

Separate Statement of Commissioner Kevin J. Martin

Re: Infinity Broadcasting Corporation of Los Angeles, Licensee of Station KROQ-FM, Pasadena, California, Memorandum Opinion and Order (adopted May 9, 2002)

Today we take an important step in clarifying our indecency rule, easing the burden on consumers, and protecting listeners and viewers from offensive broadcast programming. The attached *Order* upholds the forfeiture assessed upon Infinity Broadcasting, and in so doing, it provides important guidance for the industry and consumers.

The FCC plays an important role in protecting Americans—particularly children—from obscene and indecent material. We have been charged by Congress to implement its ban against broadcasting obscene or indecent programming, and I take this responsibility seriously.

The Courts have determined that we may prohibit indecent programming between the hours of 6:00 a.m. to 10:00 p.m. without running afoul of the First Amendment.¹ The *Order* we release today does not alter our indecency rule or our official indecency policy.² It does, however, provide much-needed guidance regarding how the rule should be implemented and increases the effectiveness of our rules by clarifying the burden listeners and viewers must meet when filing a complaint.

Many consumers have expressed frustration with how we have applied our indecency rule. They have argued that the Commission has placed too high a burden on viewers and listeners by requiring that they include with any complaint a tape or transcript of the program in question. The result, they say, is an indecency rule that is too rarely enforced. While the Commission's indecency policy has no strict tape or transcript requirement, whether it was Commission *practice* to require a tape or transcript is unclear.³ I am glad that today we put this controversy to rest – and in a way that decreases the burden on consumers.

As we explain in the *Order*, the Commission will not dismiss a complaint for failure to include a tape or transcript. As long as we have sufficient detail and context to determine whether an identified program is indecent, we will process the complaint. This clarification should facilitate consumers' ability to file a complaint when they hear or view programming they believe to be indecent.

Moreover, if we determine that a violation may have occurred, it is then up to the broadcaster to provide contrary evidence. If the broadcaster fails to provide such evidence, we

¹ The courts also have approved the Commission's definition of "indecent." See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

² See 47 C.F.R. §73.3999; *Industry Guidance of the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001).

³ Our policy states that a complaint "must generally include a full or partial tape or transcript or significant excerpts of the program." See *id.* Notably, many in the industry (such as the licensee in this case) referred to this as "the tape or transcript requirement."

may (as we do today) find that complainant's evidence is sufficient to determine that a violation has occurred. This burden shifting should further alleviate some of the concerns that have been raised by consumers while still providing broadcasters with ample opportunity to defend their programming.

I support this process, as it will facilitate consumers' ability to file indecency complaints, maintain broadcasters' ability to dispute claims that their programming was indecent, and enable the Commission to enforce our rules more effectively. Accordingly, I support this *Order*, both for the conclusions it makes and the guidance it provides.