

### Michigan FM Station Fined \$27,500 for Broadcasting Indecent Material; FCC Signals That Future Fines May Be Far Larger

The licensee of a Michigan FM station has been fined \$27,500 for broadcasting indecent material in violation of Section 73.3999 of the FCC Rules. The broadcast, which aired between 4:30 p.m. and 5:00 p.m. on a Wednesday, contained some of the most shocking, violent and graphic material submitted to the FCC in an indecency complaint in recent years.

Importantly, the full Commission signaled that in the future it may use its authority to fine licensees for each utterance that is found to be indecent, i.e., if there are several separate conversations which are found to be indecent, the FCC may fine licensees per conversation: "We also take this opportunity to note that we could have found [the licensee] to have engaged in apparent repeated violations. The statute prohibits the broadcast of indecent 'utter[ances].' While the Commission has traditionally viewed all of the utterances in one program to be a single utterance and thus a single violation, such an approach is not legally required. Here, for example, there were several different conversations, each of which could be viewed as a separate indecent utterance, and thus a separate violation. For purposes of this proceeding, we will use our traditional per-program approach. We hereby make clear that, in the future, we may treat situations like this as multiple, repeated violations with the accompanying increase in forfeitures." *In this particular case, with nine separate callers involved with the indecent material, the potential fine could have been as high as \$247,500.*

In his dissenting statement, issued because he did not believe the punishment was harsh enough for the conduct, Commissioner Michael Copps asserted that the station had "aired some of the most vulgar and disgusting indecency that I have had the misfortune to examine since I joined the Commission. The station presented graphic descriptions of violent sexual acts against women as entertainment at a time when children likely composed a significant portion of the audience."

The licensee offered no defense other than an assertion, rejected by the FCC, that "the Commission's generic definition of indecency is unconstitutional."

### D.C. Circuit Clarifies Right to Appeal Fines Imposed by Notices of Apparent Liability for Forfeiture

The United States Court of Appeals for the District of Columbia Circuit issued an opinion on April 8 that indicates that Commission licensees and regulatees can pay a fine assessed by a *Notice of Apparent Liability for Forfeiture*, and still be allowed to pursue court appeal of the fine. Previous Commission decisions clearly maintained that payment of a fine extinguished the right to appeal the imposition of the fine. We reported on one such FCC decision in the March 2001 issue of **FCC Enforcement Monitor**:

"Current FCC caselaw provides that 'money that is paid voluntarily under a misapprehension of the legal rights and obligations of the person paying, but in the absence of fraud, duress, or mistake of fact, is not recoverable.' A licensee who receives a *Notice of Apparent Liability for Forfeiture* need not pay the forfeiture until the United States seeks recovery and a final judgment is entered by a U.S. District Court after a trial. In fact, as this case shows, paying a fine and then attempting to pursue an appeal of the fine eliminates any opportunity to seek a reduction or elimination of the fine."

Reversing that caselaw in its decision earlier this month, the D.C. Circuit said that

"The Commission argues that unlike the formal hearing forfeiture process, where the Communications Act expressly gives courts of appeals jurisdiction to review forfeiture orders, the less formal NAL forfeiture proceedings are not subject to review in the courts of appeals. The plain language of the Communications Act

indicates otherwise. Section 402(a), the Act's general review provision, vests in courts of appeals exclusive jurisdiction over "[a]ny proceeding to enjoin, set aside, annul or suspend" or determine the validity of final Commission orders, [case citations] – a category that includes forfeiture orders [case citations]."

As a result of this ruling, licensees who receive a *Notice of Apparent Liability for Forfeiture* from the FCC will now have two choices: pay the fine and then file an appeal in the Court of Appeals on the merits of the *Notice*, or refuse to pay the fine and go to trial in a U.S. District Court on the merits of the *Notice*. Broadcasters should note that the Court's ruling does not affect cases where a licensee is designated for hearing and has a forfeiture imposed as a result of the hearing; such cases are still, and always have been, directly appealable to the Court of Appeals.

### **Licensee of Florida AM Station Fined \$4,000 for Failing to Have Operational EAS Equipment**

The licensee of a Florida AM station has been fined \$4,000 for violating Section 11.35(a) of the FCC Rules by not having operational EAS equipment at the station. The licensee did not respond to the *Notice of Apparent Liability for Forfeiture* issued by the FCC's Tampa Field Office, and the *Notice* was affirmed by the Chief of the Enforcement Bureau.

### **Licensee of Tennessee AM Station Fined \$4,000 for Violations of EAS and Technical Rules**

The licensee of a Tennessee AM station has been fined \$4,000 for failing to monitor two EAS sources (Rule Section 11.52(d)), failing to send and receive EAS tests (Rule Section 11.61(a)), failing to repaint its antenna structure as often as necessary to maintain good visibility (Rule Section 17.50), failing to maintain sufficient transmission system monitoring and control (Rule Section 73.1400), and failing to reduce power after sunset (Rule Section 73.1745(a)). The original fine, \$25,000, issued by the FCC's Atlanta District Office, was reduced by the Chief of the Enforcement Bureau based on a review of tax returns submitted by the licensee in support of its claim of financial hardship.

The rule violations came to the Commission's attention after two complaints were filed with the agency stating that the station did not reduce its power in the evening. Subsequent power measurements and a station inspection uncovered the other rule violations. The licensee offered no defense.

### **Licensee of Noncommercial Educational FM Station in Louisiana Fined \$2,000 for Airing Commercial Advertisements**

The licensee of a noncommercial educational (NCE) FM station in Louisiana has been fined \$2,000 for airing commercial advertisements in violation of Section 73.503 of the FCC Rules. The licensee had been admonished by the Commission less than three years ago to comply with the FCC's underwriting rules in connection with an earlier complaint.

Commercial advertisements are defined by the Communications Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility or product" of for-profit entities. FCC Rules allow contributors to NCE FM stations to be acknowledged on the air, but those acknowledgements may be made for identification purposes only, and are not allowed to promote contributors' products, services or business. The FCC specifically has ruled that such announcements acknowledging contributions may not contain "comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease."

The licensee offered no defense, and admitted airing the offending announcement 120 times over a four-month period. The announcement read, in part: "Did the last computer technician you called leave you with more wires disconnected than connected? Let me introduce you to the Rely-A-Tech program from Turning Point Solutions Group. Rely-A-Tech is a commitment between you and Turning Point to ensure your systems receive regular attention to keep them healthy."

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