

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

In the matter of)	
)	
INFINITY BROADCASTING OPERATIONS, INC.)	File No. EB-02-IH-0109
)	NAL/Acct. No. 200332080010
)	FRN 0003476074
Licensee of Station WKRK-FM)	Facility ID #9618
Detroit, Michigan)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 2004

Released: October 18, 2004

By the Commission: Commissioners Copps and Martin concurring and issuing separate statements.

1. In this Memorandum Opinion and Order (“Order”), we deny a petition for reconsideration filed by Infinity Broadcasting Operations, Inc. (“Infinity”), licensee of Station WKRK-FM, Detroit, Michigan, of a Memorandum Opinion and Order (“Reconsideration Order”)¹ denying reconsideration of a Forfeiture Order (“Infinity Forfeiture Order”)² assessing a monetary forfeiture in the amount of \$27,500 against Infinity for the willful broadcast of indecent material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, during the “Deminski and Doyle Show” on January 9, 2002 between 4:30 p.m. and 5:00 p.m. We also dismiss the Petition to Intervene and for a Rehearing filed by Carl E. Person, seeking reconsideration of the Infinity Forfeiture Order and the Reconsideration Order.³

2. Infinity for the fourth time in this proceeding asserts its argument that the Commission’s indecency standard is unconstitutional.⁴ In addition, Infinity cites four Commission decisions⁵ issued after

¹ *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004).

² *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd 26360 (2003).

³ Petition to Intervene and for a Rehearing of Carl E. Person, dated March 8, 2004 (“Petition of Carl E. Person”).

⁴ See Petition for Reconsideration of Infinity Broadcasting Operations, Inc., dated April 5, 2004 (“Infinity Petition for Reconsideration”); Petition for Reconsideration of Infinity Broadcasting Operations, Inc., dated January 7, 2004 (“Infinity Petition for Reconsideration of Forfeiture Order”); Response to Notice of Apparent Liability for Forfeiture of Infinity Broadcasting Operations, Inc., dated June 4, 2003 (“Infinity NAL Response”); Letter from Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc., to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated June 20, 2002 (“Infinity Response to Letter of Inquiry”).

⁵ Infinity Petition for Reconsideration of Forfeiture Order at 2. Infinity cites: *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 19 FCC Rcd 5032 (2004); *Infinity Radio License, Inc. (WLLD(FM))*, Memorandum Opinion and Order, 19 FCC Rcd 5022 (2004), *recon. denied*, Memorandum Opinion and Order, FCC 04-198 (rel. Aug. 23, 2004); *Capstar TX Limited Partnership (WAVW(FM) and WCZR(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 19 FCC Rcd 4960 (2004); *Complaints Against Various Broadcast Licensees Regarding Their Airing Of The “Golden Globe Awards” Program*, 19 FCC Rcd 4253 (2004). We note that the *Capstar* case was later vacated pursuant to a Consent Decree. *Clear Channel Communications, Inc.*, Order, FCC 04-128 (rel. Jun. 9, 2004).

the Reconsideration Order to support its claim that its reconsideration petition relies on changed circumstances and thus is appropriate under section 1.106(b)(2)(i) of the Commission's rules.⁶ Specifically, Infinity argues that these four decisions further undermine the constitutionality of the Commission's indecency enforcement scheme. Thus, Infinity maintains that until the Commission addresses the constitutional and procedural issues raised in these subsequent decisions, it cannot impose a sanction for the material aired on WRKR-FM.⁷

3. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). A petition that simply repeats arguments previously considered and rejected will be denied. *Bennett Gilbert Gaines*, 8 FCC Rcd 3986 (Rev. Bd. 1993). Infinity's petition repeats its constitutional argument regarding the indecency standard, which we have already considered and rejected.⁸ Although Infinity cites recent Commission decisions, the issues raised in those cases do not constitute new facts or changed circumstances that warrant further reconsideration of the forfeiture penalty assessed against Infinity for the material at issue here. In this regard, Infinity has never challenged our determination that it broadcast the relevant material during the "Deminski and Doyle Show" on January 9, 2002, that the material meets the Commission's indecency definition and that it is indecent under section 1464. Thus, Infinity's arguments concerning the sufficiency of a complainant's documentation as to what was broadcast,⁹ relevant precedent governing indecency determinations,¹⁰ and the Commission's standard for determining "contemporary community standards for the broadcast medium"¹¹ are not relevant. Infinity did not dispute the complainant's allegations, supported by an audio tape, as to the actual language used during the relevant broadcast, did not challenge the Commission's finding that this material is indecent as not consistent with precedent, and did not dispute that this material is patently offensive as measured by contemporary community standards for the broadcast medium. Moreover, Infinity's arguments concerning profanity are irrelevant because there was no finding that the material broadcast over WRKR-FM was profane.¹² Review of Infinity's petition and the Forfeiture Order reveals no material error or omission in the Forfeiture Order. We therefore deny Infinity's petition.

4. In his Petition to Intervene, Mr. Person states that he regularly listens to the "Howard

⁶ 47 C.F.R. § 1.106(b)(2)(i).

⁷ Infinity Petition for Reconsideration at 10.

⁸ *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915, 6918, ¶ 10 (2003); Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd at 26362, ¶ 5; *recon. denied*, 19 FCC Rcd 4216, at ¶ 2.

⁹ Infinity cites *Capstar TX Limited Partnership*, 19 FCC Rcd at 4960, and argues that complainant's sketchy, unsupported recollection of what was actually broadcast strips away procedural protections afforded broadcasters. Infinity Petition for Reconsideration at 3-4.

