Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
WQAM LICENSE LIMITED PARTNERSHIP	)	File Nos. EB-03-IH-0402 EB-03-IH-0403
	)	
Licensee of Station WQAM(AM), Miami, Florida	)	NAL/Acct. No. 200432080201 FRN No. 0003768769
	)	
		Facility ID No. 64002

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 22, 2004 **Released**: **November 23, 2004**

By the Commission: Commissioner Copps concurring and issuing a statement; Commissioner Martin approving in part, concurring in part and issuing a statement.

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("*NAL*"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[1] we grant two complaints[2] and find that WQAM License Limited Partnership ("WQAM"), licensee of Station WQAM(AM), Miami, Florida, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully and repeatedly airing indecent material over the station on September 9 and 10, 2003. Based upon our review of the facts and circumstances in this case, we conclude that WQAM is apparently liable for a monetary forfeiture in the amount of Fifty-Five Thousand Dollars ($55,000.00).

II. BACKGROUND

2. The Commission received complaints alleging that Station WQAM(AM) aired indecent material on the "Scott Ferrall Show" between 8:40 and 9:05 a.m. on September 9, 2003, and between 8:05 and 9:55 a.m. on September 10, 2003.[3] Because the *Complaints* contained potentially indecent material that aired between 6 a.m. and 10 p.m., the Enforcement Bureau

[1] 47 U.S.C. § 503(b) (2002); 47 C.F.R. § 1.80 (2002).

[2] *See* Letter from Complainant I to Federal Communications Commission dated September 9, 2003 ("*Complaint I*"); Letter from Complainant II to Federal Communications Commission, dated September 15, 2003 ("*Complaint II"*) (collectively, "*Complaints*").

[3] *See Complaints.*

("Bureau") issued a letter of inquiry to the licensee.[4] In its response to the Bureau's inquiry, Beasley Group, the parent company of WQAM, states that it has neither a tape nor a transcript of the complained-of broadcasts and cannot determine whether it actually aired the complained-of material.[5] Nevertheless, Beasley Group does not deny that the material aired as stated in the *Complaints*, and maintains instead that, even if it aired the material, it was not actionably indecent.[6] Specifically, Beasley Group states that the material provided "no surrounding context . . . instead noting particular words or phrases in isolation," and that "[w]ithout a sufficient transcript" of the broadcast, "the Commission cannot objectively determine what in fact aired on the Station and whether the terms were used in the context of sexual or excretory description."[7]

III. DISCUSSION

3. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.[8] The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the United States Code, section 1464 prohibits the utterance of "any

[4] *See* Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to WQAM License Limited Partnership, dated December 3, 2003.

[5] *See* Letter from Steven A. Lerman, Dennis P. Corbett, and David S. Keir, counsel for Beasley Broadcast Group, Inc. ("Beasley Group"), to Mary Turner, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated January 13, 2004 ("*Beasley Group Response*").

[6] *See id.* at 7.

[7] *Id.* Beasley Group also argues that the Commission's indecency definition is "unconstitutionally vague and overbroad" and that it has not been established that there is a compelling government interest in protecting children from indecency. *See Beasley Group Response* at 3, n.4 (*citing Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)). The cases cited by Beasley Group for this proposition are inapposite. The Commission previously has rejected constitutional challenges to our broadcast indecency standards based on the *Reno* case which invalidated an indecency standard for the Internet. *See, e.g., WQAM License Limited Partnership*, Forfeiture Order, 15 FCC Rcd 2518, para. 3 (2000) (noting that the Supreme Court in *Reno* indicated that broadcast indecency regulations were justified based on significant differences between the Internet and the broadcast medium and between the standard in the statute at issue and the Commission's broadcast indecency standard). *See also Infinity Broadcasting Operations, Inc. (WKRK-FM),* Notice of Apparent Liability, 18 FCC Rcd 6915 (2003) ("*Infinity Broadcasting NAL"*) (same); Forfeiture Order, 18 FCC Rcd 26360 (2003), *recon. denied*, 19 FCC Rcd 4216 (2004). Further, the compelling governmental interest in protecting children from indecent speech has been widely recognized by federal courts. *See, e.g., Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988); *Action for Children's Television v. FCC,* 932 F.2d 1504, 1508 (D.C. Cir. 1991)*, cert. denied,* 503 U.S. 914 (1992); *Action for Children's Television v. FCC,* 58 F. 3d 654 (D.C. Cir. 1995) (*en banc)*, *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the transmission of indecent material between the hours of 6 a.m. and 10 p.m. when children are most likely to be in attendance).

[8] *See* U.S. CONST., Amend. I; 47 U.S.C. § 326.

obscene, indecent or profane language by means of radio communication."[9] In addition, section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and, consistent with a subsequent statute and court decision,[10] shall not broadcast indecent material during the period 6 a.m. through 10 p.m.[11]

4. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[12] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[13] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[14] As we set forth in greater detail below, we conclude under this standard that WQAM is apparently liable for a forfeiture for its apparent willful violations of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

A. Indecency Analysis

5. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.[15] The

[9] 18 U.S.C. § 1464.

[10] Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the current safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also ACT III,* 58 F. 3d 654 (D.C. Cir. 1995) (*en banc)*, *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the transmission of indecent material between the hours of 6 a.m. and 10 p.m.).

[11] *See* 47 C.F.R. § 73.3999.

[12] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); s*ee also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision Inc*.") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.,* 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.,* 16 FCC Rcd at 1362, ¶ 9.

[13] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[14] *See, e.g., SBC Communications, Inc.,* Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

[15] U.S. CONST., Amend. I; s*ee ACT I*, 852 F.2d at 1344 (D.C. Cir. 1988).

federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent material, as well as the Commission's interpretation and implementation of the governing statute.[16] Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.[17]

6. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[18]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.[19]

7. As an initial matter, contrary to Beasley Group's contention, we conclude that the material quoted below does describe or depict sexual or excretory activities or organs. That material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.[20]

8. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[21] Three principal factors are

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[16] 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." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also ACT I*, 852 F.2d at 1339; *ACT II,* 932 F.2d at 1508; *ACT III,* 58 F. 3d at 657.

[17] *ACT I,* 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 may say and hear."). *See id*. at 1340 n.14 (" . . . the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[18] *Infinity Broadcasting Corporation of Pennsylvania,* Memorandum Opinion and Order, 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)).

[19] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* Policy Statement*,* 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) ("*Indecency Policy Statement"*) (emphasis in original).

[20] The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See Indecency Policy Statement,* 16 FCC Rcd at 8002, ¶ 8 and n. 15.

[21] *Indecency Policy Statement,* 16 FCC Rcd at 8002, ¶ 9 (emphasis in original). In this regard, in order for us to be in a position to judge the context of particular material, once a complainant makes a *prima facie* case, it is appropriate for the staff to seek from the licensee a tape or transcript not only of the relevant material, but also of a reasonable amount of preceding and subsequent material. *See AMFM Radio*

significant to this contextual analysis: (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.[22] In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[23] In particular cases, the weight of one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[24] or, alternatively, removing the broadcast material from the realm of indecency.[25] We turn now to our analysis of the three principal factors in our decision.

9. First, the comments and dialogue of the program host during the September 9 broadcast related in *Complaint I* contained graphic and explicit references to sexual activities, including repeated discussion and depiction of coerced or forced sexual relations including forced sexual intercourse and oral sex. The broadcast contains a call from an angry male caller to the radio program, which provoked a heated response from the program host.[26] The complainant states that he heard the host threaten the caller with confinement in prison. The complainant then says that Mr. Ferrall also said the following:

> 1. That the caller would be raped and sodomized in prison.
> 2. While the caller was in prison he, Ferrell (sic), would "stuff his package into the caller's wife's mouth."
> 3. He would "do her daily."
> 4. Then get his girlfriend to do her. . . [27]

Similarly, the September 10, 2003, broadcast included the graphic and explicit description of child molestation "[m]olested in the ass as children . . . hot candles in the ass."[28] To the extent that colloquial terms that the program host used to describe sexual activities could be described as innuendo rather than as direct references, they are nonetheless sufficient to render the material

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Licenses LLC (WWDC(FM)), Notice of Apparent Liability, 18 FCC Rcd 19917 (2003) (forfeiture paid) ("*AMFM Radio WWDC(FM) NAL*").

[22] *Indecency Policy Statement,* 16 FCC Rcd at 8002-15, ¶¶ 8-23.

[23] *Id.,* at 8003, ¶ 10.

[24] *Id.,* at 8009, ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same)).

[25] *Indecency Policy Statement,* 16 FCC Rcd at 8010, ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[26] *See Complaint I.*

[27] *Id.*

[28] *See Complaint II.*

actionably indecent because the sexual import of those terms was "unmistakable."[29] Given the explicit references and graphic manner in which the broadcasts described the threatened actions that the host made to the caller and the reference to anal sex with a child, there is no non-sexual meaning that a listener could possibly have attributed to these terms.[30] Therefore, we find that the broadcasts at issue described sexual activities through the use of direct references and/or innuendo that were sufficiently explicit or graphic to be deemed patently offensive as measured by contemporary community standards for the broadcast medium.

10. Second, the sexual discussions and references were not so fleeting or isolated as to lead us to conclude that the material at issue was not indecent. Rather, discussions about and references to rape and other forced sexual activity were repeated during the broadcast, and were the subject of the complained-of portion of the September 9 broadcast. The language concerning child molestation, contained in the September 10 broadcast, was in the context of a program that included other offensive sexual references as well, albeit none as offensive as this one. Moreover, the Commission has previously held that even relatively fleeting references to sexual activity with children may be found to be patently offensive.[31]

11. Finally, and perhaps most significantly, several characteristics of the manner in which the station presented this material establish that WQAM broadcast it to pander to and shock listeners. With respect to the September 9 broadcast, the program host's references to forced sexual activities, such as rape and sodomy, clearly evince the pandering nature and shock value of the material with regard to the listening audience. For example, the host specifically states that the caller will be "raped and sodomized in prison." The host then threatens that, while the caller is confined in prison, he will "stuff his package into the caller's wife's mouth."[32] The host also threatens that he will "do her daily" (referring to sexual intercourse with the caller's wife) and get his girlfriend to do her (referring to the host's girlfriend and the caller's wife).[33] All of the threatened activities strongly imply the use of force in order to accomplish the host's objective of inducing the caller's wife to engage in various sexual activities presumably in retaliation for the caller's angry communication with the station. The host concludes by stating that he would "bash her brains in with a baseball bat" (referring to the caller's wife) and "light the caller's children on fire."[34] Although these last two references do not fall within our indecency definition because they do not describe sexual activities or organs, they are indicative of the strong tone of depravity and brutality of the program host that run through the entire program segment in order to shock the listening audience. By dwelling on the coerced and brutal nature of the sexual activities described during the broadcast in a pandering and offensive manner, the

[29] *See Indecency Policy Statement,* 16 FCC Rcd at 8003-04, ¶ 12; *see also Telemundo of Puerto Rico License Corp. (WKAQ-TV),* Notice of Apparent Liability, 16 FCC Rcd 7157 (Enf. Bur. 2001) (forfeiture paid); *Citcasters Co. (KEGL(FM)),* Notice of Apparent Liability, 15 FCC Rcd 19091 (Enf. Bur. 2000) (forfeiture paid).

[30] *See Sagittarius Broadcast Corporation,* Memorandum Opinion and Order, 7 FCC Rcd 6873, 6874 (Mass Media Bur. 1972) (subsequent history omitted).

[31] *See Indecency Policy Statement* 16 FCC Rcd at 8010, ¶ 19, and cases cited therein.

[32] *See Complaint I.*

[33] *Id.*

[34] *Id.*

program host sets out to pander and to shock listeners. Further, the broadcast occurred at or about 9 a.m., when there was a reasonable risk that children, whom the government has a recognized and compelling interest to shield from indecent material,[35] would be in the audience, on their way to or getting ready for school. For these reasons, we find that the September 9 and 10, 2003, broadcasts described in the *Complaints* were patently offensive as measured by contemporary community standards for the broadcast medium.

12. We disagree with WQAM's contention that the language contained in these broadcasts was not patently offensive or actionably indecent because the material submitted in the complaints is "incomplete" and "disconnected," and so provides "no surrounding context" from which to make a determination of indecency. In this regard, WQAM also maintains that the brevity of the complainant's submissions prevents a determination that the language was "dwelled on" or repeat[ed] at length" in the course of the broadcast.[36] We find that the complaints in this matter provide sufficient context for us to conclude that the broadcasts at issue were indecent. As discussed above, the material at issue includes unmistakable repeated references to sexual activity that are sufficiently graphic and intended to titillate the listening audience such that a finding of indecency is warranted, the brevity of said references notwithstanding.[37]

13. We also disagree with WQAM's contention that the cited phrases are "merely declarative or interrogative," and "without descriptive detail" that would warrant a finding of indecency.[38] We find that the broadcasts' usage of such phrases as "stuff his package in the caller's wife's mouth," "do her daily," and "molested in the ass as children" in the context of the described conversation clearly relay sexual images that are patently offensive.[39] WQAM also argues that, because the complained-of material makes use of "innuendo and double entendre" it would not have an "inescapable and understandable sexual or excretory import" to children, and cannot therefore give rise to a finding of indecency."[40] We disagree. Our examination necessarily includes "a review of the manner in which the language or depictions are portrayed" and a "consideration of the ability of the medium of expression to separate adults from children."[41] In the instant case, we find that many of the minors who may have listened to the subject broadcasts would have readily understood the meaning of the terms used in the context of the discussion.[42] Further, as previously stated, colloquial terms which could be described as

[35] *See ACT III*, 58 F.3d at 660-63.

[36] *See Beasley Group Response* at 8-9.

[37] *See Emmis Radio License Corporation, WKQX(FM),* Memorandum Opinion and Order*,* 19 FCC Rcd 6452, 6455, n. 24 (2004)*; see also supra,* n.24 and accompanying text.

[38] *See Beasley Group Response* at 10.

[39] *See Infinity Broadcasting Corp. of Pennsylvania,* Memorandum Opinion and Order, 3 FCC Rcd 930, 933 (1987) (subsequent history omitted*) ("Infinity Recon. Order")*.

[40] *See Beasley Group Response* at 12.

[41] *See Infinity Recon. Order* at ¶ 16 (*citations omitted*).

[42] *See Act III,* 58 F. 3d 654, 664 (D.C. Cir. 1995) (*en banc), cert. denied,* 516 U.S. 1072 (1996) (affirming compelling government interest in protecting children under the age of 18 from exposure to indecent broadcasts).

innuendo or double entendre are sufficient to render the material actionably indecent when the sexual import of those terms is "unmistakable."[43] In this regard, WQAM argues that certain excerpts from programming that the staff had previously determined not to be indecent, in unpublished decisions, are similar to the excerpts at issue here, and so, should not be treated differently, under the doctrine of *Melody Music*.[44] To the extent that the staff may have erred in some unpublished decisions, those decisions are not binding on the Commission, and we decline to follow them.[45] That is particularly the case here, where published decisions, including those cited in the Commission's *Indecency Policy Statement,* provide guidance indicating that material such as that contained here is indecent.

