclude that Emmis’ March 20, 2000 broadcast included indecent material in violation of our rules. See *Citicasters Co. (KEGL(FM))*, 16 FCC Rcd 7546 (Enforcement Bureau 2001) (interviews with porn stars); *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19095, 19096 (Enforcement Bureau 2000); *Regent Licensee of Flagstaff, Inc. (KZGL(FM))*, 15 FCC Rcd 17286 (Enforcement Bureau 2000).

11. May 15, 2000 broadcast. Again, the complainant’s assertions are unchallenged. They reflect that the station broadcast interviews with three women about their sex lives. The interviews included conversations about oral sex. The interviewer asked each woman whether she “spit or swallowed” her partner’s sperm after engaging in oral sex. During the segment in which the women were asked whether they spit or swallowed, the station played sounds of women moaning in the background. In light of the direct and plain nature of the questions asked and answers provided, we conclude that the material broadcast was sufficiently graphic or explicit to meet the patently offensive standard. Likewise, considering that the station posed the question about spitting or swallowing to three different women, we further conclude that the material was repeated and not fleeting in nature. Finally, in light of the subject matter, the specific question posed, and the accompanying sound effects, we find that the material was meant to pander or titillate. We thus conclude that Emmis’ May 15, 2000 broadcast included indecent material in violation of our rules. See *Citicasters Co. (KEGL(FM))*, *supra* (conversation with female regarding her methods and frequency of masturbation); *Citicasters Co. (KSJO(FM))*, *supra*.

12. As noted above, Emmis contends that the NAL is based on an inadequate factual record because the complainant did not, in either case, submit a tape, transcript or significant excerpt. We disagree, finding that the excerpts are significant enough, when viewed in combination with the descriptions provided by the complainant and the lack of contradiction by Emmis, to be consistent with our practice. In any event, “our practice that complainants provide a tape, transcript or significant excerpt is not a requirement, but a general practice used by the Commission to assist in the evaluation of indecency complaints.” *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 16 FCC Rcd 6867, 6870 ¶ 11 (Enforcement Bureau 2001). We base our decision to investigate on whether the complainant provided sufficient information for us to determine that the station may have broadcast indecent material contrary to the Commission’s rule. We base our decision to impose a forfeiture on whether the record as a whole contains sufficient excerpts and description to support a finding that a violation occurred. As explained above, the complainant provided the dates and times of the broadcasts, the call sign of the station, and sufficient detail and context about what was broadcast to determine that Emmis broadcast prohibited indecent material.<sup>11</sup>

<sup>10</sup> See *Indecency Policy Statement*, *supra*, 16 FCC Rcd at 8012 (Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, to Gerald P. McAtee, dated October 26, 1989, concerning the “Geraldo Rivera Show” (Unlocking the Great Mysteries of Sex) on KTVI-TV, St. Louis, Missouri).

<sup>11</sup> See *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, *supra*, 16 FCC Rcd at 6868 (accepting a complainant’s *uncontradicted* statement that she heard certain words as probative evidence that a particular version of a song was played).

Emmis submitted no evidence to rebut the complainant's allegations. We therefore reject Emmis' contention that the record is inadequate. For the same reasons, we reject its contention that our action is contrary to the Administrative Procedure Act or due process. We have based our decision on the information provided by both the complainant and Emmis, a procedure that is consistent with 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80. Should Emmis choose not to pay the forfeiture, 47 U.S.C. § 504 protects its rights by providing that a forfeiture imposed without an evidentiary hearing cannot be used to the prejudice of that entity unless a court of competent jurisdiction has issued a final order after a trial *de novo* requiring payment of the forfeiture. See *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, *supra*, 16 FCC Rcd at 6869.

13. 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 "willfully" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules, while "repeatedly" means more than once.<sup>12</sup> In assessing a forfeiture, we take into account 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.<sup>13</sup>

14. The Commission's *Forfeiture Guidelines* set a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.<sup>14</sup> After considering all the facts and circumstances, we conclude that 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

15. 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 FORFEIT to the United States the sum of fourteen thousand dollars (\$14,000) for willfully and repeatedly violating 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

16. 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, within thirty (30) days of the release of this Forfeiture Order. See 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

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<sup>12</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>13</sup> 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*").

<sup>14</sup> *Forfeiture Guidelines*, *supra* note 13, 12 FCC Rcd at 17113.

17. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to Emmis FM License Corp. of Chicago, c/o Doyle L. Rose, President, Emmis Radio, 15821 Ventura Blvd., Suite 685, Encino, California 91436-29155; 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