

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

OFFICE OF COMMISSIONER
JAMES H. QUELLO

May 6, 1994

The Honorable Alfonse M. D'Amato
United States Senate
Washington, D.C. 20510

Dear Senator D'Amato,

While I am reluctant to respond yet again to your unfortunate comments regarding the FCC's handling of Infinity Broadcasting Corporation's application to purchase Station KRTH in Los Angeles, it is clearly necessary at this point in time to cut through the political rhetoric and get to the facts. Senator, I would not be doing my job as a public servant to let a matter that directly pertains to this agency, and that has been discussed on the floor of the U.S. Senate, pass without ensuring that the record is straight. The facts are as follows:

One. Your May 4, 1994 statement on the floor of the Senate focuses in large part on my mention of your religious and ethnic background. These two sentences were intended as a lighthearted, irrelevant portion of the seven page letter and eight-page transcript in which I explained in some detail the KRTH transaction and the Commission's indecency enforcement scheme. Religion and nationality are not relevant to my disposition of indecency matters, nor to this discussion. What is relevant is the facts surrounding the processing of the KRTH application.

While Infinity's application for KRTH was pending, several complaints were filed against Infinity stations airing Howard Stern. Section 309 of the Communications Act requires the Commission to determine, "whether the public interest, convenience, and necessity will be served" by granting the application before it. This evaluation includes a determination whether the licensee has the requisite character to be a Commission licensee and abide by the laws of Congress and the rules and regulations of the Commission. Of particular relevance is the question raised by a continuing pattern of apparent misconduct. At the time the KRTH application was being considered, Infinity had been adjudicated by the U.S. District Court for the D.C. Circuit (in the ACT I decision) to have aired indecent material during the Howard Stern show in 1987; had been found in a final Commission order to have aired indecent material in the Howard Stern show in 1988; and had been issued a NAL in 1992 and a NAL in 1993 for airing apparently indecent material.

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It would be irresponsible for this agency under these circumstances to ignore complaints against a licensee pertaining to a matter that the licensee has previously been adjudicated and sanctioned for prior to disposing of a pending application. Therefore, the full Commission considered, carefully and within the bounds of our indecency guidelines, the complaints against Infinity prior to granting the KRTH application.

I am attaching another copy of my April 29 letter, which sets forth in greater detail the facts surrounding the grant of the KRTH application. I stand squarely behind those facts.

Two. The FCC, in unanimous decisions, voted to issue four NALs to Infinity for Howard Stern broadcasts, totalling \$1,506,000. Attached are copies of these decisions which clearly indicate that each NAL was supported by the full Commission. These decisions also set forth excerpts from the Howard Stern Show that were the subject of the NALs. Again, I would like to paraphrase just a few of these passages for your edification:

- o reciting song lyrics about having sex with one's daughter ("My thick fingers will make you happier than Barney.");
- o spoofing Woody Allen saying that Dylan, a young child, is the right height to wash his genitals in the shower;
- o describing masturbating to a picture of Aunt Jemima as the closest he came to making love to a black woman;
- o talking about eating tuna fish reminds him what his wife tastes like.

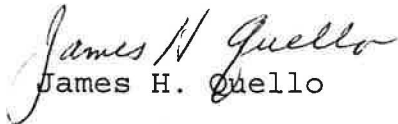
Three. I am attaching a copy of the ACT I, ACT II, and ACT III decisions, as you apparently are not familiar with their contents. These three cases have dealt primarily with the proper scope of the "safe harbor" for airing indecent programming. As I stated in my letter to you of April 29, 1994, the court in ACT I affirmed the Commission's authority to sanction indecent speech, its definition of broadcast indecency, and its finding that material aired by Infinity during the Howard Stern show was indecent. In each of these cases, the court remanded to the FCC the issue as to the proper scope of the safe harbor, which in ACT I was set by the Commission, and in ACT II and ACT III was set by Congress. In ACT II, the Court struck down Congress' directive that the Commission enforce the indecency ban on a 24-hour basis on the grounds that it violated the First Amendment. This 24-hour ban was adopted by Congress in 1988 as part of the FCC's Appropriations in a vote of 77 to 13. Senator, you were one of the 77 Senators that voted for the 24-hour indecency ban.

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Likewise, in 1992, you voted along with 92 of your colleagues for a midnight to 6:00 a.m. safe harbor which was struck down by the court in ACT III, which similarly found that the midnight to 6:00 a.m. safe harbor was not sufficiently narrowly tailored to comport with the First Amendment.¹

I find it ironic that you are now criticizing this agency, and myself in particular, for enforcing indecency laws that you have supported. Indeed, you have even supported making these laws stronger in a way that a federal district court has found inconsistent with the First Amendment.

Respectfully yours,


James H. Quello

Attachments

¹The decision in ACT III was vacated by the full court, and rehearing en banc was granted at the Commission's request.