

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

MM Docket No. 91-314

In re

Amendment of Part 73 of
the Commission's Rules
Regarding Broadcast Hoaxes

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1991; Released: November 14, 1991

Comment Date: January 2, 1992

Reply Comment Date: February 3, 1992

By the Commission: Commissioner Quello issuing a statement.

1. In several recent incidents, stations have broadcast seemingly accurate programming that later proved to be a hoax.¹ In those instances, the hoax resulted in the use of what may have been substantial public safety resources to respond to fabricated events. As we have made clear on a number of occasions, we believe that certain types of broadcast hoaxes are so potentially harmful that they are inconsistent with the public interest. Accordingly, we believe that a continuing Commission regulatory role in this area may be appropriate.² The recent events, however, have highlighted the limitations on our enforcement flexibility which the absence of a specific Commission rule addressing hoaxes imposes.³ Such a rule could be used to codify licensee obligations and would permit the Commission to levy fines in order to address harmful hoaxes, thereby allowing a sanction less drastic than license revocation, but with more deterrence value than admonition.

We therefore initiate this proceeding to seek comment on how we could craft a rule to address our core concerns in this area without causing an undue chilling effect on broadcasters' speech.

2. In striking this balance, we are mindful that adopting an overbroad rule could have significant adverse effects. It is not our intent to address harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health and safety. We have specifically rejected a regulatory approach that could be characterized as an "overreaction." See *Fourth Underbrush Order*. For example, we do not intend to reach incidents such as the April Fool's joke perpetrated recently by a station, which announced that one of the stars of the city's National Football League team had been traded. While this prank undoubtedly distressed some football fans, it is our intent to focus instead on a narrow category of cases that present the potential for substantial public harm. We believe that by focusing on three elements of a violation, it may be possible to craft such a rule.

3. First, we propose that, to be held liable, a licensee must have known that the broadcast material was false.⁴ We observe that dramatizations generally will be implicated under this element since they are "false" by definition. We seek comment on whether the other elements of the rule (described below) adequately protect dramatizations from unwarranted scrutiny. Alternatively, we could limit the scope of the rule to false reports of crimes or catastrophes. If restricted in this fashion, the rule would cover the kinds of hoaxes that have raised the most public concern to date. We seek comment on this type of limitation.

4. Second, we propose that the hoax must have directly caused immediate, substantial and actual public harm. We seek comment on what should be considered "public harm." For example, should we consider damage to the health and safety of the general public, diversion of law enforcement or other public safety authorities from their duties, and damage to property to be encompassed within our definition of public harm? Is this list of harms in and of itself an appropriate definition? By "immediate," we mean that the harm would have to occur contemporaneously.

impose a monetary forfeiture. See *Hunger In America*, 20 FCC 2d 143 (1969); *Democratic National Convention*, 16 FCC 2d 650 (1969); *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969); *The Selling of the Pentagon*, 30 FCC 2d 150 (1971); *WMJX, Inc.*, 85 FCC 2d 251 (1981). In addition, the Commission stated in the *Fourth Underbrush Order* that a current broadcast of a program like "War of the Worlds" without announcements that the program is fictional might violate the Commission's general policy requiring licensees to program their stations in the public interest and the Commission's more specific policy against deliberate distortion or falsification of programming. Again, however, no rule exists in this area and our enforcement response is therefore constrained. Moreover, the class of conduct which concerns us in this proceeding is, in most respects, narrower in scope and more susceptible to particularization in a rule than that which might be deemed to implicate the false programming policy.

⁴ We note in this regard that licensees are ultimately responsible for the actions of their employees. See *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970).

¹ For example, KROQ(FM), Pasadena, California, aired a false murder confession and WALE(AM), Providence, Rhode Island, aired a false report that one of its employees had been shot while on duty. Both situations caused significant distress to members of the listening audience and diverted police resources from legitimate crises.

² See, e.g., *Walton Broadcasting*, 78 FCC 2d 880 (1976), *aff'd* 78 FCC 2d 857 (1980), *aff'd without opinion* 679 F.2d 263 (D.C. Cir. 1982). In that case, license renewal was denied for a licensee that, *inter alia*, staged a fake kidnapping of its station's disc jockey, resulting in a flood of calls to the police. The licensee refused to call off the hoax when requested by the police, and, when a local television station exposed the hoax, the station broadcast a rebuttal. See also *Fourth Order Eliminating Unnecessary Broadcast Regulations*, 57 RR 2d 939 (1985) (*Fourth Underbrush Order*). In the *Fourth Underbrush Order*, we eliminated a Commission policy concerning scare announcements, finding that the policy constituted "regulatory overkill." In doing so, however, we concluded that our action did not alter the basic obligation of licensees to broadcast in the public interest.

³ We note that the Commission's policy against news staging could apply to some hoax cases, but would not clearly cover many others and does not give the Commission authority to

neously with or shortly after the broadcast. We seek comment on whether this is an appropriate limitation on the scope of the harm. We also seek comment on whether the rule should be limited to instances involving "substantial" public harm. By including a substantiality test, we intend to exclude cases where the harm to the public may be real, but is of such a minor nature that it does not offset the potential chilling effect of a broader rule. We seek comment on ways we might measure the substantiality of harm. For example, one measure might be whether the harm is "widespread." Another might be the severity of the damage resulting from the harm, notwithstanding how widespread the harm.

5. With respect to the proposed requirement that the harm be actual, we note that some hoaxes may involve the potential for widespread panic, severe traffic congestion, and other dangers, but do not in fact result in such consequences. Is the threat of harm sufficient, or should the rule require actual damage? In this regard, to what extent should a licensee be excused from liability by virtue of the fact that a grossly irresponsible broadcast does not cause as great a degree of harm as it otherwise might? Would a rule premised on actual harm serve as a sufficient deterrent? On the other hand, would such an approach eliminate "harm" as an element of a violation and leave only "foreseeability of harm" as the dispositive factor when a broadcast is false? We also seek comment on whether any other provisions of federal,⁵ state or local law provide adequate deterrence on a national basis.

6. Third, we propose to require that the public harm be foreseeable. To avoid imposing unreasonable or chilling constraints on broadcasters, we would consider public harm foreseeable only if the licensee could expect, with a significant degree of certainty, that such harm would occur as a result of the hoax. A foreseeability requirement would ensure that broadcasters will not be held responsible for unpredictable public behavior, and would avoid a waste of Commission resources on "obvious" hoaxes such as the amoeba hoax described in the Commission's *Fourth Underbrush Order*.⁶ What factors should determine foreseeability? Should such factors include the content of the broadcast (e.g., a report of a giant gorilla climbing the Empire State Building), and the date it occurred (e.g., April Fool's Day)? Should the number of complaints received by the Commission or the station serve as evidence of the reasonableness of broadcasters' foreseeability judgments? Should the harm be regarded as foreseeable if a hoax elicits virtually no reaction from the general public, but a few people who believe in the hoax cause a great deal of harm? What relevance, if any, should the broadcast of appropriate warnings that the material in question is false have on issues of foreseeability?⁷ Finally, in evaluating the foreseeability of harm, should we presume, and accord licensees the right to presume, that the public will behave in a rational manner? We seek comment on these issues.

7. The following model hoax rule, which incorporates the above elements, is intended as a framework for comment. Commenters should address whether the model rule is sufficiently inclusive, or whether there are additional harmful hoaxes that should be brought within the scope of such a rule. Commenters should also discuss whether the rule is overly restrictive and would encroach upon broadcasters' First Amendment rights and, more generally, whether adoption of a hoax rule is appropriate. Commenters' arguments and suggestions should also reflect our concern that any provisions adopted not be impermissibly vague or overbroad.

§ 73.1217 Broadcast hoaxes.

No licensee of any broadcast station shall broadcast information or other material it knows to be false if it is foreseeable that broadcast of the information could cause substantial public harm, and if broadcast of the information does in fact directly cause substantial public harm.

NOTE 1:

For purposes of this rule, "public harm" is immediate, substantial and actual damage to the health and safety of the general public or to property, or substantial diversion of law enforcement or other public safety authorities from their duties.

NOTE 2:

The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. Foreseeability will not be inferred from warnings or disclaimers associated with the broadcast. Lack of foreseeability may be determined in light of factors such as the content of the broadcast or the timing of the broadcast (e.g., April Fool's Day or Halloween).

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 2, 1992**, and reply comments on or before **February 3, 1992**. All

⁵ See, e.g., *Emmis Broadcasting (KSHE)*, 6 FCC Rcd 2289 (1991) (assessing a \$25,000 forfeiture for violation of the Communications Act's prohibition on the transmission of false distress signals).

⁶ The Commission described the amoeba hoax as involving "a

sudden announcement delivered in a tone of excitement to the effect that 'amoebas' were invading a certain city...." 57 RR 2d at 940.

⁷ In this regard, we do not think that the broadcast of an associated warning or disclaimer should be considered to be evidence of foreseeability. To do so might discourage the use of disclaimers by licensees.

relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Broadcasters will not be liable for a monetary forfeiture unless the Commission determines that the hoax rule has been violated and that a monetary forfeiture is warranted. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

Additional Information

11. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Notice of Proposed Rulemaking, Amendment of Part 73 of the Commission's Rules Regarding Broadcast Hoaxes

I welcome this proceeding given the number of high-profile broadcast hoaxes during the past year. Generally, I do not see how the public interest is served by a broadcast that does nothing more than scare or alarm the audience for the mere thrill of it. We should be able to draft a rule to deal with such situations.

At the same time, I recognize that direct regulation of broadcast content is inherently sensitive. It may be difficult to craft a rule that can encompass real abuses without stifling creative programming. We therefore must take care that any rule on hoaxes not prevent the broadcast of programs such as Orson Wells' "War of the Worlds," which is widely recognized as a classic of American radio.

I think the Bureau has done a responsible and praiseworthy job in proposing a model rule, and I look forward to receiving comments so that the Commission may carefully evaluate its ramifications.