14. Finally, we find no merit in Beasley Group's argument that the *Complaints* should be dismissed because the complained-of broadcasts are "consistent with contemporary community standards for the broadcast medium" and therefore not patently offensive.[46] Beasley Group misconstrues the decisions in *Infinity Recon. Order* and *Hamling v. U.S.* as authority for this proposition.[47] In *Hamling v. U.S*., the Supreme Court determined that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community . . . for making the required determination" regarding community standards. [48] In the *Infinity Recon. Order*, the Commission decided that, in an indecency proceeding, the Commission, as the "decision-maker," applies its "views of the average person in the community" to ensure that material is judged neither on the basis of a decision-maker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[49] In applying this standard in the instant proceeding, we find the broadcast material at issue to be patently offensive as determined by contemporary community standards for the broadcast medium.[50]

15. In sum, by broadcasting this material on September 9 and 10, 2003, within the 6 a.m. to 10 p.m. time period relevant to an indecency determination under section 73.3999 of the

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[43] *See Indecency Policy Statement,* 16 FCC Rcd at 8003-04, ¶ 12; *see also supra,* n. 29.

[44] *See Melody Music, Inc. v. FCC,* 345 F. 2d 730, 732 (similarly situated cases should not be treated dissimilarly); *Beasley Group Response* at 12 (*citing, inter alia.,* Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Mr. David Edward Smith, dated December 5, 2003 and Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Mindy Pierce, dated April 22, 2002).

[45] *See, e.g., Amor Family Broadcasting Group v. FCC*, 918 F. 2d 960, 962 (D.C. Cir. 1990), *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987). *See also Lorenzo Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998).

[46] *See Beasley Group Response* at 13.

[47] *See id.*

[48] *Hamling v. United States*, 418 U.S. 87, 107 (1974).

[49] *See Infinity Recon. Order,* 3 FCC Rcd at 934.

[50] *See id.* (Commission applies a concept of "contemporary community standards for the broadcast medium," to apply the standard of an average broadcast viewer or listener).

Commission's rules, WQAM apparently violated both 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

B. Proposed Forfeiture

16 Based upon our review of the record in this case, we conclude that WQAM is apparently liable for a forfeiture for two willful violations of our rules for broadcasting indecent material over its station on two occasions. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000.00 for transmission of indecent materials.[51] 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."[52] In this case, taking all of these factors into consideration, we find that WQAM is apparently liable for a forfeiture reflecting the proposed imposition of the statutory maximum of $27,500 for each of the two broadcasts of apparently indecent material over Station WQAM(AM). Specifically, we find the facts of this case particularly egregious given the graphic and pandering nature and shock value of the material (*i.e.*, threatened rape by the station employee and others and graphic description of child molestation). We therefore believe that an upward adjustment of the forfeiture amount is warranted under the circumstances presented here. We reiterate our recent statement that multiple serious violations of our indecency rule by broadcasters may well lead to license revocation proceedings.[53] We also remind broadcasters that separate utterances within a single broadcast may be considered separate violations for purposes of determining forfeitures under our indecency rules.[54]

IV. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[55] that WQAM License Limited Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Fifty-Five Thousand Dollars ($55,000.00) for willfully and repeatedly violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

18. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, WQAM License Limited Partnership SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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[51] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied,* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"*);* 47 C.F.R. § 1.80(b).

[52] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

[53] *See Infinity Broadcasting NAL,* 18 FCC Rcd at 6919, ¶ 13; *see also AMFM Radio WWDC(FM) NAL,* 18 FCC Rcd at 19923 – 924, ¶ 16.

[54] *See Infinity Broadcasting NAL,* 18 FCC Rcd at 6919, ¶ 13.

[55] 47 C.F.R. § 1.80.

19. 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 MUST INCLUDE the FCC Registration Numbers ("FRN") referenced above and also should note the NAL/Account Number referenced above.

20. The response, if any, must be mailed to William H. Davenport, 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.

21. 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.

22. 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.[56]

23. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If WQAM qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this *NAL*, either in its response to the *NAL* or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether WQAM, including its parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in Attachment A of this *NAL*. This information will be used for tracking purposes only. WQAM's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If WQAM has questions regarding any of the information contained in Attachment B, it should contact OCBO at (202) 418-0990.

24. Accordingly, IT IS ORDERED, that the complaints filed against Station WQAM(AM)'s broadcasts of September 9, and 10, 2003, ARE GRANTED, and the complaint proceeding IS HEREBY TERMINATED.[57]

[56] *See* 47 C.F.R. § 1.1914.

[57] Consistent with section 503(b) of the Act and with Commission practice, for the purposes of the forfeiture proceeding initiated by this NAL, WQAM shall be the only party to this proceeding.

25. IT IS FURTHER ORDERED, that a copy of this Notice of Apparent Liability For Forfeiture shall be sent by Certified Mail, Return Receipt Requested, to WQAM License Limited Partnership, 3033 Riviera Drive, Naples, FL. 33940, with copies to its counsel, Steven A. Lerman, Esquire, Dennis P. Corbett, Esquire, and David S. Keir, Esquire, 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809, and to the Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

ATTACHMENT A

FCC List of Small Entities

As described below, a "small entity" may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization

Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

(2) Small Governmental Jurisdiction

Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.

(3) Small Business

Any business concern that is independently owned and operated and is not dominant in its field, *and* meets the pertinent size criterion described below.

Industry Type	Description of Small Business Size Standards
Cable Services or Systems	
Cable Systems	Special Size Standard – **Small Cable Company** has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
Common Carrier Services and Related Entities	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – **Small Business** is less than $40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and controlling principals) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHZ Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - **Small Business** is $40M or less in annual gross revenues for three previous calendar years **Very Small Business** is average gross revenues of $15M or less for the preceding three calendar years (includes affiliates
Broadband Personal Communications Services (Block F)	

Narrowband Personal Communications Services	and persons or entities that hold interest in such entity and their affiliates)
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - **Small Business** is $15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	**Small Business** is 1,500 employees or less **Small Government Entities** has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	**Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – **Small Business** is $40M or less average annual gross revenues for three preceding calendar years Prior to Auction – **Small Business** has annual revenue of $12.5M or less
Multichannel Multipoint Distribution Service	$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – **Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – **Small Business** is an entity that, together with its affiliates, has no more than a $6M net worth and, after federal income taxes (excluding carryover losses) has no more than $2M in annual profits each year for the previous two years New Standard – **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television	

Systems	$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	**Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	$29 Million in Annual Receipts or Less
Nursing Homes	$11.5 Million in Annual Receipts or Less
Hotels and Motels	$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,

Re: WQAM License Limited Partnership, Licensee of Station WQAM(AM), Miami, FL, Notice of Apparent Liability for Forfeiture

I concur in the decision to find these broadcasts indecent in violation of the statute. I note that the broadcaster in this instance claims that it has neither a tape nor a transcript and that, without such a record, the Commission cannot determine if the material violates the statute. Many broadcasters have argued that the Commission's proposal to require broadcasters to keep a tape or transcript of what they air is unnecessary, yet this broadcaster claims that such a record is necessary for a finding of indecency. In this instance, the complainant was able to provide a significant excerpt and I believe a case could be made that there were separate indecent utterances within these broadcasts.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
APPROVING IN PART, CONCURRING IN PART

Re: WQAM License Limited Partnership, Licensee of Station WQAM(AM), Miami, FL, Notice of Apparent Liability for Forfeiture

Consistent with my past statements, I believe we should be fining broadcasters on a "per utterance" basis.[1] In this instance, we could have found several violations within the broadcasts at issue and therefore could have assessed a larger fine.

[1] *See, e.g.*, Separate Statement of Commissioner Martin, *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan*, Notice of Apparent Liability, 18 FCC Rcd. 6915, 6939 (2003) (urging the Commission to fine violators "per utterance").