

Federal Communications Commission
Washington, D.C. 20554

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 1, 2003

Released: August 5, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Infinity Radio Operations, Inc. ("Infinity") has apparently violated Section 73.1206 of the Commission's rules by broadcasting a telephone conversation without first informing the party to the conversation of its intention to do so. Based on our review of the facts and circumstances in this case, we conclude that Infinity is apparently liable for a forfeiture in the amount of four thousand dollars (\$4,000).

II. BACKGROUND

2. Brenda L. Tanner, of Buffalo, New York, filed a complaint alleging that on June 26, 2002, at approximately 9:30 p.m., on air personality Shae Moore of WBLK(FM), Buffalo, New York, broadcast a telephone conversation between Ms. Moore and Ms. Tanner without the latter's knowledge. At the time, Ms. Tanner was at work as a telephone customer service representative for Adelphia Communications, Inc., a cable television company in the process of Chapter 11 reorganization. According to Ms. Tanner, Ms. Moore asked several questions about the future of the firm, the job security of its employees, and the possibility of non-payment of bills or cable theft.

3. In response to a Commission letter of inquiry, Infinity, the licensee of WBLK(FM), admits that it did broadcast the conversation a single time at approximately 9:00 p.m. as alleged in the complaint, and that it did not inform Ms. Tanner of its intention to do so. Infinity further states that the incident is inconsistent with its written policy in this respect. Infinity also states that it took disciplinary

1 47 C.F.R. § 73.1206.

2 Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, to Infinity Radio Operations, Inc., July 29, 2002.

3 Licensee states that the call occurred at "approximately 9:00 p.m.," whereas Ms. Tanner states that it was "about 9:30 p.m."

action against Ms. Moore and distributed a memo to all WBLK on air employees reiterating its policy with respect to Section 73.1206. Infinity then claims that, because this was an isolated incident and that it has taken steps to remedy the situation, no further action is warranted.

### 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.<sup>4</sup> The Commission has stated, "we believe that there is a legitimate expectation of privacy that telephone calls will not be broadcast without the consent of the parties involved."<sup>5</sup> In this case, we find that Infinity apparently violated Section 73.1206 of the Commission's rules by recording and broadcasting Ms. Tanner's conversation without giving her prior notice of its intent to broadcast such conversation.

5. Section 503(b) of the Communications Act of 1934, as amended ("Act"),<sup>6</sup> and Section 1.80(a) of the Commission's rules,<sup>7</sup> each provide that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Commission's 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 intent to violate the Commission's rules.<sup>8</sup>

6. Based on the evidence before us, we find that Infinity broadcast a conversation on June 26, 2002, at approximately 9:30 p.m., in apparent willful violation of Section 73.1206 of the Commission's rules. *The Commission's Forfeiture Policy Statement* sets a base forfeiture of \$4,000 for the unauthorized broadcast of a telephone conversation.<sup>9</sup> In assessing a monetary forfeiture, we take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act. Those factors include 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. Infinity's claim that the matter here is an isolated incident ignores another case in which the Commission found that Infinity had violated Section 73.1206.<sup>10</sup> Moreover, Infinity's subsequent remedial efforts do not alter the fact that the violation took place or justify further mitigation or cancellation of the proposed forfeiture penalty.<sup>11</sup> Based upon these facts and considering all of the circumstances present here, we find that no reduction or increase in the base forfeiture amount is warranted and that \$4,000 is the appropriate forfeiture amount.

---

<sup>4</sup> 47 C.F.R. § 73.1206.

<sup>5</sup> *In the Matter of Amendment of Section 1206: Broadcast of Telephone Conversations*, 3 FCC Rcd 5461, 5463 (1988).

<sup>6</sup> 47 U.S.C. § 503(b).

<sup>7</sup> 47 C.F.R. § 1.80(a).

<sup>8</sup> *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 (1991).

<sup>9</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, 17100-01 (1997), recon. denied, 15 FCC Rcd 303 (1999).

<sup>10</sup> *See EZ Sacramento, Inc. and Infinity Broadcasting Corporation of Washington, D.C.*, 16 FCC Rcd 4958 (2001); recon. denied, 16 FCC Rcd 15,605 (2001) (broadcast of a conversation while the parties had been told they were on hold).

<sup>11</sup> *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

#### IV. ORDERING CLAUSES

7. 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,<sup>12</sup> Infinity Radio Operations, Inc., is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of four thousand dollars (\$4,000) for violating Section 73.1206 of the Commission's rules, which prohibits broadcasters from airing telephone conversations without first informing the parties to such conversations of their intention to do so.

8. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's rules,<sup>13</sup> within thirty days of this NOTICE OF APPARENT LIABILITY, Infinity Radio Operations, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

9. 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.

10. 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.

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 NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division, 445 12<sup>th</sup>, S.W., Room 3-B443, Washington, D.C. 20554. Your certification should indicate 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 Notice of Apparent Liability. 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 Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street,

---

<sup>12</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>13</sup> 47 C.F.R. § 1.80.

S.W., Washington, D.C. 20554.<sup>14</sup>

14. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY 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, P.L.L.C., 2000 K Street N.W., Washington, D.C. 20006-1890.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

---

<sup>14</sup> See 47 C.F.R. § 1.1914.

## 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 – Small Cable Company 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	1,500 Employees or Fewer
Broadband Personal Communications Services (Blocks A, B, D, and E)	
Broadband Personal Communications Services (Block C)	
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	

Fixed Microwave Services	1,500 Employees or Fewer
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 <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
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)