

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

In the Matter of Liability of )  
 )  
CHESAPEAKE TELEVISION )  
LICENSEE, INC. )  
 )  
Licensee of Television Station )  
WBFF(TV), Baltimore, Maryland )  
Facility I.D. No. 10758 )  
 )  
for a Forfeiture )

### MEMORANDUM OPINION AND ORDER AND FORFEITURE ORDER

**Adopted: January 13, 2000**

**Released: January 14, 2000**

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, 47 C.F.R. § 0.283, has before it for consideration: (i) a Notice of Apparent Liability in the amount of ten thousand dollars (\$10,000) issued against Chesapeake Television Licensee, Inc. (Chesapeake Television), licensee of station WBFF(TV), Baltimore, Maryland, *Chesapeake Television Licensee, Inc. (WBFF(TV))*, DA 97-292 (MMB Released Feb. 10, 1997) (*WBFF NAL*); and (ii) Chesapeake Television's Response to *WBFF NAL* filed on March 10, 1997 (Response). The forfeiture was assessed for apparent repeated violations of Section 73.670 of the Commission's Rules, 47 C.F.R. § 73.670, which limits the amount of commercial matter that may be aired during children's programming.

2. In *WBFF NAL*, we found that station WBFF(TV)'s record of exceeding the Commission's commercial limits during the last license term constituted a repeated violation of Section 73.670 of the Commission's Rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), Chesapeake Television was advised of its apparent liability for forfeiture in the amount of \$10,000. That amount was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the five criteria consisting of: (1) the number of instances of commercial overages; (2) the length of each overage; (3) the period of time over which the overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gave for the overages. Applying these criteria to the facts of station WBFF(TV)'s case, we considered the five violations reported by Chesapeake Television. Those violations included four program-length commercials, the category of violations over which Congress expressed particular concern because young children often have difficulty distinguishing between commercials and programs. Based on the number and type of violations, we concluded

that children had been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990.<sup>1</sup> We noted, moreover, the Commission's statement made at the time it delayed the effective date of Section 73.670 of the Rules from October 1, 1991, until January 1, 1992, that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance . . . ."<sup>2</sup> In doing so, we rejected the reasons offered by Chesapeake Television -- human error and inadvertence on the part of the station staff and program suppliers -- as bases for excusing station WBFF(TV)'s violations of the commercial limits.

3. In responding to *WBFF NAL*, Chesapeake Television claims the forfeiture assessed against station WBFF(TV) was the base fine contained in *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*Policy Statement/Assessing Forfeitures*), which the Commission had previously used as a guideline for assessing forfeitures and which had been set aside by the U.S. Court of Appeals for the District of Columbia. Chesapeake Television notes that, subsequent to the court's decision, the Commission commenced a rulemaking proceeding which proposed identical forfeiture guidelines. Because the rulemaking proceeding was pending at the time *WBFF NAL* was adopted, Chesapeake Television argues, the proposed imposition of a \$10,000 forfeiture essentially prejudged the outcome of that proceeding.

4. Chesapeake Television also contends that the kinds of errors which occurred at station WBFF(TV) were either inadvertent or beyond the licensee's control and, accordingly, should be considered "lesser offenses." To this end, Chesapeake Television contends that the 30-second overage was *de minimis* in nature and does not warrant a forfeiture. Therefore, Chesapeake Television surmises that we must have placed undue weight on the four program-length commercials, even though three of them occurred despite the licensee's efforts to comply with the Commission's Rules. Along this line, Chesapeake Television explains that two of the program-length commercials involved live network feeds from the Fox Network, while another involved a program in which the program supplier scheduled its own barter spots with no warning of a potential problem to station WBFF(TV). In such situations, Chesapeake Television claims, it would be unfair, and contrary to Congress' intent, to impose liability against the licensee. Furthermore, Chesapeake Television argues, it is well-established that a rule which allows for monetary penalties against those who violate it must give fair warning of the conduct the rule prohibits or requires, citing to *Diamond Roofing v. Occupational Safety and Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976); *accord, Gates and Fox Co., Inc. v. Occupational Safety and Health Review Commission*, 790 F.2d 154, 156 (D.C. Cir. 1986). Because Section 73.670 of the Rules does not define or include the term "children's program-length commercial," Chesapeake Television reasons, it is unfair to construe the rule as giving fair notice of a prohibition on children's program-length commercials and, therefore, the Commission may not lawfully impose

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<sup>1</sup> Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394.

<sup>2</sup> *Id.* at 5530 n.10.

a monetary forfeiture for them.

5. Finally, Chesapeake Television maintains, relevant case precedent does not support the proposed forfeiture. In this regard, Chesapeake Television contends that the cases cited in *WBFF NAL* fail to justify the \$10,000 forfeiture, and that two of the cited rulings are on appeal. Chesapeake Television also asserts that the forfeiture assessed against station WBFF(TV) is inconsistent with the forfeitures assessed in other cases contemporaneous with *WBFF NAL*, pointing to *Sullivan Broadcasting License Corporation (WTAT-TV)*, DA 97-393 (MMB released Feb. 26, 1997) (\$12,500 forfeiture assessed for 21 violations, including three program-length commercials) (*Sullivan Broadcasting*); *Paramount Stations Group, Inc. (WDCA(TV))*, 12 FCC Rcd 14890 (MMB 1997) (\$15,000 forfeiture assessed for 20 violations, including 11 program-length commercials) (*Paramount*); and *Jefferson-Pilot Communications Company (WBTB(TV))*, DA 97-468 (MMB released March 4, 1997) (\$20,000 forfeiture assessed for 79 violations) (*Jefferson-Pilot*). For all of these reasons, Chesapeake Television concludes, the forfeiture assessed against station WBFF(TV) should be rescinded.

6. *Discussion.* In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement/Assessing Forfeitures*, stating that the guidelines for assessing forfeitures established therein must be subject to public comment to comply with the Administrative Procedure Act. In accordance with the court's decision, the Commission released *Forfeiture Guidelines - Notice of Proposed Rulemaking in CI Docket No. 95-6*, 10 FCC Rcd 2945 (1995). After receiving and considering comments from the public in that proceeding, the Commission adopted *Forfeiture Guidelines - Report and Order in CI Docket No. 95-6*, 12 FCC Rcd 17087 (1997) (*Forfeiture Guidelines*). *Forfeiture Guidelines* became effective on October 14, 1997. 62 Fed. Reg. 43474 (August 14, 1997). However, with regard to (i) all cases pending when *Forfeiture Guidelines* was adopted, and (ii) all cases involving "violations arising from facts that occurred before the effective date of th[at] order," forfeiture amounts are to be assessed "under the case-by-case approach in effect when the violation occurred," in conformity with the standards set out in Section 503 of the Communications Act. *Id.* at 17108-9. Also under the *Forfeiture Guidelines*, the Commission retained its "discretion . . . to issue forfeitures on a case-by-case basis, under [its] general forfeiture authority contained in Section 503 of the Act." *Id.* at 17099.

7. In *WBFF NAL*, we did not specifically refer to *Policy Statement/Assessing Forfeitures* having been set aside by the court of appeals or the pendency of the rulemaking proceeding which subjected the forfeiture guidelines to public comment. However, more importantly, we applied the same criteria in *WBFF NAL*, see *supra* ¶ 2, as we did in the other cases which arose after *Policy Statement/Assessing Forfeitures* had been set aside and pending adoption of *Forfeiture Guidelines*.<sup>3</sup> In *WBFF NAL*, we articulated those criteria, which were developed and applied by the Commission in previous cases, and stated that they were "appropriate in analyzing violations of the commercial

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<sup>3</sup> See, e.g., *Centennial Communications, Inc. (WGNT(TV))*, DA 97-197 (MMB 1997); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (MMB 1995), *aff'd*, 13 FCC Rcd 10099 (MMB 1997); *UTV of San Francisco (KBHK-TV)*, 10 FCC Rcd 10986 (1995).

limits during children's programming, since they take into account, *inter alia*, 'the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability,' as required under §503(b)(2)(D) of the Communications Act."<sup>4</sup> As the forfeiture amount in the instant case was determined in accordance with those criteria in conformity with the standards established in Section 503 of the Communications Act, Chesapeake Television is incorrect in asserting that application of the criteria in the instant case was inappropriate or improper.

8. We disagree, moreover, with Chesapeake Television's argument that station WBFF(TV)'s violations did not warrant imposition of a forfeiture because of the kinds of errors which caused them. While we considered the explanations given for the violations, we also said that the Commission has repeatedly rejected human error, inadvertence and a licensee's reliance on a program's source or producer for compliance with our children's television rule and policies as bases for excusing violations of Section 73.670 of the Rules.<sup>5</sup> Chesapeake Television has offered no reason why we should accept those same explanations to mitigate or excuse the violations in this case. Nor does Chesapeake Television stand correct in asserting that it had no fair notice of the prohibition on program-length commercials because Section 73.670 does not include or define that term. Indeed, fair notice of the conduct required or prohibited by a regulation must be provided before a violation of the regulation can occur. To determine whether adequate notice was provided, the Court of Appeals for the District of Columbia has stated that:

If, by reviewing the *regulations and other public statements* issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation. [emphasis added]

*General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). As a Commission licensee, Chesapeake Television is charged with having had notice of *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991) (*Children's Television Programming*), which adopted Section 73.670 of the Rules.<sup>6</sup> There, as Chesapeake Television admits, the Commission also defined a children's program-length commercial. In doing

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<sup>4</sup> *WBFF NAL*, ¶ 4.

<sup>5</sup> See, e.g., *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (MMB 1995), *aff'd*, 13 FCC Rcd 10099 (MMB 1997) (*Act III Broadcasting*); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994), *aff'd*, 12 FCC Rcd 20490 (MMB 1997) (*Ramar*); *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995). These cases were also cited in *WBFF NAL*. At the time we issued *WBFF NAL*, two of those cases, *Act III Broadcasting* and *Ramar*, were on appeal. Our decisions in those cases have since been affirmed.

<sup>6</sup> We note that the Federal Register citation for *Children's Television Programming* follows the text of Section 73.670 of the Rules.

so, we note, the Commission adopted the conclusion set forth in the *Notice of Proposed Rulemaking*,<sup>7</sup> which initiated the process of implementing the Children's Television Act of 1990, that "any children's program found to be a program-length commercial would count toward the statutory commercial limits."<sup>8</sup> Given that the children's television commercial limits and policies became effective more than eight months after their adoption, *see supra* ¶ 2, we believe Chesapeake Television had ample opportunity to identify and become familiar with them. For these reasons, we believe Chesapeake Television had fair notice of the prohibition on children's program-length commercials and may lawfully be fined for them.

9. Turning to the argument that the Commission accorded it disparate treatment when assessing the \$10,000 forfeiture against station WBFF(TV) compared to the forfeitures assessed in *Sullivan Broadcasting*, *Paramount* and *Jefferson-Pilot*, we reject Chesapeake Television's attempt to make a violation-by-violation comparison with those cases. The Communications Act does not require the Commission to attribute monetary liability to each separate violation. *See Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991); *Niagara Frontier Broadcasting Corp.*, 51 FCC 2d 525 (1975), *aff'd*, 36 RR2d 1584 (1976), *recon. granted in part*, 38 RR2d 1004 (1976). Further, the Commission has a great deal of discretion under Section 503 of the Communications Act in determining forfeiture amounts. *Triple X Broadcasting Co., Inc.*, 46 RR2d 788, 789 (B/C Cur. 1979), *citing Brennan Broadcasting Co.*, 25 FCC 2d 400, 405 (1970). Such discretionary authority holds particular relevance given the different factors involved in compliance with the children's television commercial limits (*e.g.*, number, type and duration of overages, period of time over which the violations occurred, extent of compliance program), making it impossible to devise a precise formula to calculate forfeiture amounts. The Commission, moreover, "is not bound to deal with all cases at all times as it has dealt with some that appear comparable." *Triple X Broadcasting, supra*, *citing Continental Broadcasting Co. v. FCC*, 439 F.2d 580, 583 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971).

10. In any event, contrary to Chesapeake Television's assertion, the monetary forfeiture assessed in *WBFF NAL* is generally consistent with forfeitures imposed in roughly similar cases, such as *Gannett Massachusetts Broadcasting, Inc. (WLVI-TV)*, 9 FCC Rcd 1555 (MMB 1994) (*Gannett*) and *Ramar, supra* n.5.<sup>9</sup> In *Gannett*, a \$10,000 forfeiture was assessed for seven violations of the children's television commercial limits. The violations consisted of one 28-second overage, one 30-second overage, one one-minute overage and three program-length commercials, and were attributed to human error. We also assessed a \$10,000 forfeiture in *Ramar* for station KJTV(TV)'s violation of the commercial limits on six occasions. Of those violations, one was 15 seconds in duration, two were 30 seconds in duration and three were program-length commercials. The licensee in that case maintained that the violations resulted from inadvertent staff and logging errors, and that procedures had been instituted to prevent a recurrence. When compared,

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<sup>7</sup> 5 FCC Rcd 7199 (1990).

<sup>8</sup> *Children's Television Programming*, 6 FCC Rcd at 2118.

<sup>9</sup> In *WBFF NAL*, we cited to *Gannett* and *Ramar* in support of our assessment of a \$10,000 forfeiture against station WBFF(TV).

similarities may be drawn between all three cases, as nearly the same number and type of violations were reported by each licensee. More specifically, station WBFF(TV) reported a slightly lower number of total violations, but a higher number of program-length commercials, than the stations in *Gannett* and *Ramar*. In this regard, we note that the Commission has routinely assessed higher forfeitures for program-length commercials than for a greater number of conventional overages. See, e.g., *Channel 39 Licensee, Inc. (WDZL(TV))*, 12 FCC Rcd 14012, 14015 n.3 (1997). Finally, all three licensees offered virtually the same reasons for their violations. In view of the foregoing considerations, we believe that a forfeiture in the amount of \$10,000 is not only appropriate for the violations reported by station WBFF(TV), but also consistent with Commission policy. Given the totality of the facts and circumstances in this case, we see no reason to disturb our decision.

11. Accordingly, IT IS ORDERED THAT Chesapeake Television Licensee, Inc.'s Response to *Chesapeake Television Licensee, Inc. (WBFF(TV))*, 12 FCC Rcd 12444 (MMB 1997) IS DENIED. IT IS FURTHER ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), Chesapeake Television Licensee, Inc. FORFEIT to the United States the sum of ten thousand dollars (\$10,000) for repeated violations of Section 73.670 of the Commission's Rules, 47 C.F.R. §73.670. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. With regard to this forfeiture proceeding, Chesapeake Television Licensee, Inc. may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart  
Chief, Mass Media Bureau