

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

In the Matter of)
)
Liability of)
Agape Broadcasting)
Foundation, Inc.)
)
Licensee, KNON(FM))
Dallas, TX)
)
for a Forfeiture)

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1998

Released: February 10, 1998

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by § 0.283 of the Commission's Rules, has under consideration (1) a \$12,500 Notice of Apparent Liability (NAL)¹ issued April 1, 1994, to Agape Broadcasting Foundation, Inc., licensee of noncommercial station KNON(FM), Dallas, Texas, for broadcasting indecent language in violation of 18 U.S.C. § 1464; and (2) the licensee's April 25, 1994 response to the NAL, arguing that the fine is unwarranted and excessive.

2. Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication." Indecency has been defined by the Commission as 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 Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC ("ACT III"), 58 F.3d 654 (D.C. Cir. 1995); Action for Children's Television v. FCC ("ACT I"), 852 F.2d 1332 (D.C. Cir. 1988).

3. Several complaints filed with the Commission indicated that on July 12, 1992, Radio Station KNON(FM), Dallas TX, broadcast the song "I Want To Be A Homosexual" (lyrics transcribed in Attachment 1) at 3:55 p.m. during its "Lambda Weekly" program. The NAL stated that the broadcast was apparently indecent because it described sexual and excretory activities and organs in patently offensive terms. Additionally, it noted that the lyrics aired at mid-afternoon when there was a reasonable risk that children may have been in the audience.

4. The licensee claims that the subject broadcast was not indecent. It maintains that, "[t]aken in context, ... the words and the song constitute political speech" aired in a good faith attempt to present

¹ Agape Broadcasting Foundation, Inc., 9 FCC Rcd 1679 (MMB 1994).

meaningful public affairs programming. To this end, according to Agape, the song in question employed "controversial words and phrases," not for indecent or obscene purposes, but rather to challenge those who would use such language to stigmatize, oppress, and shame members of the gay community. The licensee also suggests that if the FCC does not regard the subject broadcast as public affairs programming, then the FCC's policies concerning public affairs programming are unconstitutionally vague. The licensee claims further that any FCC enforcement action with respect to this broadcast violates its rights under the First and Fourteenth Amendments to the U.S. Constitution.

5. The licensee appears to be arguing that its affirmative obligation to air public affairs programming outweighs its obligation to avoid the broadcast of indecent material. We fail to see, however, why these obligations must be in conflict. A licensee has wide discretion in its choice of public affairs programming to meet the perceived needs of its community. Similarly, it has considerable discretion as to the times of day, generally through the evening hours "safe harbor" period,² when it may broadcast indecent material to which children should not be exposed. Consequently, we find unavailing Agape's argument that, in essence, its duty to air public affairs programming required a mid-afternoon presentation of lyrics containing repeated, explicit, and vulgar descriptions of sexual activities and organs.

6. Thus, we need not quarrel with the licensee's characterization of the programming to find a violation of 18 U.S.C. § 1464 prohibiting the broadcast of indecent material. Moreover, while acknowledging that such speech is surely protected under the First Amendment, the Supreme Court in FCC v. Pacifica Foundation, 438 U.S. 76 (1978), upheld the Commission's authority to regulate indecent broadcasts while rejecting the proposal that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Since that time, in 1988 and again in 1995, the United States Court of Appeals has affirmed this agency's authority to channel such speech to certain evening hours for the protection of children. See ACT I, supra, and ACT III, supra.

7. As a final matter, the licensee asserts that, even if we determine the broadcast was indecent, a fine is inappropriate under the circumstances. Agape states that, within a day or two of the broadcast, KNON's manager received a listener complaint about the July 12, 1992 broadcast, discussed it with the individual responsible for the program, and reminded him of the station's policies with respect to "objectionable" material. Agape reports that the individual remained with the station for only two more weeks following the incident, during which time his broadcasts were monitored and assertedly contained nothing else similar to the song in question. The licensee urges that a warning is a more fitting sanction, in view of its prompt "containment" of the problem, to the extent there was one, and its limited resources which make any fine "harsh and unduly excessive."

8. With due regard to these claims and for other reasons, we will recalculate the fine. In arriving at an apparent monetary liability of \$12,500, the NAL relied, in part, upon forfeiture standards which have since been set aside by the United States Court of Appeals. See United States Telephone Assn. v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). Accordingly, we will directly apply to the specific circumstances of this case the relevant statutory factors in Section 503(b)(2) of the Communications Act, including the nature, circumstances, extent, and gravity of the violation.

9. KNON's broadcast, while relatively brief, details sexual activities in very vulgar and explicit

² The Commission's rule, 47 C.F.R. § 73.3999, which went into effect on August 28, 1995, establishes a safe harbor for the broadcast of indecent material between the hours of 10 p.m. and 6 a.m. Prior to that date, and during the time of the KNON broadcast in question, the safe harbor began even earlier, at 8 p.m.

terms, warranting, on these grounds, a substantial forfeiture. Taking into consideration, however, the licensee's prompt response to the complaint (before a Commission investigation began), and the licensee's financial records submitted in response to the NAL, we believe a forfeiture of \$2,000 is reasonable.

10. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Agape Broadcasting Foundation, Inc., licensee of station KNON(FM), Dallas, Texas, FORFEIT to the United States the sum of two thousand dollars (\$2,000) for its violation of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Radio Station KNON(FM), Dallas, TX
Date/Time Broadcast: July 12, 1992 at 3:55 p.m. (CDT)
Material Broadcast: "I Want To Be A Homosexual"

Lyrics:

Oh, Ben, gee, I think you're really cute and sexy,
and well, I know you're straight.
But look, I know you have a girlfriend.
But if you really want to give me a blowjob,
I guess I'll let you as long as you respect me in the morning.
Suck it baby. Oh yeah, suck it real good.
And remember, queers don't produce, they seduce.
And well, everybody's a fag.
The whole goddamn world's a fag.
Don't you realize it even yet.
And um, wow.
Are you sure this is your first rim job?
You're catching on real fast, girlfriend.
Oh, oh, Ben, it feels so right.
Won't you be my homosexual husband?
I've got a little lisp, and I've been working on my limp wrist.
See, we're all in drag. I think I wanna be a faggot man. (Unintelligible)
I wanna be, I wanna be a homosexual.
I wanna be, wanna be a homosexual.
I wanna be, wanna be a homosexual. I wanna be.
Shock the middle class.
Stick it up your punk rock ass.
You rub your little thing,
when you see phony dikes in Penthouse magazine.
So what's the difference, Mr. Cream?
When you just need a man, a beat-me-leather fag,
to take you out in drag. Oh, yeah.
I wanna be, I wanna be a homosexual.
I wanna be, wanna be a homosexual.
I wanna be, wanna be a homosexual. I wanna be.
Call me a faggot, call me a butt-loving, fudge-packing queer.
But I don't care, 'cause it's a strain being straight.
That makes me wanna drink a beer, and be a pansy and be at home.
Shock the middle class, stick it up your punk rock ass.
You rub your puny thing, when you see something (Unintelligible)
pass you on the street.
Who wears short shorts? You wear short shorts.
You're so full of shit. Why don't you admit,
you don't have the balls to be a queer.
I wanna be, I wanna be a homosexual.
I wanna be, wanna be a homosexual.
I wanna be, wanna be a homosexual.
I wanna be a homosexual.