

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

In the matter of)	
)	
Infinity Radio Operations, Inc.)	File No. EB-02-IH-0624-GC
)	NAL/Acct. No. 200332080020
Licensee of Station WBLK(FM),)	FRN 0004036711
Buffalo, New York)	Facility ID # 71215

FORFEITURE ORDER

Adopted: August 11, 2004

Released: August 12, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we impose a forfeiture of \$4,000 on Infinity Radio Operations, Inc. (“Infinity”) for violating section 73.1206 of the Commission’s rules¹ by broadcasting a telephone conversation without first informing the party to the conversation of its intention to do so.

II. BACKGROUND

2. On August 5, 2003, we issued a *Notice of Apparent Liability* in which we proposed a \$4,000 forfeiture based on a finding that Infinity apparently violated section 73.1206 of the Commission’s rules.² Specifically, we found that Infinity, licensee of Station WBLK(FM), Buffalo, New York, had broadcast a telephone conversation on June 26, 2002, between Shae Moore, a disc jockey (DJ) employed by Infinity, and Brenda Tanner, a customer service representative employed by Adelpia Communications, Inc., without informing Ms. Tanner of its intent to broadcast the conversation.³ Based on the facts and circumstances surrounding the apparent violation, we proposed a forfeiture in the amount of \$4,000.00, the base forfeiture amount for such a violation.⁴

3. On September 4, 2003, Infinity filed a response to the *NAL* urging the Enforcement Bureau (“Bureau”) to rescind the forfeiture.⁵ Infinity contends that no forfeiture is warranted because: (1) the Bureau’s reference to a prior offense by Infinity violates section 504(c) of the Communications Act of 1934, as amended (“the Act”);⁶ and (2) the Commission recently cancelled a notice of apparent

¹47 C.F.R. § 73.1206.

²See *Infinity Radio Operations, Inc. (WBLK(FM))*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 16,191 (EB 2003) (“*NAL*”).

³*Id.*

⁴*Id.*

⁵Infinity Radio Operations, Inc., Response to Notice of Apparent Liability for Forfeiture, filed September 4, 2003 (“*Infinity Response*”).

⁶*Id.* at 2-3.

liability issued to an unrelated broadcaster in another proceeding that allegedly contained more aggravating circumstances than the present one.⁷

III. DISCUSSION

4. Section 73.1206 of the Commission's rules provides that, 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 its 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.⁸ Infinity admits that it broadcast the telephone conversation between its DJ and Ms. Tanner on June 26, 2002, and that it did not inform Ms. Tanner of its intent to broadcast her conversation.⁹ Thus, it is undisputed that Infinity violated section 73.1206.

5. Nevertheless, Infinity claims that the proposed forfeiture should be cancelled because the *NAL*, in its discussion of the statutory factors to be considered in determining a forfeiture amount, rebutted Infinity's claim that the broadcast was an isolated incident by citing another proceeding in which the Commission assessed a forfeiture against another Infinity affiliate for similar conduct.¹⁰ Infinity contends that section 504(c) of the Act bars the Commission from considering a prior unpaid, unadjudicated forfeiture proceeding in the instant case.¹¹ Section 504(c) states:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.¹²

Infinity thus argues that the Bureau's reference to the earlier proceeding impermissibly relied on a prior, unpaid forfeiture to Infinity's detriment.¹³

6. Infinity's reliance on section 504(c) as justification for canceling the instant *NAL* is misplaced. Contrary to Infinity's claim, we referenced the earlier Infinity decision—*EZ Sacramento*—merely to rebut Infinity's inaccurate claim that its June 26, 2002, unauthorized telephone broadcast was an "isolated incident" that did not warrant further action.¹⁴ As the Commission has previously held in a rulemaking order addressing this very issue that Infinity does not even mention, reliance on the underlying facts of similar conduct in other unadjudicated proceedings, as opposed to the existence of a notice of apparent liability as such, is permissible under section 504(c).¹⁵

⁷*Id.* at 3-4.

⁸47 C.F.R. § 73.1206.

⁹*NAL*, 18 FCC Rcd at 16,191-92, ¶¶ 3-4.

¹⁰*Id.* at 16,192, ¶ 6, n. 10 (citing *EZ Sacramento, Inc., and Infinity Broadcasting Corporation of Washington, D.C.*, 16 FCC Rcd 4958 (2001) ("*EZ Sacramento*"), *recon. denied*, 16 FCC Rcd 15605 (2001)).

¹¹*Infinity Response* at 2-3 (citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 500 (D.C. Cir. 1977) ("*Pleasant Broadcasting*"); *WIYN Radio, Inc.*, 59 FCC 2d 424 (1976) ("*WIYN Radio*")).

¹²47 U.S.C. § 504(c).

¹³*See Infinity Response* at 2-3.

¹⁴*See NAL*, 18 FCC Rcd at 16,192, ¶ 6.

¹⁵*The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 15 FCC Rcd 303, 304, ¶¶ 3-6 (1999). *Pleasant*

7. Furthermore, we are not persuaded by Infinity's argument that the Bureau should cancel the proposed forfeiture because we recently canceled part of another proposed forfeiture for \$9,000 in the *American Family* case that allegedly involved more aggravating circumstances.¹⁶ In that proceeding, the Bureau canceled the portion of a \$9,000 proposed forfeiture attributable to three admitted, willful violations of the local public inspection file rule and admonished the licensee instead because the required items were at the station (albeit not in the public file) at the time of the inspection. Infinity argues that, if the Bureau cancelled a portion of the *American Family* forfeiture because of the licensee's good faith efforts to comply, then the Bureau should likewise cancel the instant forfeiture based on Infinity's "one-time" violation and similar good faith efforts.¹⁷

8. We find no merit in Infinity's reliance on a single order in an unrelated area to justify rescinding the forfeiture. And, as noted above, this is not the first Infinity violation of our telephone broadcast rule. We therefore reject Infinity's arguments that imposing a forfeiture in this instance would constitute impermissible disparate treatment.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,¹⁸ Infinity Radio Operations, Inc., shall FORFEIT to the United States the sum of Four Thousand Dollars (\$4,000.00) for willfully violating section 73.1206 of the Commission's rules.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration number (FRN) referenced above and also must note the NAL/Acct. No. referenced above.

11. 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.

12. 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 you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this Forfeiture Order, either in your response to this Forfeiture Order or in a separate filing to be sent to the Investigations and Hearings Division, 445 12th, S.W., Room 3-B443, Washington, D.C. 20554. Your certification should indicate

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Broadcasting and *WIYN Radio*, cited by Infinity, are inapposite because those cases simply restate the statutory provision without any reference to the kind of situation at issue here. See *Pleasant Broadcasting*, 564 F.2d at 502; *WIYN Radio*, 59 FCC 2d. at 425, ¶ 7. (*WIYN Radio* was one of the underlying orders upheld in *Pleasant Broadcasting*.)

¹⁶*Infinity Response* at 3-4 (citing *American Family Association, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16,530 (Enf. Bur. 2003)) ("*American Family*").

¹⁷*Id.*

¹⁸47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

whether you, including your parent 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 Forfeiture Order. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

13. Requests for payment of the full amount of this Forfeiture under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁹

14. IT IS FURTHER ORDERED THAT a copy of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Radio Operations, Inc., 14 Lafayette Square, Suite 1300, Buffalo, New York 142203, with a copy to its counsel, attn: John D. Poutasse, Leventhal, Senter & Lerman PLLC, 2000 K Street N.W., Washington, D.C. 20006-1890.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁹See 47 C.F.R. § 1.1914.