

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

In the Matter of)	
)	
INFINITY BROADCASTING)	File No. EB-00-IH-0009
CORPORATION OF WASHINGTON, D.C.)	NAL/Acct. No. X32080005
)	
Licensee of Station WJFK-FM)	
Manassas, Virginia)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 6, 2000

Released: March 8, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we find that Infinity Broadcasting Corporation of Washington, D.C. (“Infinity”) has apparently violated Section 73.1206 of the Commission’s rules, 47 C.F.R. § 73.1206, by broadcasting a telephone conversation live without first informing the party to the conversation of its intention to do so. We conclude that Infinity is apparently liable for a forfeiture in the amount of four thousand dollars (\$4,000).

II. BACKGROUND

2. On December 14, 1999, the Commission received a complaint from Ms. Flora Barton, the National Latino Media Council, and Mr. Jose Armas.¹ The complainants alleged that on August 17, 1999, during the “Don and Mike” radio show, broadcast over WJFK-FM and other radio stations, the hosts called city hall at El Cinezo, Texas, where Ms. Barton is a Commissioner. According to the transcript and tape submitted with the complaint, Ms. Barton answered the telephone, and the following exchange took place:

Ms. Barton: El Cinezo, how may I help you?

Don: Uh, ola.

Clerk: Hello?

Don: Ola? Ola, Senorita Ola?

Clerk: Yes.

¹ The complaint also alleges that Infinity violated Section 73.3999 of the Commission’s rules, 47 C.F.R. § 73.3999, concerning indecent programming. That portion of the complaint will be addressed separately.

Don: Hello, this is the Don and Mike Radio Show. We're doing a live, national radio show right now.²

Don and Mike then engaged Ms. Barton in an extended discussion of El Cinezo's decision to conduct official business in Spanish that even Infinity describes as exceeding "the bounds of good taste in their treatment of Ms. Barton." *See Id.*, pp. 4-17; Letter Dated January 7, 2000 from Stephen A. Hildebrandt, Vice President of Infinity ("Infinity Response"), p. 5.

3. On December 23, 1999, the Investigations and Hearings Division, Enforcement Bureau, sent Infinity a letter of inquiry regarding the complaint. In its January 7, 2000, response, Infinity admits that it broadcast a conversation with Ms. Barton. While Infinity does not have its own recording of the show, it denies knowledge that the transcript and tape are "materially different from what was actually broadcast" on Station WJFK-FM. Infinity Response, p. 1 n.2.

III. DISCUSSION

4. Section 73.1206 of the Commission's rules states:

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

5. Infinity denies that it violated Section 73.1206 of the Commission's rules. It claims that it uses digital audio delay devices to "ensure that persons called by the station are informed prior to any broadcast of their conversation that they will be on the air, a process that gives them an opportunity to object before any such call is broadcast." According to Infinity, these devices "automatically and consecutively delay matter to be broadcast by eight seconds each. . . ." If a called party expresses a wish not to be broadcast, any one of five employees have the capability to prevent the material from being broadcast by hitting a yellow button marked "DUMP." When the "DUMP" button is hit, four seconds of material is erased and not broadcast. Infinity states that up to four "dumps" may be activated, resulting in the elimination of 16 seconds of material. When the "DUMP" button is hit, the broadcast immediately becomes live, and whatever is being said at that moment is broadcast. The delay is automatically and gradually restored by slowing down the rate at which words or gaps between words are broadcast. *See* Infinity Response, p. 2. By using the delay devices, Infinity claims that it does not broadcast any conversation "simultaneously" with its occurrence. *Id.*, p. 3. Infinity acknowledges the rule also prohibits the recording of a telephone conversation for broadcast without prior notice that the material will be broadcast, but it denies that it "recorded" the conversation with Ms. Barton. It claims, relying on a dictionary definition of "record," that the digital delay devices do not "record" because they do not permanently preserve the material. *Id.*, p. 3.

² *See* "Transcript of Don and Mike Radio Show" (Complaint, Exhibit B), p. 3.

