

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

In the Matter of)	File No. EB-00-IH-0228
)	
Citadel Broadcasting Company)	NAL/Acct. No. 200132080057
)	Facility ID #11229
Licensee of Station KKMG(FM),)	
Pueblo, Colorado)	

MEMORANDUM OPINION AND ORDER

Adopted: January 7, 2002

Released: January 8, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we rescind the Notice of Apparent Liability (“NAL”) in which we found that Citadel Broadcasting Company (“Citadel”), licensee of Station KKMG(FM), Pueblo, Colorado, apparently violated 18 U.S.C. § 1464 and Section 73.3999 of the Commission’s rules, 47 C.F.R. § 73.3999, by willfully broadcasting apparently indecent language.¹ Having reviewed Citadel’s response and having again reviewed the relevant case law, we disagree with our initial analysis and we now conclude that the material at issue was not patently offensive under contemporary community standards for the broadcast medium. Accordingly, we conclude that the licensee did not violate the applicable statute or our indecency rule, and that no sanction is warranted.

II. BACKGROUND

2. The Commission received a letter dated July 18, 2000, complaining about repeated broadcasts of a song entitled “The Real Slim Shady” on Station KKMG(FM). The complaint included lyrics that the complainant contended are offensive. After reviewing the lyrics, Enforcement Bureau (“Bureau”) staff issued a letter of inquiry to Citadel, licensee of the station involved. In its response to the staff’s inquiry, Citadel claimed that the song version that the station aired was different from the one complained about, and that the station carefully screened the broadcast version to omit any offensive language through the use of a muting device or overdubbed sound effect. In support, Citadel submitted a copy of the “radio edit” version, and argued that the lyrics contained therein are not indecent under the applicable Commission standards.

3. On June 1, 2001, the Bureau issued a Notice of Apparent Liability (“NAL”) which rejected Citadel’s arguments and found that the “radio edit” version of “The Real Slim Shady” apparently violated the Commission’s indecency rule. In the NAL, we acknowledged that

¹ DA 01-1334 (EB rel. June 1, 2001).

Citadel attempted to render the song suitable for broadcast through editing, but found that the licensee failed to purge several apparently indecent references. To redress this apparent rule violation, we concluded that a monetary sanction in the base forfeiture amount of \$7,000 appeared appropriate.

4. Citadel challenges the NAL's findings, arguing that the version broadcast makes no explicit sexual or excretory references, and is not patently offensive. In this regard, Citadel contends that any of the song's sexual or excretory references cited in the NAL are oblique, and are intended merely to satirize and parody popular culture, and not to titillate, shock, or pander to listeners. In view of this, Citadel asks that the NAL's findings be set aside and that a monetary forfeiture not be imposed.

III. DISCUSSION

5. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of "any obscene, indecent or profane language by means of radio communication." Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the "Act"), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress's authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.² In contrast, federal courts have held that indecent speech is protected by the First Amendment.³ Nonetheless, the federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well as the Commission's interpretation and implementation of the statute.⁴ However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.⁵ Consistent with a subsequent statute and case law,⁶ under the Commission's rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. See 47 C.F.R. § 73.3999.

² See *Miller v. California*, 413 U.S. 15 (1973), *reh.g denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

³ *Sable Communications of California, Inc. v. FCC*, *supra* note 2.

⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("ACT I"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) ("ACT II"); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) ("ACT III").

⁵ *ACT I*, *supra* note 4, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear."). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

⁶ Public Telecommunications Act of 1992, Pub. L. No. 356, 102nd Cong., 2nd Sess. (1992); *ACT III*, *supra* note 4.

6. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.” *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)). This definition has been specifically upheld by the federal courts.⁷ The Commission’s authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.⁸

7. The Commission’s indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts. See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”)*, 16 FCC Rcd 7999 at 8015 ¶ 24 (2001). “Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.” *Id.* In evaluating the record to determine whether the complained of material is patently offensive, three factors are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. See *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

8. In the NAL, we found two passages in the edited version of the song “The Real Slim Shady” to be apparently indecent:

My bum is on your lips
My bum is on your lips

And if I’m lucky you might just give it a little kiss
And that’s the message we deliver to little kids
And expect them not to know what a woman’s BLEEP is
Of course, they’re gonna know what intercourse is

* * * * *

It’s funny cause at the rate I’m goin’
When I’m 30 I’ll be the only person in the nursing home flirting
Pinching nurses asses when I’m BLEEP or jerkin’
Said I’m jerkin’ but this whole bag of Viagra isn’t workin.’

⁷ In *FCC v. Pacifica Foundation, supra*, the Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation, supra*, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I, supra* note 4, 852 F.2d at 1339; *ACT II, supra* note 4, 932 F.2d at 1508; *ACT III, supra* note 4, 58 F.3d at 657.

⁸ *ACT III, supra* note 4.

9. The passages in question, in context, refer to sexual activity.⁹ Thus, the material warranted scrutiny. Based on our review of Citadel's response, however, we conclude that the material broadcast was not patently offensive, and thus not actionably indecent.

10. With respect to the first key factor set out in the *Indecency Policy Statement*, we agree with Citadel's contention that the sexual references contained in the song's "radio edit" version¹⁰ are not expressed in terms sufficiently explicit or graphic enough to be found patently offensive. Although the song, as edited, refers to sexual activity, these references are oblique. In this regard, the material is less explicit and graphic than every example of indecent material mentioned in the *Indecency Policy Statement* in connection with this factor. *See id.* at ¶¶ 13-14.

11. We also agree with Citadel's contention, with respect to the third key factor, that the sexual references contained in the "radio edit" version, in the context presented, do not appear to pander to, or to be used to titillate or shock its audience. Thus, the sexual references do not have the effect of a "verbal shock treatment." *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978)(Powell, J., concurring in part and concurring in the judgment). In this regard, the material is of less concern than all of the examples mentioned in the *Indecency Policy Statement* in connection with this factor. *See id.* at ¶ 20.¹¹

12. Consequently, based on our review of Citadel's response in light of the applicable case law, we conclude that Citadel did not violate the statute or the Commission's indecency rule through its broadcast of the "radio edit" version of "The Real Slim Shady."

IV. ORDERING CLAUSES

13. Accordingly, pursuant to Sections 0.111(a)(7), 0.311 and 1.80(f)(3) of the Commission's rules, 47 C.F.R. §§ 0.111(a)(7), 0.311 and 1.80(f)(3), IT IS ORDERED THAT the Bureau's June 1, 2001, NAL against Citadel Broadcasting Company, licensee of Station KKMGM(FM), Pueblo, Colorado, is hereby RESCINDED.

⁹ Citadel amends its prior submission to indicate that the third phrase actually broadcast was not "when I'm BLEEP or jerkin'," but instead "when I'm BLEEP with jergens."

¹⁰ We note that the song at issue here is not the same version that was the subject of an earlier Bureau NAL. *See In re Liability of Capstar TX Limited Partnership (WZEE(FM))*, 16 FCC Rcd 901 (EB 2001) (forfeiture paid).

¹¹ With regard to the comparison in this paragraph and paragraph 10 with cases mentioned in the *Indecency Policy Statement*, we do not mean to suggest that those cases constitute a floor on what is indecent. But the fact that all of the indecency cases cited in those sections involve stronger facts than here does support our conclusion that the material here is not indecent.

14. IT IS FURTHER ORDERED THAT a copy of this MEMORANDUM OPINION AND ORDER shall be sent by Certified Mail -- Return Receipt Requested to Kathleen A. Kirby, Esq. and Elizabeth E. Goldin, Esq., Counsel for Citadel Broadcasting Company, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau