





## II. BACKGROUND

2. The complainants allege, and Infinity does not dispute, that Station WNEW(FM) aired the “Opie & Anthony Show,” on August 15, 2002, during which the hosts conducted a contest entitled “Sex for Sam” which involved participants having sex in “risky locations” throughout New York City, including St. Patrick’s Cathedral,<sup>6</sup> a zoo, Rockefeller Center, the Disney Store, and the FAO Schwarz toy store.<sup>7</sup> According to the transcript of the broadcast that Infinity provided to the Enforcement Bureau, the contest was a competition among five couples<sup>8</sup> who were vying for the opportunity to accompany station personnel to the Sam Adams Brewery in Boston, Massachusetts, for a live broadcast.<sup>9</sup> The object of the contest was for the couples to earn the most number of points by having sex in as many of the places specified by the station as possible.<sup>10</sup> Each couple was accompanied by a station “spotter,” who assigned his couple points based upon the nature of the location and the activities in which the couple engaged.<sup>11</sup> For example, two points were awarded for “a balloon-knot action,” and the on-air personalities referred repeatedly to the accomplishment of achieving those two points for the “balloon-knot action” as a “two-point conversion.”<sup>12</sup> The station aired the contest over at least a one-hour period, during which the hosts and the “spotters” engaged in descriptions and discussions of the sexual activities of five participating couples in a variety of publicly visible locations.<sup>13</sup>

3. The complainants allege that the broadcast material contains either obscene and/or indecent references, that it was intended to titillate, pander to, or shock the audience, and that the Commission should levy strong sanctions against Infinity for the station’s broadcast of the subject contest.<sup>14</sup> One complainant submitted a 14-minute transcript excerpt of the contest

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<sup>6</sup> See *Donohue Complaint* at 1.

<sup>7</sup> See *September 20 Response*, program transcript at 12, 59, 65, and 79.

<sup>8</sup> See Letter from Dennis P. Corbett, counsel for Infinity Broadcast Operations, Inc., to Chief, Investigations and Hearings Division, Enforcement Bureau, dated September 20, 2002. (“*September 20 Response*”).

<sup>9</sup> *September 20 Response*, program transcript at 19-20, 41, 136, 186 and 193.

<sup>10</sup> See generally *September 20 Response*. Specific point amounts were assigned to each location selected by the station. *September 20 Response*, program transcript at 7. Some of the locations, and specific point amounts assigned were: a church, 25 points; a theme restaurant, 15 points; Carnegie Hall, 20 points; another radio station’s van, 30 points; a zoo, 15 points; a movie theatre, 10 points. *September 20 Response*, program transcript at 83,120,139; 52, 69; 48, 48, 50; 165; 140; 172. In addition, couples were to be awarded 75 extra points if a “stranger bangs your girl” and 100 points “if this stranger happens to be one of our pals from the NYPD or one of our pals from the Fire Department.” *Id.* at 11. Fifty additional points were to be awarded if the sexual act occurred on live television. *Id.* at 13.

<sup>11</sup> *Id.* at 7-13.

<sup>12</sup> *Id.* at 10-11, 31, 35, 45-52, 58-60, 73, 80, 82-83, 86-87, 94-96, 103, 108, 113-14, 124-26, 160, 172.

<sup>13</sup> See generally *September 20 Response*.

<sup>14</sup> See *Donohue and Amling Complaints*.

portion of the show and argues that it demonstrates that Station WNEW(FM)'s program hosts made broadcast references to specific apparent sexual activity in the Cathedral.<sup>15</sup>

4. The full transcript of the broadcast that Infinity submitted to the Commission provides the context of this particular segment and reveals that the hosts of the "Opie & Anthony Show" participated in extended discussions about sexual activity with the station "spotters."<sup>16</sup> Of relevance to the instant complaints, the transcript indicates that one participating couple engaged in actual or simulated sexual activity inside St. Patrick's Cathedral while the program hosts and "spotter," Paul Mercurio, discussed that activity on the air.<sup>17</sup> The on-air banter and discussion was a running commentary that continued well after the sexual activity appears to have ended. Mercurio described the couple's sexual activity in the Cathedral with detailed and specific comments. The station also broadcast dialogue of a confrontation at the Cathedral between a security or law officer and Mercurio which also included descriptions of, or references to, sexual activity.<sup>18</sup> The full transcript also memorializes, among other things, the commentary of one "spotter" describing the sexual activity of a couple at a zoo and of another spotter observing a couple preparing for sexual activity in an elevator at Rockefeller Center when four children entered the elevator.<sup>19</sup>

5. The Enforcement Bureau sent Infinity a letter of inquiry on August 22, 2002.<sup>20</sup> In its responses dated September 20 and October 11, 2002, Infinity acknowledges that Station WNEW(FM) broadcast the contest in question during the hours of 3 through 7 p.m. on August 15, 2002, and aired that broadcast over WNEW(FM) and 12 other affiliated stations.<sup>21</sup> Infinity also admits that the show's hosts "at least made it appear to the listeners that a participating couple had engaged in some sort of sexual activity in St. Patrick's Cathedral."<sup>22</sup> Infinity maintains, however, that the aired material was not obscene and did not contain "any description of sexual or excretory activity that would fit within the Commission's indecency definition."<sup>23</sup> Infinity acknowledges that it found the station's broadcast of the "Sex for Sam" program

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<sup>15</sup> See *Donohue Complaint* at 1.

<sup>16</sup> See *September 20 Response*, program transcript, *passim*.

<sup>17</sup> *September 20 Response*, program transcript at 32, 66, 74, 80-83, 87-94, 96-103.

<sup>18</sup> *Id.* at 80-82, 84-85, 87-99, 96-103. Later in the program, the hosts played a recording of Mercurio's contemporaneous description of the events at the Cathedral, including the sexual activity and his confrontation with the authorities. *Id.* at 149-51.

<sup>19</sup> See *infra* at ¶ 11.

<sup>20</sup> Letter from the Chief, Investigations and Hearings Division, Enforcement Bureau, to Infinity Broadcasting Operations, Inc., dated August 22, 2002.

<sup>21</sup> See Letter from Stephen A. Hildebrandt, Vice President, Infinity Broadcast Operations, Inc., to Chief, Investigations and Hearings Division, Enforcement Bureau, dated October 11, 2002 ("*October 11 Response*"), at 8. Infinity acknowledges that Station WNEW(FM) aired the contest during the afternoon, outside the "safe harbor" hours of 10 p.m. to 6 a.m. *Id.* at 2.

<sup>22</sup> *October 11 Response*, at 10.

<sup>23</sup> *Id.* at 10 n.11.

“fundamentally unacceptable” and contrary to its own programming standards.<sup>24</sup> Infinity represents that, as a result of Station WNEW(FM)’s broadcast, it immediately cancelled the “Opie & Anthony Show” program and suspended those personnel responsible for the station’s broadcast of the “Sex for Sam” contest.<sup>25</sup>

### III. DISCUSSION

6. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission’s rules and applicable statutory provisions concerning the operation of those stations. The Commission’s role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters’ freedom of expression.<sup>26</sup> The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the United States Code, Section 1464 prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.”<sup>27</sup> In addition, section 73.3999 of the Commission’s rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.

7. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>28</sup> In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>29</sup> The Commission will then issue a forfeiture if it finds by a preponderance

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<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> *See* 47 U.S.C. § 326.

<sup>27</sup> 18 U.S.C. § 1464.

<sup>28</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D)(forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>29</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

of the evidence that the person has violated the Act or a Commission rule.<sup>30</sup> As we set forth in greater detail below, we conclude under this standard that Infinity is apparently liable for a forfeiture for its apparent willful and repeated violations of 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.

**A. Indecency Analysis**

8. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.<sup>31</sup> The federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent material, as well the Commission’s interpretation and implementation of the governing statute.<sup>32</sup> Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.<sup>33</sup>

9. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.<sup>34</sup>

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.<sup>35</sup>

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<sup>30</sup> See, e.g., *SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002)(forfeiture paid).

<sup>31</sup> U.S. CONST., amend. I; *See Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT I*”).

<sup>32</sup> 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.” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *ACT I*, 852 F.2d at 1339; *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) (“*ACT II*”); *Action for Children’s Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) (“*ACT III*”).

<sup>33</sup> *ACT I*, 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 may say and hear.”) See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

<sup>34</sup> *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)).

<sup>35</sup> *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, 8002, ¶¶ 7-8 (2001) (*emphasis in original*).

As an initial matter, Infinity does not dispute that it aired material describing or depicting sexual and excretory activities and organs.<sup>36</sup> That material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.<sup>37</sup>

10. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”<sup>38</sup> Three principal factors are significant to this contextual analysis: (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.<sup>39</sup> In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”<sup>40</sup> In particular cases, the weight of one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>41</sup> or, alternatively, removing the broadcast material from the realm of indecency.<sup>42</sup> In this case, we examine all three factors and determine that each weighs in favor of a finding that the broadcast material was patently offensive. We note that, in particular, the station’s presentation of the material in a manner that was pandering, titillating, and shocking weighs heavily in this determination.<sup>43</sup> We turn now to our analysis of the three principal factors in our decision.

11. First, those reporting over the air on the broadcast contest made graphic and explicit references to sexual and excretory organs and activity.<sup>44</sup> For example, during the Cathedral

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<sup>36</sup> *October 11 Response* at 9-10.

<sup>37</sup> The “contemporary standards for the broadcast medium” criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See id.* at ¶ 8 and n. 15.

<sup>38</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original). In this regard, in order for us to be in a position to judge the context of particular material, once a complainant makes a *prima facie* case, it is appropriate for the staff to seek from the licensee a tape or transcript not only of the relevant material, but also of a reasonable amount of preceding and subsequent material.

<sup>39</sup> *Id.* at 8002-15, ¶¶ 8-23.

<sup>40</sup> *Id.* at 8003, ¶ 10.

<sup>41</sup> *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same).

<sup>42</sup> *Id.* at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

<sup>43</sup> *See id.* at 8010, ¶ 20 (citing *Rusk Corporation (KLOL(FM))*, 5 FCC Rcd 6332 (MMB 1990)(forfeiture paid) (manner of presentation was critical to indecency finding); *Jacor Broadcasting Corporation (WEBN(FM))*, 13 FCC Rcd 4152 (MMB 1997), *aff’d* 13 FCC Rcd 5825 (MMB 1997) (forfeiture paid) (same).

<sup>44</sup> *September 20 Response*, program transcript at 10-11, 51, 83, 109 and 134.

episode, the station's on-air hosts and "spotter," Paul Mercurio, reported the couple's sexual activities in graphic and explicit terms. Specifically, Mercurio reported "we're in St. Pat's and he's doing the balloon knot inside,"<sup>45</sup> causing one host to award the participants "twenty-seven points. Twenty-five points, a two-point conversion, and eternal damnation."<sup>46</sup> The hosts engaged in further discussion of the couple's activities in the Cathedral involving balloon-knot sex later in the broadcast, as well.<sup>47</sup> Specifically, they noted about the contestants: "allegedly they may have had balloon-knot sex, um, in St. Patrick's Cathedral,"<sup>48</sup> and "I don't notice any balloon-knot action. Seems your son doesn't like sticking it where the sun don't shine."<sup>49</sup> Elsewhere in the broadcast, a "spotter" and another observer of one couple's sexual activities took note of the man's "ruby red bag," an obvious reference to his scrotum.<sup>50</sup> A spotter also reported that one couple was in an elevator at Rockefeller Center, and, as the woman prepared for sexual activity, "as soon as the skirt went down," a family from England with four children walked in.<sup>51</sup> After another "spotter" reported that a couple had sexual activity at a zoo, one of the program's hosts asked whether "there [was] a little blond kid trying to check out his Dad's mule at the zoo."<sup>52</sup>

12. To the extent that the colloquial terms that the participants used to describe organs and activities could be described as innuendo rather than as direct references, they are nonetheless sufficient to render the material actionably indecent because the "sexual [and] excretory import" of those references was "unmistakable."<sup>53</sup> Given the detailed and explicit manner in which the broadcast described the contest and the activities of the participants, there is no non-sexual meaning that a listener could possibly have attributed to these terms.<sup>54</sup> Therefore, we find that the "Sex for Sam" broadcast contest made references to sexual and excretory organs and activity in the use of direct references and/or colloquial expressions that were sufficiently graphic or explicit to be deemed patently offensive as measured by contemporary community standards for the broadcast

<sup>45</sup> *Id.* at 80; *see also id.* at 82, 149.

<sup>46</sup> *Id.* at 83.

<sup>47</sup> *Id.* at 103.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 160.

<sup>50</sup> *Id.* at 109.

<sup>51</sup> *Id.* at 187. Upon hearing of the activity at Rockefeller Center, one of the show's hosts commented, "[w]ow, that's great. What a great view. Little Argentinian ass."

<sup>52</sup> *Id.* at 140.

<sup>53</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002-04, ¶¶ 9-12 (2001). *See also, Emmis Radio License Corporation (WKQX(FM))*, 17 FCC Rcd 5263 (EB 2002) (NAL); 17 FCC Rcd 21697 (EB 2002) (FO) (petition for reconsideration pending) (where innuendo's "unmistakably sexual" meanings and contexts were established by lengthy surrounding discussion, the material was found to be actionably indecent). In this regard, "balloon-knot action" and "two point conversion," referred to anal sex. *September 20 Response*, program transcript at 10-11; *passim*. The hosts made inescapable the sexual meaning of their repeated references to "two point conversions" in evaluating the contestants' performances. *Id.* at 10. ("You got to spin her around and –and that will give you two additional points.")

<sup>54</sup> *See Sagittarius Broadcast Corporation*, 7 FCC Rcd 6873, 6874 (1992) (subsequent history omitted).

medium.

13. Second, the broadcast contest dwelled at length on and referred repeatedly to sexual and excretory activity and organs. The contest portion of the broadcast, over an hour in duration and reproduced in a 203-page transcript provided by Infinity, contains numerous references to sexual and excretory activity and organs.<sup>55</sup> The contest involved the program hosts' awarding of points to five participating couples for having sex in or near identified locations in New York City, with a prize going to the couple that attained the highest point total.<sup>56</sup> Moreover, the on-air banter between the show's hosts, "spotters," and participants continuously focused on the contest's sexual theme and the participants' ongoing sexual activities.<sup>57</sup> The descriptions of sexual and excretory activity and organs were not in any way isolated or fleeting.<sup>58</sup> Indeed, the entire broadcast contest was devoted to sexual activity, and the graphic and explicit discussion of sexual and excretory activity and organs was repeated to such an extent that this discussion constituted the sum and substance of the broadcast. The sexual discussions and references were more than sufficiently dwelled upon and repeated to constitute patently offensive material as measured by contemporary standards for the broadcast medium.<sup>59</sup>

14. Finally, two characteristics of the manner in which the station presented this material establish that the program was intended to pander, titillate, and shock its listeners. As an initial matter, the contest was a well-planned marketing event.<sup>60</sup> Large numbers of station and program employees and managers participated in the advance planning and/or approval of the contest.<sup>61</sup> Indeed, Infinity admits that earlier versions of the "Sex for Sam" contest, which also encouraged participants to engage in public sex in exchange for prizes, were first planned by the hosts of the "Opie & Anthony Show" as early as 2000 and subsequently aired three times: on July 21, 2000, August 3, 2001, and by the subject broadcast.<sup>62</sup> In short, this contest was a well-proven marketing tactic that the station used repeatedly. The premeditated nature of the decision to encourage sexual activity in locations that would surprise and shock passersby and attract attention at risk to the participants, evidenced by the station's formulation of appropriate locales and assignment of points to each based upon how provocative and/or offensive sexual conduct in those locations might be, was plainly reflective of a transparent effort to pander and titillate for marketing

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<sup>55</sup> The station apparently aired the contest portion of the broadcast during the afternoon, outside the "safe harbor" hours of 10 p.m. to 6 a.m. See *October 11 Response*, at 2; note 21, *supra*.

<sup>56</sup> *October 11 Response*, at 9.

<sup>57</sup> *September 20 Response*, program transcript, *passim*.

<sup>58</sup> See *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915 (2003) (response pending).

<sup>59</sup> See *Indecency Policy Statement*, 16 FCC Rcd 7999, 8002.

<sup>60</sup> *October 11 Response*, at 3-6.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 7, 9. Infinity claims that the earlier contests encouraged participating couples to "exercise judgment to stay either entirely out of public view or in settings where they would not cause public controversy." *Id.* at n.9.

purposes.<sup>63</sup>

15. Moreover, the execution of segments of the contest in locations plainly chosen to expose sexual conduct to unwitting, unwilling, and potentially vulnerable observers was a transparent attempt to shock those witnesses and, in turn, the program's listeners. For example, performing or simulating sex acts in a religious institution at a time when it was filled with worshippers<sup>64</sup> was likely to shock not only unwilling observers on the scene but also listeners. Both groups were subjected to the sex acts, and, in addition, listeners were subjected to the ensuing confrontation with police, which also included explicit sexual references. Particularly by encouraging participants to engage in or simulate sex acts in a locale in which they were uninvited and unwelcome intruders, the station deliberately attempted to pander to, titillate, and shock listeners.<sup>65</sup>

16. Indeed, we find the calculated and callous nature of Infinity's decision to impose this predictably offensive conduct upon unwilling and potentially vulnerable observers to be a particularly compelling and weighty aspect of our indecency analysis in this case. The imposition of shocking sexual content on unsuspecting listeners is a fundamental factor that always weighs in our indecency analysis. Here, the station set out to shock listeners to an even greater degree by imposing sexual conduct on unsuspecting people who were otherwise going about their business.<sup>66</sup> For example, encouraging couples to engage in sexual activity in a zoo and in a toy store was obviously calculated to expose children to the scene.<sup>67</sup> And one spotter reported on the broadcast as a female participant dropped her skirt in an elevator in Rockefeller Center and a family with four children entered the elevator.<sup>68</sup> This result was clearly foreseeable and was the type of event the program was designed to create. This deliberate attempt to increase the shock value of the aired sexual and excretory references is of particular concern to us, and is significant in our finding that this broadcast material was intended to pander, titillate, and shock.<sup>69</sup> For these reasons, we find that

<sup>63</sup> *October 11 Response*, at 2-10; *id.*, program transcript at 41 (“And you need a girl who could take a good F’ing.”); *Id.*, program transcript at 41. *id.* at 68 (“[a] Fire Department gang-bang would be devastating.”). *Id.* at 68.

<sup>64</sup> *See Donohue Complaint* at 1. *See also September 20 Response*, program transcript at 139 (“we also did a house of worship. And out front, it said, uh, ‘Church open all day for prayer, meditation’—and I guess now for banging, too.”). *September 20 Response*, program transcript at 139.

<sup>65</sup> *See Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978) (Powell, J., concurring in part, and concurring in judgment: “[T]he language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment.”)).

<sup>66</sup> As the couple and Mercurio walked up the steps of the Cathedral, Mercurio commented on the air, “And we are getting looks like you wouldn’t (inaudible). It’s unbelievable. One woman yelled out, ‘That’s a church. You should be ashamed of yourself.’” *September 20 Response*, program transcript at 65.

<sup>67</sup> *Id.* at 140 (zoo); *Id.* at 79 (FAO Schwarz toy store).

<sup>68</sup> *Id.* at 187.

<sup>69</sup> *Cf. The KBOO Foundation*, 16 FCC Rcd 10731 (EB 2001) (NAL), *rescinded*, 18 FCC Rcd 2472 (EB 2002) (In finding material not indecent, Commission did not find that references to sexual or excretory activities or organs were intended to pander, titillate or shock, and did note that artist performed song in high school by invitation.).

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the resulting broadcast was patently offensive as measured by contemporary community standards for the broadcast medium.

17. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. Thus, because there was a reasonable risk that children may have been in the audience at the time that the material at issue was broadcast on August 15, 2002, the material broadcast is legally actionable.<sup>70</sup> By broadcasting this material, Infinity apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.

### B. Obscenity Analysis

18. To be obscene, material must meet a three-prong test: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.<sup>71</sup> Applying that test, we find that the material that Infinity broadcast on August 15, 2002, was not obscene. Although the material included sexual references, it was not sufficiently graphic or explicit to be deemed obscene under pertinent federal law and precedent.<sup>72</sup> Because the broadcast does not meet the obscenity standard under *Miller*, it is subject to the protections of the First Amendment,<sup>73</sup> and we deny the complaints alleging that the broadcast was obscene.

### C. Proposed Forfeiture

19. Based upon our review of the record in this case, we conclude that Infinity is apparently liable for 13 willful and repeated violations of our rules, one for each of the 13 Infinity stations that carried the broadcast.<sup>74</sup> The Commission's *Forfeiture Policy Statement* sets a base

<sup>70</sup> See *ACT III*, 58 F.3d at 660-63.

<sup>71</sup> See *Miller v. California*, 413 U.S. at 24.

<sup>72</sup> Cf. *Harriscop of Chicago, Inc., et al., A Joint Venture d/b/a VIDEO 44 (WSNS-TV)*, 8 FCC Rcd 2753, 2754 (1993) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973) (in an obscenity adjudication, hard-core pornography with singular focus on sexual organs and acts "can and does speak for itself")); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985) (where the content of a pornographic film dwelled "morbid[ly]" on the "mechanics of sex," that, as a whole, lacked any literary, artistic political or social value, it was found to be obscene); *Jenkins v. Georgia*, 418 U.S. 153 (1974)(close-up and focused depictions of sex acts may be diagnostic of obscenity); *U.S. v. Bagnell*, 679 F.2d 826 (11<sup>th</sup> Cir. 1982), cert. denied, 103 S.Ct. 1449(1983)(films which depicted man and woman engaged in oral, anal, and genital copulation, lesbian and homosexual acts, mutual masturbation, and which lacked plot or dialogue were obscene).

<sup>73</sup> *Sable v. FCC*, 492 U.S. 116, 126 (1989).

<sup>74</sup> According to Infinity, the program was aired over 13 stations: WNEW(FM), KLLI(FM)(formerly KYNG(FM)), WYSP(FM), WCKG(FM), WXTM(FM), WAZU(FM), KXOA(FM), KYCY(AM), WJFK-FM, WBCN(FM), WBUF(FM), KUPL(AM)(formerly KUFO(AM)), and KSFN(AM). *October 11 Response*, at 8.

forfeiture amount of \$7,000 for transmission of indecent or obscene materials.<sup>75</sup> The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>76</sup> In this case, taking all of these factors into consideration, we find that Infinity is apparently liable for a forfeiture of \$357,500.00, reflecting the proposed imposition of the maximum forfeiture amount for each of the 13 violations (13 x \$27,500). Based upon our review of the entire record, we believe that this upward adjustment to the statutory maximum is warranted. The contest was a well-planned event executed and approved by the station’s managers. The material broadcast was specifically calculated to produce offensive conduct and the contest portion of the broadcast, over an hour in duration, was extensive. Accordingly, we believe the egregious nature of the violations and the degree of culpability justifies an increase to the full amount. Additionally, Infinity’s recent history of indecent or apparently indecent broadcasts justifies imposition of the maximum forfeiture amount.<sup>77</sup> We reiterate our recent statement that “additional serious violations by Infinity may well lead to a license revocation proceeding.”<sup>78</sup>

<sup>75</sup> *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), recon. denied 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); 47 C.F.R. § 1.80(b). The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new rates apply to violations that occur or continue after November 13, 2000. See *Order, In the Matter of Amendment of Section 1.80(b) of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

<sup>76</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17110.

<sup>77</sup> See, e.g., *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915, 6917 (2003) (response pending) (broadcast on WKRK on January 9, 2002 that “described in detail how specifically named sexual acts are performed” and that “included explicit and graphic sexual references, including references to anal and oral sex, as well as explicit and graphic references to sexual practices that involve excretory activities”); *Infinity Broadcasting Corporation of Los Angeles, (KROQ-FM)*, Memorandum Opinion and Order, 17 FCC Rcd 9892 (2002) (broadcast on KROQ-FM on March 28, 1997 of song “You Suck”); *Infinity Broadcasting Operations, Inc. (WNEW(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 10665, 10665-66 (EB 2002)(response pending) (broadcasts on the Opie and Anthony Show on WNEW November 15 and 16, 2000 and January 8, 2001 that included a song in which a girl says she is her father’s “little whore” and says that “I almost choked on your creamy head,” a segment in which the hosts “asked a seventeen-year old girl to remove her panties and rub the telephone on her pubic hair,” and a song sung by a man who is “horny for little girls,” liked the girls’ “round butts” and “liked to ram them”).

We note that none of these prior broadcasts have led to either a payment/admission by Infinity or a final adjudication of indecency by a court of competent jurisdiction. In addition, some of the proceedings remain pending before the Commission and we make no final decision on those pending proceedings. In this regard, we cite these prior broadcasts only for their underlying facts, not because of the existence of an *NAL* or forfeiture order. Prior to any final adjudication of a forfeiture amount in this case that is increased based on these prior broadcasts, Infinity will have the right to a final adjudication regarding whether these prior broadcasts were in fact indecent. See *Forfeiture Policy Statement Reconsideration Order*, 15 FCC Rcd 303, 304-05 (1999).

<sup>78</sup> *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, 18 FCC Rcd at 6919 (response pending). We note Continued on next page

## IV. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,<sup>79</sup> that Infinity Broadcasting Operations, Inc. and the other above-listed entities are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of Three Hundred Fifty-Seven Thousand Five Hundred Dollars (\$357,500.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.<sup>80</sup>

21. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, Infinity SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

22. Payment of the forfeiture may be made 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 MUST INCLUDE the FCC Registration Numbers ("FRN") referenced above and also should note the NAL/Account Number referenced above.

23. The response, if any, must be mailed to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 3-B443, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

24. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

25. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>81</sup>

26. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If Infinity qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this NAL, either in its response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether Infinity, including its parent

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that the behavior here took place prior to the release of the *WKRK-FM* NAL.

<sup>79</sup> 47 C.F.R. § 1.80.

<sup>80</sup> The amount is allocated on a basis of \$27,500.00 per station.

<sup>81</sup> See 47 C.F.R. § 1.1914.

entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Infinity's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If Infinity has questions regarding any of the information contained in Attachment A, it should contact OCBO at (202) 418-0990.

27. Accordingly, IT IS ORDERED, that the complaints filed against Station WNEW(FM)'s broadcast of the "Opie & Anthony Show" program on August 15, 2002, ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.<sup>82</sup>

28. IT IS FURTHER ORDERED, that a copy of this *Notice of Apparent Liability For Forfeiture* shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc., 2000 K Street, N.W., Suite 725, Washington, D.C. 20006; to Infinity's counsel, Dennis P. Corbett, Esq., Leventhal, Senter and Lerman, P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809, and to William A. Donohue, Ph.D., President of the Catholic League for Religious and Civil Rights, 450 Seventh Avenue, New York, N.Y. 10123, and by e-mail to Robert E. Amling, ramling1@earthlink.net.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>82</sup> Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this NAL, Infinity shall be the only party to this proceeding.

October 2002  
ATTACHMENT A

## FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

<b>(1) Small Organization</b>	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
<b>(2) Small Governmental Jurisdiction</b>	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
<b>(3) Small Business</b>	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
<b>Industry Type</b>	<b>Description of Small Business Size Standards</b>
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – <b>Small Cable Company</b> has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

**Note:** With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

*International Services*

International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<b>Mass Media Services</b>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – <b>Small Business</b> is less than \$40M in annual gross revenues for three preceding years
<b>Wireless and Commercial Mobile Services</b>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - <b>Small Business</b> is \$40M or less in annual gross revenues for three previous calendar years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - <b>Small Business</b> is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	<b>Small Business</b> is 1,500 employees or less <b>Small Government Entities</b> has population of less than 50,000 persons

Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	<b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years
39 GHz Service	<b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
Multipoint Distribution Service	Auction special size standard (1996) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – <b>Small Business</b> has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – <b>Small Business</b> is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	<b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
<b>Miscellaneous</b>	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee’s Type of Business)

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS,  
DISSENTING**

*Re: Infinity Broadcasting Operations, Inc., Licensee of Stations WNEW(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; KYCY(AM), San Francisco, California; Infinity Radio Operations, Inc., Licensee of Stations WBUF(FM), Buffalo, New York; KSFN(AM), North Las Vegas, Nevada; WXTM(FM), Cleveland Heights, Ohio; WAZU(FM), Circleville, Ohio; KUPL(AM), Portland, Oregon; Infinity Radio Subsidiary Operations, Inc., Licensee of Station KXOA(FM), Roseville, California; Infinity Broadcasting Corporation of Dallas, Licensee of Station KLLI(FM), Dallas, Texas; Infinity Broadcasting Corporation of Washington, D.C., Licensee of Station WJFK-FM, Manassas, Virginia; Infinity Holdings Corporation, Licensee of Station WCKG(FM), Elmwood park, Illinois; Hemisphere Broadcasting Corporation, Licensee of Station WBCN(FM), Boston, Massachusetts, Notice of Apparent Liability for Forfeiture; AMFM Radio Licenses, Licensee of Station WWDC-FM, Washington, D.C., Notice of Apparent Liability for Forfeiture*

I dissent from the Commission's decisions to provide no more than a slap on the wrist to Infinity (owned by Viacom) and Clear Channel rather than take serious action to address indecency on our airwaves. Today, the majority proposes a \$27,500 fine for each incident of airing what the majority agrees appears to be indecent programming at a time when children likely composed a significant portion of the audience.

In the case of Infinity/Viacom, thirteen stations ran the "Opie & Anthony Show" which contained a broadcast of sexual activity at St. Patrick's Cathedral in New York as part of an on-air stunt. In this stunt, called "Sex for Sam," couples received points for having sex in public places. In addition to St. Patrick's Cathedral, the broadcast described sexual activity at restaurants, at the Disney Store and at FAO Schwartz. In the case of Clear Channel, one of its stations, WWDC-FM, broadcast an "Elliot in the Morning" show which included a station-sponsored promotion to which female high school students called in for the opportunity to audition to dance in a cage at an upcoming rock concert. The show's hosts questioned the girls about their sexual activities at their school -- Bishop Denis J. O'Connell High School -- actively solicited other high school students to call, and made repeated and graphic references to oral sex.

Neither of these cases is a difficult call. Both are outrageous and both were run by stations whose owners knew better and whose parent companies have had previous indecent broadcasts brought before this Commission. I believe we should designate these cases for a hearing on the possible revocation of these stations' licenses, as provided for by section 312(a)(6) of the Communications Act.

I am particularly troubled by the decision on the "Opie and Anthony Show." I defy anyone to read the transcript and argue that this broadcast does not violate the statutory prohibition against airing indecent material. And I defy anyone to argue that a \$27,500 fine to each of the stations owned by a multi-billion dollar conglomerate is adequate to address this clear violation of federal law.

Infinity/Viacom could pay this entire fine by tacking just one more commercial onto one of its prime-time TV shows and probably pocket a profit to boot. Some punishment!

The majority admits that each of these stations appears to have egregiously and extensively violated the statutory ban on broadcast of indecent material. The majority claims

further to recognize the seriousness of the offense. And it even concedes that the Commission has the option of the license revocation process. But then it turns timid and decides that the appropriate recourse for this filth is a \$27,500 fine against each station. In other words, the majority determines that these stations deserve yet another chance before the Commission even considers revoking a license. When, I ask, will this end?

This is not the first action against a station owned by Infinity. Infinity stations paid \$1.7 million in 1995 to settle a series of indecency cases. As part of that settlement, Infinity agreed to take steps to prevent further broadcast of indecent material. More complaints involving other Infinity broadcasts followed. Last April, this Commission issued another tepid proposed fine against another station owned by this same company – WKRK-FM in Detroit – which had aired some of the most vulgar and disgusting indecency that I have had the misfortune to examine. In that decision, the majority warned that repeated serious violations by Infinity could result in the revocation of station licenses. The majority repeats that same warning again in this decision.

Yet, two months prior to the airing of “Sex for Sam” on the “Opie and Anthony Show,” this agency cited the same show for three separate apparent violations of the indecency statutes. These shows aired between November 2000 and January 2001. In one instance, a graphic song about a father having oral sex with his young daughter was broadcast. In the second instance, the “Opie and Anthony Show” aired another graphic song by a man seeking girls between the ages of two and three for sex. In the third instance, the show provided detailed instructions to a teenager and then broadcast her rubbing a telephone between her legs.

If this situation does not meet the majority’s test for repeated violators, I fail to understand what would. The message to licensees is clear. Even egregious repeated violations will not result in revocation of a license. Rather, they will result only in a financial penalty that doesn’t even rise to a serious cost of doing business.

I wonder when this Commission will finally take a firm stand against the “race to the bottom” on our airwaves. The time has come for us to send a message that we are serious about enforcing the indecency laws of our country and that we will be especially vigilant about the actions of repeat offenders such as those cases before us here. Instead we turn an apparently incurable deaf ear to millions of Americans who are fed up with the patently offensive programming sent into their homes so regularly. Today’s decision does nothing to discourage such programming.

It all comes down to this: station owners aren’t given licenses to use the public’s airwaves to peddle smut. They are given licenses to serve the public interest.

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

*Re: Infinity Broadcasting Operations, Inc., Licensee of Stations WNEW(FM), New York, New York; WYSP(FM), Philadelphia, Pennsylvania; KYCY(AM), San Francisco, California; Infinity Radio Operations, Inc., Licensee of Stations WBUF(FM), Buffalo, New York; KSFN(AM), North Las Vegas, Nevada; WAZU(FM), Circleville, Ohio; WXTM(FM), Cleveland Heights, Ohio; KUPL(AM), Portland, Oregon; Infinity Radio Subsidiary Operations, Inc., Licensee of Station KXOA(FM), Roseville, California; Infinity Broadcasting Corporation of Dallas, Licensee of Station KLLI(FM), Dallas, Texas; Infinity Broadcasting Corporation of Washington, DC Licensee of Station WJFK-FM, Manassas, Virginia; Infinity Holdings Corporation of Orlando, Licensee of Station WCKG(FM), Elmwood park, Illinois; Hemisphere Broadcasting Corporation, Licensee of Station WBCN(FM), Boston, Massachusetts, Notice of Apparent Liability for Forfeiture*

I support the finding in this Notice of Apparent Liability that the licensee apparently violated our rule against the broadcast of indecent content, but I would have proposed a higher fine. I note both that we have taken issue with this licensee in past broadcasts of this radio show and that the licensee subsequently removed the show.<sup>83</sup> As I have said in similar cases, we could have found that each time the show's hosts started talking about an indecent topic or had a separate distinct conversation, the ensuing conversation constituted a separate violation.<sup>84</sup> In prior cases, the Commission has acknowledged that we have the discretion to consider each indecent utterance a separate violation.<sup>85</sup>

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<sup>83</sup> In June 2002, for example, the Enforcement Bureau issued a Notice of Apparent Liability for \$21,000 for the Opie and Anthony Show willfully and repeatedly broadcasting indecent language on several occasions. *See Infinity Broadcasting Operations, Inc., Licensee of Station WNEW(FM), New York, New York*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 27711 (EB 2002). The final outcome of this case is still pending.

<sup>84</sup> *See* Separate Statement of Commissioner Kevin J. Martin, *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915 (2003) (*Infinity Detroit NAL*).

<sup>85</sup> *Infinity Detroit NAL* at para. 13 (clarifying that the Commission could pursue enforcement action for each indecent utterance). *See also* 18 U.S.C. § 1464 (specifying that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

**SEPARATE STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Infinity Broadcasting Operations, Inc., Notice of Apparent Liability for Forfeiture*

This Notice sends the unmistakable message to Infinity and other broadcasters who violate our indecency rules: We are stepping up our enforcement. Once again, we give fair warning that the Commission can and will avail itself of a range of enforcement sanctions, including the initiation of proceedings that could result in the revocation of these stations' licenses. I will not hesitate to consider such revocation proceedings for serious violations that occur after the explicit notice we provided in April in WKRK-FM, another case involving Infinity. Similarly, as broadcasters were explicitly notified in April, I will also support on a going-forward basis an approach that treats each indecent utterance, such as distinct conversations or program segments, as a separate violation under our rules. This will substantially increase our fines, which by statute are capped at an inadequate level, so they will be more commensurate with the offenses.

The Commission reached the obvious conclusion in this case that the broadcast material was indecent and Infinity should be liable for the full statutory maximum forfeiture amount. It took far too long for us to reach this conclusion, and I hope we will act more swiftly in the future to send a clear message.

Infinity's actions here were unquestionably willful and egregious. Program hosts Opie & Anthony held numerous conversations on the air with station spotters describing and encouraging sexual activity. Station and program employees participated actively in the "Sex for Sam" contest by planning the event, arranging the spotters, encouraging the most provocative locations like toy stores and churches likely to expose innocent children and worshippers to unwelcome sexual conduct, and instructing the contestants to go inside St. Patrick's Cathedral. These callous actions show a high degree of culpability and a deliberate attempt to heighten the shock to listeners. They clearly offended community standards.

Unfortunately, the statutory constraints on our ability to level fines are currently inadequate, as the low fines can be considered by broadcasters as a cost of doing business and not a serious deterrent. In this case, a fine below the statutory maximum would not accurately reflect the circumstances and Infinity's culpability. I believe strongly that our fines, or other appropriate enforcement actions, should be sufficient to deter broadcasters from broadcasting indecent material on the public's airwaves at a time when children are listening. Today's action, while an important step in that direction, must be followed by more stringent, swifter and stricter enforcement of our statutory obligation to prevent indecent broadcasts over the public airwaves.