6. We reject Infinity's arguments. Assuming, for the sake of argument, that digital audio delay devices could be used to facilitate compliance with the rule, Infinity never told Ms. Barton that it was using digital audio delay devices or that it had the capability to prevent her voice from being transmitted over the air. Instead, Ms. Barton was simply told that she was on the air "live." She therefore had no reason to believe that she could tell the station that she did not want to be broadcast on the air. The Commission has warned licensees:

We remind all licensees that Section 73.1206 of our rules requires that before a telephone conversation is recorded for later broadcast or is begun for simultaneous broadcast, the licensee must inform the other party that the conversation will be recorded for broadcast purposes or will be broadcast live, as the case may be. The recording of such conversation with the intention of informing the other party later -- whether during the conversation or after it is completed but before it is broadcast -- does not comply with the Rule if the conversation is recorded for possible broadcast. Likewise, the initiation of a live broadcast of conversation with the intention of seeking the other party's permission for its broadcast sometime during the conversation, does not constitute compliance.

Station-Initiated Telephone Calls Which Fail to Comply with Section 73.1206 of the Rules, 24 RR 2d 1814 (1972). As Infinity admits, the rule requires that persons called by stations have "an opportunity to object before any such call is broadcast." Infinity Response, p. 3. Commission precedent in this area makes clear that this rule is intended to protect the called party. See *Amendment of Section 73.1206: Broadcast of Telephone Conversations (Report and Order)*, 3 FCC Rcd 5461, 5463 (1988). Yet, if we were to accept Infinity's argument that merely having a delay without any obligation to affirmatively advise the called party that they were being broadcast on the air or being recorded for future broadcast is sufficient, it would diminish this protection. Indeed, by telling Ms. Barton that she was on the air "live," Infinity deprived Ms. Barton of the opportunity to object to being broadcast. Under all these circumstances, we conclude that Infinity apparently violated Section 73.1206.

7. Moreover, we reject Infinity's contention that the use of digital delay devices places the station wholly outside the rule because the conversations are neither "simultaneous" nor "recorded." When it called Ms. Barton, Infinity considered the conversation to be "live." In describing and interpreting the rule, the Commission has used the words "simultaneously" and "live" as synonyms. See, e.g., *Amendment of Section 73.1206: Broadcast of Telephone Conversations (Report and Order)*; *Station-Initiated Telephone Calls Which Fail to Comply with Section 73.1206 of the Rules*. Infinity offers no support for the proposition that a broadcast that it described as "live" cannot be considered a "simultaneous" broadcast. Accordingly, Infinity apparently violated the rule beginning at the time it began its simultaneous, "live" conversation with Ms. Barton.³

8. Infinity cites three cases for the proposition that the Commission has approved the use of the digital delay system to ensure compliance with Section 73.1206 of the rules. Infinity Response, p. 3 n.4, citing *Infinity Broadcasting Corp. of Washington, D.C. (WJFK-FM)*, 14 FCC Rcd 5539 (MMB 1999), *Letter from Norman Goldstein to Kenneth C. Stevens*, Case Nos. 9610161 and 96040220 (MMB June 4, 1996), and *Letter from Norman Goldstein to Bernard A. Solnik, Esq.*, Case No. 02120518 (MMB March 25, 1996). None of these rulings contain any analysis or discussion of the digital delay system.

³ We need not consider Infinity's argument that the digital delay devices did not "record" the conversation because, under the circumstances of this case, we find its broadcast to be "simultaneous" within the meaning of the rule.

Moreover, none of the language in those rulings is inconsistent with the plain language of the rule, which clearly requires prior notification.

9. Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(a) of the Commission's rules, 47 C.F.R. § 1.80(a), each state that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission's rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Communications Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

10. Based on the evidence before us, we find that Infinity broadcast a telephone conversation on September 21, 1999, in apparent willful violation of Section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206. The Commission's Forfeiture Policy Statement sets a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation. *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087 (1997), *recon. denied* FCC 99-407 (released December 28, 1999). We have reviewed Infinity's response to our letter of inquiry, including its description of its policies and procedures concerning compliance with Section 73.1206, and we do not find any basis for either increasing or decreasing the forfeiture from the base forfeiture amount.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Sections 0.111, 0.311 and 1.80 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.80, that Infinity Broadcasting Corp. of Washington, D.C. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for willfully violating Section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Infinity SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1995 or 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 should note the NAL/Acct. No. referenced above.

14. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington DC 20554 and MUST INCLUDE the file number listed above.

15. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Infinity's counsel, H. Anthony Lehv, Esq., Leventhal, Senter, & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau