

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

In the Matter of )
The KBOO Foundation ) File No. EB-00-IHD-0079
) NAL/Acct. No. 200132080056
) Facility ID # 65755
Licensee of Noncommercial Educational )
Station KBOO-FM, Portland, OR )

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 2003

Released: February 20, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we rescind the Notice of Apparent Liability ("NAL") in this proceeding, which found that The KBOO Foundation, licensee of noncommercial Station KBOO-FM, Portland, Oregon, apparently violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based on our review of The KBOO Foundation's response and supplemental response to the NAL, we conclude that the licensee did not violate the applicable statute or the Commission's indecency rule, and that no sanction is warranted.

II. BACKGROUND

2. The Commission received a complaint alleging that KBOO-FM broadcast indecent material on October 20, 1999 between 7:00 p.m. and 9:00 p.m. during the "Soundbox." The complainant submitted a tape containing allegedly indecent material that aired on the "Soundbox" on that date. After reviewing the complainant's tape, the staff of the Enforcement Bureau issued a letter of inquiry to The KBOO Foundation, the licensee of the station involved.

3. On May 17, 2001, after reviewing the licensee's response to the letter of inquiry, the Enforcement Bureau ("Bureau") issued a Notice of Apparent Liability ("NAL"), which found that "Your Revolution," material broadcast during the October 20, 1999 "Soundbox" program, apparently violated the Commission's indecency rule. The Bureau proposed a monetary sanction of the base forfeiture amount of \$7,000.

4. The KBOO Foundation challenges the NAL and argues that a forfeiture should not be imposed. The KBOO Foundation asserts that based upon the song's entire context,

1 The KBOO Foundation, Notice of Apparent Liability, 16 FCC Rcd 10731 (EB 2001).

2 We note that The American Civil Liberties Union of Oregon and the American Civil Liberties Union of the National Capital Area (collectively, the ACLU) filed a Memorandum in support of The KBOO Foundation's initial response to the NAL. We treat this pleading as an amicus curiae brief. The ACLU's Memorandum

“Your Revolution” is not actionably indecent and that any other analysis is contrary to the free speech protections afforded to broadcasters under the Constitution’s First Amendment. The KBOO Foundation asks that the proposed monetary forfeiture be rescinded.

### III. DISCUSSION

5. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, 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.” Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress’s authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.<sup>3</sup> In contrast, federal courts have held that indecent speech is protected by the First Amendment.<sup>4</sup> Nonetheless, the federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent speech, as well as the Commission’s interpretation and implementation of the statute.<sup>5</sup> However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.<sup>6</sup> Consistent with a subsequent statute and case law,<sup>7</sup> under the Commission’s rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. *See* 47 C.F.R. § 73.3999.

6. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the

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raises essentially the same arguments presented in The KBOO Foundation’s response. The KBOO Foundation also filed a supplement to its response to the NAL on February 6, 2002. In addition, on October 2, 2002, Sarah Jones, author of “Your Revolution,” submitted an informal request, pursuant to 47 C.F.R. § 1.41, asking that the Commission rescind the NAL and issue a declaratory ruling that “Your Revolution” is not actionably indecent. We dismiss Ms. Jones’s informal request as moot in light of our action here.

<sup>3</sup> *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973).

<sup>4</sup> *Sable Communications of California, Inc. v. FCC*, *supra* note 3, 492 U.S. at 126.

<sup>5</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also Action for Children’s Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (“ACT I”); *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“ACT II”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“ACT III”).

<sup>6</sup> *ACT I*, *supra* note 5, 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 say and hear.”). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

<sup>7</sup> Public Telecommunications Act of 1992, Pub. L. No. 356, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. (1992); *ACT III*, *supra* note 5.

broadcast medium.” *Infinity Broadcasting Corporation of Pennsylvania*, 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)). This definition has been specifically upheld by the federal courts.<sup>8</sup> The Commission’s authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.<sup>9</sup>

7. The Commission’s indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts. *See 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 at 8015, ¶ 24. “Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.” *Id.* In evaluating the record to determine whether the complained of material is patently offensive, three factors are particularly relevant: (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. *See Indecency Policy Statement, supra*, 16 FCC Rcd at 8003 ¶ 10.

8. Applying the definition of broadcast indecency, we note first that it is undisputed that KBOO-FM aired material that describes sexual activity. Thus, the NAL correctly determined that the material the KBOO Foundation aired during the “Soundbox” program was sexual in nature and warranted scrutiny. However, based on our review of the record developed in response to the NAL, we now conclude that the material is not patently offensive and therefore not indecent.

9. The NAL acknowledged that the contemporary social commentary in “Your Revolution” is a relevant contextual consideration,<sup>10</sup> but nevertheless concluded that the broadcast of the song was apparently indecent. While this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase (“six foot blow job machine”) was not repeated. Moreover, we take cognizance of the fact presented in this record that Ms. Jones has been asked to perform this song at high school assemblies. While not controlling, we find that this is evidence to be considered when assessing whether material is patently offensive. In sum, we find that The KBOO Foundation has demonstrated that the lyrics of “Your Revolution,” measured by contemporary community standards, are not patently offensive and therefore not indecent. Accordingly, we rescind the NAL.

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<sup>8</sup> In *FCC v. Pacifica Foundation*, the Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation, supra* note 5, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I, supra* note 5, 852 F.2d at 1339; *ACT II, supra* note 5, 932 F.2d at 1508; *ACT III, supra* note 5, 58 F.3d at 657.

<sup>9</sup> *ACT III, supra* note 5.

<sup>10</sup> *See Infinity Broadcast Corporation of Pennsylvania*, 3 FCC Rcd 930, 932-33 (1987) (subsequent history omitted).

10. In light of our decision rescinding the NAL, we dismiss as moot Sarah Jones's informal request filed October 2, 2002.

**IV. ORDERING CLAUSES**

11. In view of the foregoing, pursuant to Sections 0.111(a)(7), 0.311 and 1.80(f)(3) of the Commission's rules, 47 C.F.R. §§ 0.111(a)(7), 0.311 and 1.80(f)(3), IT IS ORDERED THAT the Bureau's May 17, 2001 Notice of Apparent Liability for Forfeiture issued to The KBOO Foundation, licensee of noncommercial Station KBOO-FM, is hereby RESCINDED.

12. IT IS FURTHER ORDERED That, the informal request, filed pursuant to 47 C.F.R. § 1.41, by Sarah Jones on October 2, 2002, IS HEREBY DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED THAT a copy of this MEMORANDUM OPINION AND ORDER And FORFEITURE ORDER shall be sent by Certified Mail -- Return Receipt Requested to John Crigler, Esq., Counsel for The KBOO Foundation, Garvey, Schubert & Barer, 1000 Potomac Street, N.W., Fifth Floor, Washington, DC 20007 and to The KBOO Foundation, 20 S.E. 8<sup>th</sup> Ave., Portland, Oregon, 97214.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau