

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

In the Matter of	)	File No. EB-05-IH-0109
)	
VIACOM INC.	)	NAL/Acct. No. 200532080012
	)	FRN No. 0003612447
)	
INFINITY RADIO INC.	)	NAL /Acct. No. 2001320800008
	)	FRN No. 0003616588
)	
Licensee of Station WLLD(FM), Holmes Beach, Florida	)	Facility ID No. 18527
)	
Forfeiture Order released March 2, 2001 (DA 01-537))	
)	
INFINITY BROADCASTING EAST INC.	)	FRN No. 0009225210
)	
Licensee of Stations WKRK-FM, Detroit, Michigan and WNEW(FM), New York, New York	)	Facility ID No. 9618
	)	Facility ID No. 25442
)	
Forfeiture Order released December 8, 2003 (FCC 03-302)	)	NAL/Acct. No. 200332080010
)	
Notice of Apparent Liability for Forfeiture released March 18, 2004 (FCC 04-49)	)	NAL/Acct No. 200432080013
)	
Notice of Apparent Liability for Forfeiture Released June 7, 2002 (DA 02-1336)	)	NAL/Acct. No. 200232080012
	)	NAL/Acct. No. 200432080004
)	
INFINITY BROADCASTING EAST INC.	)	FRN No. 0009225210
)	
Licensee of Stations WNEW(FM), New York, New York	)	Facility ID No. 25442
WYSP(FM), Philadelphia, Pennsylvania	)	Facility ID No. 28628
KYCY(AM), San Francisco, California	)	Facility ID No. 25458
)	
INFINITY RADIO INC.	)	FRN No. 0003616588
)	
Licensee of Stations WBUF(FM), Buffalo, New York	)	Facility ID No. 53699
KSFN(AM), North Las Vegas, Nevada	)	Facility ID No. 47745
WXTM(FM), Cleveland Heights, Ohio	)	Facility ID No. 74473
WAZU(FM), Circleville, Ohio	)	Facility ID No. 64717
KUPL(AM), Portland, Oregon	)	Facility ID No. 26926

INFINITY RADIO HOLDINGS INC.	)	FRN No. 002052751
)	
Licensee of Station KHWD(FM), Roseville, California	)	Facility ID No. 11273
)	
INFINITY BROADCASTING CORPORATION OF DALLAS	)	FRN No. 0001661032
)	
Licensee of Station KLLI(FM), Dallas, Texas	)	Facility ID No. 1087
)	
INFINITY BROADCASTING CORPORATION OF WASHINGTON, DC	)	FRN No. 0002147528
)	
Licensee of Station WJFK-FM, Manassas, Virginia	)	Facility ID No. 28625
)	
INFINITY RADIO HOLDINGS CORPORATION OF ORLANDO	)	FRN No. 0001800705
)	
Licensee of Station WCKG(FM), Elmwood Park, Illinois	)	Facility ID No. 71283
)	
HEMISPHERE BROADCASTING CORPORATION	)	FRN No. 0003617933
)	
Licensee of Station WBCN(FM), Boston, Massachusetts	)	Facility ID No. 26897
)	
Notice of Apparent Liability for Forfeiture Released October 2, 2003 (FCC 03-234))	

ORDER ON RECONSIDERATION

Adopted: October 10, 2006

Released: October 17, 2006

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a Petition,¹ jointly filed by Right to Decency, Inc. and the American Decency Association (collectively, the “Petitioners”), seeking reconsideration of our *Order*² approving a Consent Decree settling enforcement actions regarding possible violations of broadcast indecency restrictions against Viacom Inc. and its network and broadcast licensee subsidiaries

¹ Petition for Reconsideration jointly filed by Right to Decency, Inc. and the American Decency Association (December 23, 2004) (“*Petition*”).

² *Viacom, Inc., et al.*, Order, 19 FCC Rcd. 23100 (2004) (“*Order*”). The Consent Decree is attached to and incorporated by reference in the *Order*.

and affiliates, including CBS Broadcasting Inc., UPN, and Infinity Broadcasting Corporation (collectively, “Viacom”).³

II. BACKGROUND

2. Viacom is the Commission licensee of various broadcast stations. The Commission received complaints that Viacom had broadcast indecent material over a number of those stations, in violation of a federal statute and the Commission’s rules.⁴ As a result of some of these complaints and subsequent investigations by the Enforcement Bureau, the Commission issued two notices of apparent liability that, in turn, resulted in forfeiture orders against Viacom, assessing monetary forfeitures against it for violation of the Commission’s indecency rule.⁵ Subsequently, the Commission and Viacom entered into the Consent Decree resolving the forfeiture orders, as well as other pending indecency complaints and ongoing indecency investigations against Viacom.

3. Pursuant to the Consent Decree, Viacom admitted that some of the broadcast material at issue in the forfeiture orders, and certain other programming that was the subject of the pending complaints and ongoing investigations, is indecent and in violation of section 73.3999 of our rules,⁶ agreed to make a voluntary contribution of \$3,500,000 to the United States Treasury,⁷ and adopted a “company-wide compliance plan for the purpose of preventing the broadcast of material violative of the indecency laws.”⁸ In addition, Viacom waived any and all rights to contest the validity of the Consent Decree or the *Order*.⁹ In return, the Commission agreed to rescind, vacate and cancel the forfeiture orders, terminate its pending inquiries into possible indecency violations by Viacom stations, and dismiss all but certain specified indecency complaints against Viacom.¹⁰ The Commission also agreed not to use the facts of the Consent Decree, the forfeiture orders, the pending inquiries or complaints, “or any similar

³ As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd. 2760, n.2. (2006), *recon. denied*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *appeal pending sub. nom. CBS Corporation, et al. v. FCC & USA*, No. 06-3575 (3rd Cir. 2006). For purposes of this decision, we will refer to the company and its licensee affiliates by their names at the time of the *Order*.

⁴ *See* 18 U.S.C. § 1464 (prohibiting the utterance of “any obscene, indecent, or profane language by means of radio communication”); 47 C.F.R. § 73.3999.

⁵ *Infinity Radio License, Inc. (WLLD(FM))*, Forfeiture Order, 16 FCC Rcd 4825 (Enf. Bur. 2001), *recon. denied*, Memorandum Opinion and Order, 17 FCC Rcd 18339 (Enf. Bur. 2002), *review denied*, Memorandum Opinion and Order, 19 FCC Rcd 5022 (2004), *recon. denied*, Memorandum Opinion and Order, FCC 04-198 (rel. Aug. 23, 2004); *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Forfeiture Order, 18 FCC Rcd 26360 (2003), *recon. denied*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004), *further recon. denied*, Memorandum Opinion and Order, FCC 04-226 (rel. Oct. 18, 2004).

⁶ *Order*, 19 FCC Rcd at 23105, ¶ 7.

⁷ *Id.* at 23106, ¶ 9.

⁸ *Id.* at 23105-6, ¶ 8.

⁹ *Id.* at 23107, ¶¶ 13, 16.

¹⁰ *Id.* at 23106-7, ¶ 10. In the Consent Decree, the Commission agreed to terminate all pending proceedings against Viacom relating to restrictions on the broadcast of obscene, indecent or profane material except for its decision in *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004) (“*Super Bowl NAL*”) (subsequent history omitted). The Consent Decree also left in place the general warnings to broadcasters set forth in paragraphs 12 and 13 of the Commission’s decision in *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability, 18 FCC Rcd 6915 (2003), that was otherwise vacated by the *Order*.

complaints” regarding programming aired before the Consent Decree’s effective date for any purpose relating to Viacom or its stations, and to treat all such matters as null and void.¹¹

4. On November 23, 2004, the Commission released its *Order* adopting the Consent Decree. The Commission found that “the public interest would be served by approving the Consent Decree and terminating all pending proceedings against Viacom” relating to possible indecency violations, with the exception of the *Super Bowl NAL* noted above.¹² Based upon its examination of the record, the Commission also concluded that there were “no substantial and material questions of fact in regard to these matters as to whether Viacom possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations.”¹³

5. Petitioners argue that the Commission “essentially allowed Viacom to purchase a finding of basic character qualifications.”¹⁴ More specifically, they contend that the *Order* was *ultra vires* because it prevented the Commission from considering Viacom’s apparent indecency violations in making the statutory determination whether grant of Viacom’s pending renewal applications would serve the public interest.¹⁵ They also maintain that the *Order* was illegal as inconsistent with Commission precedent, because it required the agency to “ignore a significant portion of [Viacom’s] record during the relevant renewal period in passing on a renewal application.”¹⁶

III DISCUSSION

6. We disagree with Petitioners’ contention that we lack the requisite authority to have settled our indecency enforcement actions against Viacom by means of the Consent Decree.¹⁷ As a general matter, an agency is presumed to have the discretion to settle or dismiss an enforcement action.¹⁸ In addition, the Act provides the Commission “broad discretion” to settle enforcement actions.¹⁹ Here, we appropriately exercised that discretion by means of the Consent Decree, under which Viacom admitted

¹¹ *Id.* The Commission further agreed not to “initiate any inquiries, investigations, forfeiture proceedings, hearing, or other sanctions or actions” against Viacom, any Viacom Station, or any pending or future application to which Viacom is a party based on the forfeiture orders, the inquiries, or the dismissed complaints pending prior to the Consent Decree’s effective date. *Id.* Petitioners have opposed Viacom’s pending renewal application for Station WKRK-FM, Detroit, Michigan (File No. BRH-20040601BHZ) based on matters that have been vacated by the *Order* as well as material allegedly broadcast over Station WKRK-FM but not the subject of complaints and material broadcast over other radio stations controlled by Viacom. *See Petition* at iv, 11; *Petition to Deny* jointly filed by Right to Decency, Inc. and the American Decency Association (September 1, 2004).

¹² *Order*, 19 FCC Rcd 23103, ¶ 3.

¹³ *Id.*, ¶ 4.

¹⁴ *Petition* at 3, 7.

¹⁵ *Id.* at 7. *See* 47 U.S.C. § 309(a).

¹⁶ *Petition* at 9-10.

¹⁷ *See Petition* at 5-9.

¹⁸ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”) (citations omitted); *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985) (“*Schering Corp.*”) (FDA’s decision to take a voluntary dismissal of an enforcement action and to agree not to file a new action for eighteen months “[f]ell squarely within the confines of *Chaney*.”).

¹⁹ *Parents Television Council, Inc. v. FCC*, 2004 WL 2931357 (D.C. Cir. 2004) (holding that decision to enter into the Consent Decree at issue in that case was a nonreviewable exercise of agency discretion); *New York State Department of Law v. F.C.C.*, 984 F.2d 1209, 1215 (D.C. Cir. 1993) (citing S.Rep. No. 580, 95th Cong., 1st Sess. 25 (1977)).

that its stations had broadcast indecent material in violation of the Commission's rules and agreed to substantial remedial obligations, including making a \$3,500,000 voluntary payment to the United States Treasury and adopting and implementing a multi-year compliance plan designed to prevent future indecency violations.²⁰ Our agreement in return to terminate the pending enforcement actions against Viacom, and not to consider the facts related to such actions in connection with other Viacom applications, "simply represents the *quid pro quo* that the agency found necessary to procure" Viacom's agreement to resolve these matters.²¹ These undertakings were within our broad discretion to settle enforcement actions. Thus, the *Order* represents a valid and appropriate exercise of our authority to settle enforcement actions.²²

7. We reject Petitioners' contention that the Consent Decree is "illegal" because the Commission "ignore[d] a significant portion of a broadcaster's record during the relevant renewal period. . .".²³ First, in entering into the Consent Decree, we did not ignore the potential character issues raised by Viacom's apparent indecency violations, as Petitioners suggest. Rather, we fully considered all potential basic qualifications issues raised by Viacom's apparent indecency violations and specifically determined that they did not raise substantial and material questions of fact as to whether Viacom possesses the requisite qualifications necessary to be a Commission licensee.²⁴ Had we not so concluded, we could not have agreed to the provisions of the Consent Decree regarding our use of the facts here in connection with future applications. Having already fully considered those matters, we need not reexamine these issues in a different proceeding.²⁵ Moreover, our determination was consistent with the record before us. Generally, our decision is also consistent with past Commission practice because our concern in evaluating the impact of wrongdoing on a licensee's character is the licensee's probable future behavior.²⁶ Viacom's acknowledgment in the Consent Decree of responsibility for violating indecency restrictions is

²⁰ See Consent Decree, 19 FCC Rcd at 23105-6, ¶¶ 8-9.

²¹ *Schering Corp.*, 779 F.2d at 687.

²² Petitioners' suggestion that the settlement discussions leading to the Consent Decree violated the Commission's *ex parte* rules lacks merit. *Petition* at 10-13. Those discussions fall within the exception to the general prohibition of *ex parte* communications in restricted proceedings for communications "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence or for the resolution of issues, including possible settlement." 47 C.F.R. § 1.1204(10); see *New York State Department of Law v. F.C.C.*, 984 F.2d 1209, 1217-18 (D.C.Cir.1993).

²³ See *Petition* at 9-10.

²⁴ *Order*, 19 FCC Rcd at 23103, ¶ 4.

²⁵ See *Infinity Broadcasting Corp.*, 12 FCC Rcd at 5057, n.1 (challenges to the applicant's character qualifications based on past apparent indecency violations were moot where the Commission previously determined that such violations were not disqualifying and agreed to expunge them from the applicant's record for all purposes under the terms of an agreement settling indecency enforcement proceedings).

²⁶ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1183 ¶ 7 (1986), *recon. denied*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987) (character inquiries "focus on the likelihood that an applicant will . . . comply with the Communications Act and our rules and policies."); *id.* at 1189, ¶ 21 (character inquiries "should be narrowly focused on specific traits which are predictive of an applicant's propensity to . . . comply with the Communications Act or the Commission's rules and policies."). See also *Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, Policy Statement and Order, 5 FCC Rcd 3252 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd 3448 (1991), *modified*, 7 FCC Rcd 6564 (1992) ("1990 Modifications of Character Policy Statement").

a step towards ensuring that it does not repeat such violations.²⁷ Likewise, the company-wide Compliance Plan which Viacom agreed to implement as part of the Consent Decree will help to avoid such violations.²⁸

IV. ORDERING CLAUSE

8. IT IS ORDERED that the Petition for Reconsideration jointly filed by Right to Decency, Inc. and the American Decency Association is hereby DENIED.

9. IT IS FURTHER ORDERED, that copies of this Order on Reconsideration shall be sent by Certified Mail, Return Receipt Requested, to Dennis J. Kelly, Esq., counsel for Right to Decency, Inc. and the American Decency Association, Post Office Box 41177, Washington, DC, 20018, and Dennis P. Corbett, counsel for Viacom, Inc., Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ See *id.* at 1129, ¶ 106 (“rehabilitation is significant. We find that the factors which we have already determined to consider, including . . . efforts to remedy the situation, are good evidence of whether rehabilitation has occurred.”).

²⁸ See *id.* at 1227-28, ¶ 102 (whether corrective action has been taken is an appropriate factor for analysis in character inquiries).