

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

In the Matter of)	
)	
INFINITY BROADCASTING)	File No. EB-00-IH-0009
CORPORATION OF WASHINGTON, D.C.)	NAL/Acct. No. X32080005
)	Facility #28625
Licensee of Station WJFK-FM)	
Manassas, Virginia)	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 2001

Released: November 13, 2001

By the Chief, Enforcement Bureau:

I. Introduction

1. In this order, pursuant to section 1.106(a)(1) of the Commission's rules, 47 C.F.R. § 1.106(a)(1), we grant a petition for reconsideration filed June 16, 2000, by Infinity Broadcasting Corporation of Washington, D.C. ("Infinity"), licensee of station WJFK-FM, Manassas, Virginia. Infinity seeks reconsideration of *Infinity Broadcasting Corporation of Washington, D.C.*, 15 FCC Rcd 10387 (Enforcement Bureau 2000) ("*Forfeiture Order*"), which imposed a \$4,000 forfeiture for a willful violation of section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206, regarding the broadcast of telephone conversations. For the reasons that follow, we cancel the forfeiture.

II. Discussion

2. Section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206, provides in pertinent part 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 the licensee's 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.

3. For more than five years, Infinity has used digital delay devices in the context of airing telephone conversations on the "Don and Mike Show." The digital delay devices used by Infinity allow Infinity to capture the speakers' words temporarily and either broadcast those words shortly thereafter or not at all. It appears that the length of delay between the speakers' utterances and their broadcast is under Infinity's control and depends on the number and type of devices employed.

4. In the matter now before us, Infinity used digital delay devices to capture a conversation with the complainant, Ms. Flora Barton. Consistent with its past practice, Infinity

did not notify Ms. Barton of its intention to broadcast the conversation *before* the conversation to be broadcast began. Rather, as the *Forfeiture Order* reflects, Infinity gave notice of its intention to Ms. Barton *after* the conversation to be broadcast began.

5. Infinity argues that it used the procedures described above in good faith reliance on three prior Commission staff decisions that led it to believe that its use of digital delay devices ensured compliance with the rule. *Letter from Norman Goldstein to Bernard A. Solnik, Esq.*, Case No. 02120518 (Mass Media Bureau, March 25, 1996), *Letter from Norman Goldstein to Kenneth C. Stevens, Esq.*, Case Nos. 96010161 and 96040220 (Mass Media Bureau, June 4, 1996), and *Infinity Broadcasting Corp. of Washington, D.C.*, 14 FCC Rcd 5539 (Mass Media Bureau 1999) (“*IBC*”). In each instance, a complaint occurred as a result of a broadcast of a telephone conversation on the “Don and Mike” show. In the first two cases, the staff took no action against Infinity after receiving conflicting stories about the broadcasts. In the *IBC* case, the staff imposed a forfeiture. However, that forfeiture was premised on the broadcast of a portion of the conversation that occurred after Don and Mike told the complainant she was being put on hold, not on the broadcast of any portion of the conversation that occurred before that point.¹ Although none of the rulings explicitly discusses or endorses the delay devices used by Infinity, the factual circumstances surrounding those broadcasts are indistinguishable from the instant case. Specifically, in each case, Infinity gave essentially the same notice at the same time to each complainant as was given to Ms. Barton. Also, in each case, Infinity broadcast the entire conversation, including that portion that occurred before notice, but contended it could have avoided doing so because delay devices allowed it to dump a conversation if the person called had objected to the conversation or terminated it after receipt of Infinity’s notice.

6. This background persuades us that Infinity could have reasonably believed that, at the least, the Commission’s staff had tacitly approved its procedures for broadcasting telephone conversations. Thus, as applied to Infinity, we believe the rule was not sufficiently clear to justify a forfeiture. We note that Infinity has indicated that it intends to file a request for declaratory ruling on the issue of whether a radio station’s use of a digital delay device, coupled with delivery of a specified notice to the called party during the period of the digital delay, is compliant with 47 C.F.R. § 73.1206. Furthermore, consistent with the *Forfeiture Order*’s determination that Infinity’s procedures were not in accord with the rule’s requirements, Infinity informs us that the “Don and Mike Show” will implement steps in the production process designed to ensure that the show will not contain the called party’s voice until the called party is provided notice of intent to broadcast.² In view of all the above, we conclude that cancellation of the forfeiture is appropriate.

III. Ordering Clauses

7. Accordingly, IT IS ORDERED, pursuant to authority granted by section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106(a) of the Commission’s rules, 47 C.F.R. § 1.106(a), that the petition for reconsideration filed June 16, 2000, by Infinity Broadcasting Corporation of Washington, D.C. IS GRANTED.

¹ See *IBC*, 14 FCC Rcd 13541 (Mass Media Bureau 1999); *EZ Sacramento, Inc.*, 14 FCC Rcd 13539 (Mass Media Bureau 1999), *recon. of both denied sub nom. EZ Sacramento, Inc.*, 15 FCC Rcd 18257 (Enforcement Bureau 2000), *review denied*, 16 FCC Rcd 4958 (2001), *recon. dismissed*, FCC 01-230, released August 14, 2001.

² Letter from Dennis P. Corbett, counsel for Infinity, to David H. Solomon, Chief, Enforcement Bureau, dated October 22, 2001.

8. IT IS FURTHER ORDERED that the forfeiture imposed in Infinity Broadcasting Corporation of Washington, D.C., 15 FCC Rcd 10387 (Enforcement Bureau 2000) IS CANCELLED.

9. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order shall be sent, by Certified Mail/Return Receipt Requested, to Infinity's counsel, Dennis P. Corbett, Esq., Leventhal, Senter & Lerman P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau