

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

In the Matter of	)	File No. 99090433
	)	
<b>INFINITY RADIO LICENSE, INC.</b> <sup>1</sup>	)	NAL/Acct. No. 2001320800008
	)	FRN: 0004-0367-11
Licensee of Station WLLD(FM),	)	Facility ID # 18527
Holmes Beach, Florida	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 6, 2004**

**Released: August 23, 2004**

By the Commission: Commissioner Martin concurring and issuing a statement.

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny a Petition for Reconsideration filed on April 19, 2004, by Infinity, licensee of Station WLLD(FM), Holmes Beach, Florida (“Petition”). Infinity seeks reconsideration of the Commission’s denial of Infinity’s October 28, 2002, Application for Review.<sup>2</sup> In its Application for Review, Infinity sought review of a *Memorandum Opinion and Order*<sup>3</sup> issued by the Chief, Enforcement Bureau (“Bureau”), which denied Infinity’s Petition for Reconsideration of a *Forfeiture Order*<sup>4</sup> that imposed a monetary forfeiture in the amount of Seven Thousand Dollars (\$7,000.00) against it for willful violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, the latter of which prohibits the broadcast of indecent material between 6 a.m. and 10 p.m.

**II. BACKGROUND**

2. The facts and circumstances resulting in the forfeiture are discussed at length in the *2004 Commission MO&O* and Bureau orders noted above and will not be repeated here. In its Petition, Infinity repeats arguments previously made in this proceeding and advances two additional arguments, both of which, it maintains, warrant reconsideration and reversal of the *2004 Commission MO&O*. First, Infinity contends that the *2004 Commission MO&O* raises questions as to whether the Commission’s ascertainment and understanding of contemporary community standards relative to broadcast indecency are adequate.<sup>5</sup> Second, Infinity argues that

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<sup>1</sup> Commission records reflect that the licensee of Station WLLD(FM) is now Infinity Radio Inc., following grant of an application for approval of the *pro forma* assignment of the station’s license on November 25, 2003. See File No. BALH-20031110AHJ. We hereafter refer to the licensee as “Infinity.”

<sup>2</sup> *Infinity Radio License, Inc.*, 19 FCC Rcd 5022 (2004) (“*2004 Commission MO&O*”).

<sup>3</sup> *Infinity Radio License, Inc.*, 17 FCC Rcd 18339 (EB 2002).

<sup>4</sup> *Infinity Radio License, Inc.*, 16 FCC Rcd 4825 (EB 2001) (“*Forfeiture Order*”).

<sup>5</sup> Petition at 4-6.

five Commission decisions<sup>6</sup> released contemporaneously with the *Commission MO&O* further undermine the constitutionality of the Commission's indecency enforcement scheme. Infinity maintains that, until the Commission brings clarity to the purportedly unconstitutionally vague standards employed in enforcing the prohibition against broadcast indecency and reintroduces procedural and substantive restraints consistent with the First Amendment, it cannot penalize any broadcaster for airing allegedly indecent material.<sup>7</sup>

### III. DISCUSSION

3. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.<sup>8</sup> A petition that simply repeats arguments previously considered and rejected will be denied.<sup>9</sup> To the extent that the Petition repeats constitutional arguments regarding the indecency standard which we have already considered and rejected,<sup>10</sup> denial of reconsideration is warranted. Moreover, as we explain below, neither additional argument raised by Infinity in its Petition warrants reconsideration of the *2004 Commission MO&O*.

4. Applying our long-standing definition of indecency<sup>11</sup> in the *2004 Commission MO&O*, we affirmed the Bureau's determination that the utterance at issue aired by Station WLLD(FM) was indecent. Nothing in Infinity's Petition suggests that Station WLLD(FM) did not air the cited utterance between the hours of 6 a.m. and 10 p.m. Moreover, neither the *2004 Commission MO&O*'s discussion of how the Commission determines contemporary community

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<sup>6</sup> The five decisions are: *Clear Channel Broadcasting Licenses, Inc. et al.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 6773 (2004); *Emmis Radio License Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 6452 (2004) ("*Emmis*"); *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5032 (2004); *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* (Memorandum Opinion and Order), 19 FCC Rcd 4975 (2004) ("*Golden Globe*"); and *Capstar TX Limited Partnership (WAVW(FM) and WCZR(FM))*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 4960 (2004) ("*Capstar*"). Infinity also suggests that *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915, 6919 (2003), which warned broadcasters about possible license revocations for future serious indecency violations and about possible forfeitures for multiple indecency violations within a single program, constitutes a changed circumstance that justifies reconsideration of the *2004 Commission MO&O*.

<sup>7</sup> Petition at 2, 6-13.

<sup>8</sup> *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

<sup>9</sup> *Bennett Gilbert Gaines*, 8 FCC Rcd 3986 (Rev. Bd. 1993).

<sup>10</sup> *2004 Commission MO&O*, *supra* note 2, p. 6, ¶ 13; *Forfeiture Order*, *supra* note 4, 16 FCC Rcd at 4827, ¶ 9.

<sup>11</sup> 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*, 16 FCC Rcd 7999, 8000 ¶ 4 (2001) ("*Indecency Guidelines*"). Indecent material is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." See also *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)).

standards in indecency cases nor the Commission decisions cited by Infinity, either singly or in combination, constitute a changed fact or circumstance that justifies reconsideration. The 2004 Commission MO&O did not modify the definition of “contemporary community standards” nor the agency’s methodology for ascertaining those standards.<sup>12</sup> Likewise, none of the five recent Commission decisions cited by Infinity altered the Commission’s definition of indecency or the safe harbor parameters prescribed in 47 C.F.R. § 73.3999 or addressed issues pertinent to the case now before us. Thus, Infinity’s arguments about the sufficiency of a complainant’s evidence as to what was broadcast,<sup>13</sup> unpublished staff decisions as relevant precedent,<sup>14</sup> or the validity of finding that a particular utterance could be profane as well as indecent<sup>15</sup> are irrelevant. As discussed at length in our prior decision, the cited utterance broadcast by Station WLLD(FM), which described a sexual activity in patently offensive terms, was indecent,<sup>16</sup> and this finding was consistent with precedent.<sup>17</sup> Consequently, nothing raised in the Petition constitutes new facts or changed circumstances that warrant further reconsideration of the forfeiture penalty assessed against Infinity for the material at issue here. Rather, Infinity’s Petition contains arguments that the Commission has already considered or that have absolutely nothing to do with the issues in this proceeding. We therefore deny Infinity’s Petition.

#### IV. ORDERING CLAUSES

5. ACCORDINGLY, **IT IS ORDERED** that, pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106(b)(3), the Petition for Reconsideration filed on April 19, 2004, by Infinity Radio License, Inc. **IS DENIED**.

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<sup>12</sup> Compare 2004 Commission MO&O, 19 FCC Rcd at 5026, ¶ 12 with *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, 3 FCC Rcd 930, 933 ¶ 24 (1987) (subsequent history omitted). To the extent we spelled out in more detail how we determine contemporary community standards, our statements were entirely consistent with prior Commission statements.

<sup>13</sup> See Petition at 7, at which Infinity cites *Capstar* and argues that the Commission’s initial reliance therein on a “complainant’s sketchy, unsupported recollection . . . strips away the procedural protections of the erstwhile ‘tape or transcript’ requirement.” In a similar vein, in the Petition at 7-8, Infinity finds fault with *Emmis*, 19 FCC Rcd at 6455-56, ¶ 10, for supposedly basing an indecency finding “solely on the complainant’s ‘characterization’ of the broadcast and the Commission’s categorization of the speakers involved.” In this proceeding, however, the complainant submitted both tapes and transcripts. Infinity did not dispute that the material that the Commission found indecent was broadcast over Station WLLD(FM) between 6 a.m. and 10 p.m. See *CBS Radio License, Inc.*, 15 FCC Rcd 23881, ¶ 4 (Enf. Bur. 2000).

<sup>14</sup> See Petition at 9-10, at which Infinity maintains that, in *Infinity Broadcasting Operations and Clear Channel*, the Commission’s determination that unpublished staff decisions are not binding on the Commission undermines the guidance set forth in *Indecency Guidelines*.

<sup>15</sup> See Petition at 10-13, at which Infinity argues that *Golden Globe*, *supra* note 6, 19 FCC Rcd at 4981-82, replaced established indecency regulation with a new regime of profanity regulation. In this proceeding, Infinity was assessed a forfeiture because the broadcast in question was determined to be indecent, not because it was found to be profane.

<sup>16</sup> 2004 Commission MO&O, 19 FCC Rcd at 5022-24.

<sup>17</sup> *WQAM License Limited Partnership*, 15 FCC Rcd 2518, *recon. denied*, 15 FCC Rcd 13549 (2000); *The Rusk Corporation (KLOL(FM))*, 8 FCC Rcd 3228 (1993).

6. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to counsel for Infinity, Steven A. Lerman, Esq., Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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

*Re: Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, FL,  
Memorandum Opinion and Order*

This Order denies a Petition for Reconsideration of an Order we released in March of this year. I concur in this Order for the same reason I concurred in the underlying Order: the broadcast included numerous indecent utterances; Infinity, the licensee, has a long history of repeated violations; and thus each violation in this broadcast deserves a much higher fine. The Bureau's proposed \$7,000 fine is therefore inadequate.