

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

LETTER  
March 25, 1994

Released: April 1, 1994

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mr. Steve Bridges, Vice President 8210-RS  
Flambo Broadcasting, Inc. 92030273  
Licensee of Radio Station KFMH-FM, Muscatine, Iowa  
3218 Mulberry Avenue  
Muscatine, Iowa 52761

Dear Mr. Bridges:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On February 21, 1992, after receiving a complaint alleging that Station KFMH-FM, Muscatine, Iowa, had broadcast indecent language in violation of 18 U.S.C. Section 1464, we asked for your comments concerning certain material broadcast on two occasions during the morning of August 30, 1991. Transcripts of the relevant passages, based in part on a tape recording of the second broadcast, were attached to our letter of inquiry. A transcript of the relevant August 30 material is also appended here.

Section 1464 of Title 18, United States Code, prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. Section 1464. The Commission has defined indecency 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. 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 of day when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

You state that both broadcasts in question, which occurred within approximately eight minutes of one another, were part of a live and spontaneous contest where members of the listening audience would call the station and tell their best jokes in an attempt to win \$100. You claim to have repeatedly emphasized that all jokes had to be "clean" and family oriented. To ensure compliance with your standards, you assert, all callers were pre-screened to determine the acceptability of their jokes for broadcast. If the jokes were found to be acceptable during the pre-screening, the caller would then be allowed to re-tell the joke during the live broadcast. You did not use delay

technology in the pre-screening process, but state that you will do so in the future if "live" telephone calls are to be aired. In this regard, you note that where jokes are to be broadcast, such material is now taped and then reviewed before it is aired.

With regard to the first broadcast, of which there is a transcript but no tape, you acknowledge that part of the broadcast occurred, but contend that the call was cut off immediately after the words "blow job." Because the transcript contains the entire joke, which you claim was not broadcast in full, you contend that the complainant and the caller must be the same person, reasoning that only the caller would know the entire joke.

In connection with the second broadcast, which occurred a few minutes after the first and which was taped by the complainant, you contend that you "auditioned" a male caller who presented a "clean" joke during the pre-screening and then substituted the one actually broadcast when the call was placed on the air. You state that you suspected this caller was the same one who had previously been cut off, but were not sure, and therefore elected to broadcast the call despite your concerns. You claim that you were horrified by the material presented, immediately admonished the caller and apologized to the audience, but that your "outraged reaction" was edited from the tape submitted by the complainant.

You argue that since these broadcasts were isolated and fleeting and were the only incidents of objectionable material to have occurred during the call-in joke contest, a patently offensive context was not created. Furthermore, you contend that you should not be held responsible for live and spontaneous broadcasts when a caller, who you believe may be a competitor intent on harassing you, deceives you and then intentionally places what he hopes will be objectionable material onto "your" air.

Because there is no tape or other evidence to establish the extent of the first broadcast, we are unable to resolve the conflict between your assertion that the joke was cut off as soon as objectionable material was encountered and the complainant's apparent contention that the entire joke was aired. Under these circumstances, and given the brief, live and unscripted nature of the material as well as its outside source, we will take no further action with respect to this broadcast. We emphasize, however, that licensees bear ultimate responsibility for the programming they broadcast, regardless of its source, and that failure to take the necessary precautions to prevent a repetition of this incident would weigh against you in any future enforcement action.

The second broadcast, however, is a different matter. While it also occurred in the context of live and spontaneous programming and was of short duration, you admit your suspicion that the caller involved was the same person who had told the objectionable joke only eight minutes earlier. Despite this substantial concern, you chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device. Furthermore, the broadcast was not cut off at the first sign of questionable material. Indeed, station personnel actually encouraged the caller by inviting the punch line. Under these circumstances, your contention that the material is not actionable because it was fleeting and aired in spontaneous and live programming is unpersuasive. Finally, we find that the context of the subject broadcast rendered clear and inescapable the import of the material aired as a patently offensive reference to sexual contact with a female infant.

We conclude that the material in question is apparently indecent in that it contains language that describes sexual activities in patently offensive terms. Moreover, because the material aired at times when there was a reasonable risk that children may have been in the audience (morning hours, after 6:00 a.m.), it is legally actionable. Thus it appears that on August 30, 1991, Station KFMH-FM violated 18 U.S.C. Section 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, Flambo Broadcasting, Inc., is hereby advised of its apparent liability for a forfeiture of twelve thousand five hundred dollars (\$12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and reflected in our *Policy Statement on Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *appeal pending sub nom. USTA v. FCC*, Case No. 92-1321 (D.C. Cir. July 30, 1992). Under these standards, \$12,500 is the base forfeiture for the transmission of indecent or obscene material.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

#### FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief  
Mass Media Bureau

#### Attachments

Radio Station KFMH-FM, Muscatine, IA

Date/Time Broadcast: August 30, 1991, morning  
(after 6:00 a.m.)

Material Broadcast: Two jokes.

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First Broadcast: Partial transcript provided by complainant.

Man walks into a bar and orders 12 martinis.

Bartender says, "Wo, what are you celebrating?"

Man says, "Well, I got my first blow job today."

Bartender says, "Congratulations, let me buy you another one."

Man says, "No thanks, if twelve won't take the taste out of my mouth, then nothing will."

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Second Broadcast: Transcript of tape provided by complainant.

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MC: Male Caller MC2: Second Male Caller MV: Male Voice FV: Female Voice

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MV: Hi.

MC: Hello.

MV: Hello.

MC: Okay, I got a good one for you.

MV: What's your name?

MC: This is, Ev.

MC: Ev. Where you calling from, Ev?

MC: Cedar Rapids.

MV: OK.

MC: What do you do after you eat a bald pussy?

MV: (Laughter) I don't know Ev.

MC: Refasten the diaper.

MV: Ah, Ev, I'm not even going to ask the Ouija(?).

FV: We're too embarrassed

MV: Yeah, we're not even going to bring it up with the spirit world.

FV: No.

MV: Sorry. Should we have the Ouija pick or, one more.

FV: Oh.