

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

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| In the Matter of            | ) |                            |
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|                             | ) |                            |
| Rubber City Radio Group     | ) | File No. EB-02-IH-0064     |
|                             | ) | NAL/Acct. No. 200232080019 |
| Licensee of Station WONE-FM | ) | FRN 0002-9338-77           |
| Akron, Ohio                 | ) | Facility ID # 43873        |
|                             | ) |                            |
|                             | ) |                            |

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: August 1, 2002**

**Released: August 2, 2002**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Rubber City Radio Group of Akron, Ohio (“Rubber City”), licensee of Station WONE-FM, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based upon our review of the facts and circumstances in this case, we conclude that Rubber City is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

**II. BACKGROUND**

2. The Commission received a complaint that WONE-FM broadcast indecent material on November 29, 2001, at 8:30 a.m. during the “Morning Show” program. The complainant alleges that during a segment featuring the Morning Show host and a guest from an MTV television show entitled “Jackass,” she heard the following exchange: (Guest): “I’ve got a joke – what do you get when you stick a butcher knife up a baby’s ass?” (Host): “I don’t know – what do you get?” (Guest): “A mean hard on.” The complainant also alleges that, following this exchange, there was much laughter and joking by the radio personalities. After reviewing the complaint, we issued a letter of inquiry to the licensee.

3. In response to our letter of inquiry, Rubber City states that, although WONE-FM does not have a recording of the allegedly indecent broadcast, it does not dispute the complainant’s characterization of the dialogue. Nor does Rubber City dispute the fact that it broadcast the dialogue between the hours of 6 a.m. and 10 p.m. Moreover, Rubber City asserts that it does not condone indecent or obscene programming. Indeed, Rubber City acknowledges that the host should have anticipated the need to use a time-delay device, based on the known background of the guests and the tenor of the comments the guests made prior to the challenged dialogue.<sup>1</sup> Nevertheless, Rubber City claims that the

<sup>1</sup> According to a WONE-FM employee, the “Jackass” guests have a reputation for being “rebellious” and have a penchant for “get[ting] a rise out of people.” See letter dated February 21, 2002, from Erwin G. Krasnow, Shook, Hardy & Bacon, L.L.P., counsel for Rubber City, to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission.

host did not know where the “joke” was going and submits that the dialogue was merely a “fleeting reference,” i.e., a spontaneous utterance in the context of a live program.

### III. DISCUSSION

4. 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>2</sup> In contrast, federal courts have held that indecent speech is protected by the First Amendment.<sup>3</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>4</sup> The First Amendment, however, is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.<sup>5</sup> Consistent with a subsequent statute and case law,<sup>6</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.

5. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual or excretory organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary standards for the 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)). 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. *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). As noted above, current law holds that such times begin at 6 a.m.

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<sup>2</sup> *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>3</sup> *Sable Communications of California, Inc. v. FCC*, *supra* note 2, 492 U.S. at 126.

<sup>4</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 P*”); *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>5</sup> *ACT I*, *supra* note 4, 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>6</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 4.

and conclude at 10 p.m. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996).

6. The dialogue set out in the complaint refers to a child's excretory organ and to sexual activity associated with that child. Thus, this material warrants scrutiny in order to determine whether it is patently offensive. In making this determination, 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 *In the Matter of 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 (2001).

7. With respect to the first key factor, we find that the language of the dialogue is a graphic and explicit depiction of sexual activity with an infant. The dialogue graphically depicts a sadistic act of simulated anal sodomy with an infant and explicitly discusses a person's sexual arousal in response to that act. Furthermore, with respect to the third factor, the sexual references appear to be used to shock and are similar to other patently offensive material involving graphic references to sexual activity with children, which were found to be indecent.<sup>7</sup> Under these circumstances, we need not find that the sexual references were repeated at length, which is relevant under the second factor, in order to find that the material is patently offensive. As noted in the *Indecency Policy Statement*, broadcasting references to sexual activities with children, even if relatively fleeting, may be found indecent where, as here, other factors contribute to a finding of patent offensiveness.<sup>8</sup> Thus, we find that the material broadcast on WONE-FM, in context, was patently offensive as measured by contemporary community standards. We also find that the indecent dialogue was broadcast at 8:30 a.m., when there was a reasonable risk that children may have been in the audience, and thus is legally actionable.

8. We are not persuaded by Rubber City's claim that the host was unaware of the dialogue's sexual import. A licensee is responsible for the programming of its station. *Mr. Steve Bridges*, 9 FCC Rcd 1681 (MMB 1994)(a licensee is ultimately responsible for the programming it broadcasts, regardless of the source of the programming); *Community Broadcasters, Inc.*, 55 FCC 2d 28, 35 (1975)(a licensee is responsible for material broadcast over its station and may not avoid liability for a violation by pleading ignorance of what was broadcast). The failure of Rubber City's host to edit a guest's indecent material, especially where, as here, the host was aware of the questionable nature of the guest's material and could have used a time-delay device, does not relieve Rubber City of liability. Accordingly, for the reasons discussed above, we find that on November 29, 2001, WONE-FM apparently violated the prohibitions in the Act and the Commission's rules against broadcast indecency.

9. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission's rules, 47 C.F.R § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any

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<sup>7</sup> *Citicasters Co.(KSJO(FM))*, 15 FCC Rcd 19091 (EB 2000)("joke" that includes patently offensive references to incest and sex with children); *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997)(patently offensive language referring to sexual activity with a child); *EZ New Orleans, Inc (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997)(patently offensive references to incest and sexual activity with an infant).

<sup>8</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8009.

intent to violate the Commission's rules.<sup>9</sup> Because Rubber City elected not to edit its guest's indecent dialogue, it appears that Rubber City willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, by airing indecent programming on WONE-FM between the hours of 6 a.m. and 10 p.m.

10. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.<sup>10</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>11</sup> After reviewing all of the circumstances, we believe a \$7,000 forfeiture is appropriate in this case for the apparent broadcast of indecent material.

#### IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission's rules,<sup>12</sup> that Rubber City Radio Group is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

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, Rubber City SHALL PAY 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 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 Number (FRN) referenced above, and also 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 12<sup>th</sup> Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

15. 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");

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<sup>9</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>10</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).

<sup>11</sup> *Forfeiture Statement*, 12 FCC Rcd at 17110.

<sup>12</sup> 47 C.F.R. §§ 0.111, 0.311 and 1.80.

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.

16. 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>13</sup>

17. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Rubber City Radio Group, 1795 West Market Street, Akron, Ohio 44313, and to Rubber City's counsel, Erwin G. Krasnow, of Shook, Hardy & Bacon LLP, Hamilton Square, 600 14th Street, N.W., Suite 800, Washington, D.C. 20005-2004.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>13</sup> See 47 C.F.R. § 1.1914.