¹⁰ Infinity cites *Infinity Broadcasting Operations, Inc.*, 19 FCC Rcd at 5032, and argues that the Commission's determination that unpublished staff decisions are not binding on the Commission undermines the guidance set forth in the *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency ("Indecency Policy Statement")*, 16 FCC Rcd 7999 (2001). Infinity Petition for Reconsideration at 4-5.

¹¹ Infinity cites *Infinity Radio License, Inc.*, 19 FCC Rcd at 5022, and argues that there is no evidence that the Commission's expertise and knowledge of contemporary community standards for the broadcast medium is developed through interaction with lawmakers, courts, public interest groups and citizens. Infinity Petition for Reconsideration at 5-6.

¹² See *Complaints Against Various Broadcast Licensees Regarding Their Airing Of The "Golden Globe Awards" Program*, 19 FCC Rcd at 4253. Infinity Petition for Reconsideration at 7-8.

Stern Show” and that he has purchased advertising time on radio stations in New York and elsewhere. He claims that based upon the forfeiture assessed in this proceeding, Infinity may decide to discontinue broadcasting the “Howard Stern Show,” and if this occurs, he will lose an outlet for his infomercial advertisements and will not have access to material broadcast by Mr. Stern.¹³

5. A non-party petitioner seeking reconsideration of a Commission order in an adjudicatory proceeding must demonstrate (1) that the petitioner’s “interests are adversely affected by the order,” and (2) the petitioner has “good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding.”¹⁴ Mr. Person has failed to demonstrate that he meets either of these requirements. The Reconsideration Order assessed a monetary forfeiture penalty against Infinity based upon material that aired over a Detroit, Michigan radio station during the “Deminski and Doyle Show,” and not the “Howard Stern Show.” In any event, Mr. Person’s speculative and unsupported allegations that Infinity may discontinue broadcasting the “Howard Stern Show” are insufficient to demonstrate that the Reconsideration Order adversely affects him within the meaning of section 405(a) of the Act and section 1.106(b)(1) of our rules.¹⁵

6. In addition, Mr. Person did not participate, nor did he seek to participate, earlier in this proceeding. Mr. Person asserts that he was unaware of the forfeiture proceeding and its purported impact on the “Howard Stern Show” until the March 5, 2004, broadcast of the show. This is insufficient to demonstrate a “good reason,” within the meaning of section 1.106(b)(1) of our rules, for Mr. Person to refrain from seeking to participate earlier in this proceeding.¹⁶ We therefore dismiss Mr. Person’s Petition to Intervene and for a Rehearing.

7. ACCORDINGLY, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended (“Act”)¹⁷ and Section 1.106 of the Commission’s Rules,¹⁸ Infinity Broadcasting Operations, Inc.’s petition for reconsideration of the Reconsideration Order **IS DENIED**.

8. **IT IS FURTHER ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended (“Act”)¹⁹ and Section 1.106 of the Commission’s Rules,²⁰ Carl E. Person’s Petition to Intervene and for a Rehearing **IS DISMISSED**.

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s Rules²¹ within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²² Payment by check or money order may be mailed to Forfeiture Collection Section,

¹³ Petition of Carl E. Person at 1-4.

¹⁴ 47 C.F.R. § 1.106(b)(1). *See* 47 U.S.C. § 405(a) (stating that a reconsideration petition may be filed by a non-party who is “aggrieved or whose interests are adversely affected” by a Commission order).

¹⁵ *AT&T Corp. and Sprint Communications Company, L.P. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750 (2001).

¹⁶ *See id.*

¹⁷ 47 U.S.C. § 405.

¹⁸ 47 C.F.R. § 1.106.

¹⁹ 47 U.S.C. § 405.

²⁰ 47 C.F.R. § 1.106.

²¹ 47 C.F.R. § 1.80.

²² 47 U.S.C. § 504(a).

Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above and also should note the NAL/Acct. No. referenced above.

10. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by Certified Mail Return Receipt Requested to Stephen Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc., 2000 K Street, NW, Suite 725, Washington, DC 20006, and to Carl E. Person, Esquire, 325 W. 45th Street, Suite 201, New York, NY 10036-3803, with a copy to Infinity's counsel, Steven A. Lerman, Esquire, Dennis P. Corbett, Esquire, and Philip A. Bonomo, Esquire, Leventhal, Senter & Lerman PLLC, 2000 K Street, N.W. Suite 600, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan,
Memorandum Opinion and Order*

In this second reconsideration decision, I once again concur in the decision to reject Infinity's arguments that enforcement of the indecency statutes is unconstitutional. Nonetheless, I continue to believe that the majority's fine of \$27,500 is insufficient and not even a slap on the wrist to Infinity.

**CONCURRING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan,
Memorandum Opinion and Order.*

In this second Petition for Reconsideration, I again concur in the Commission's approach to this proceeding.¹ I agree that Infinity Broadcasting Operations, Inc. violated our indecency regulations during the broadcast of the "Deminski and Doyle Show" on January 9, 2002. I continue to believe, however, that the fine of \$27,500 is inadequate. I would have found several violations within this program and assessed the statutory maximum for each violation, for a total fine of over \$200,000.

¹ See, e.g., *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Memorandum Opinion and Order, 19 FCC Rcd 4216, 4219 (2003) (Separate Statement of Commissioner Martin, urging the Commission to fine violators "per utterance").