

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

In the Matter of)	
)	
R. J.' S LATE NIGHT ENTERTAINMENT)	EB-01-IH-0003-KMS
CORPORATION)	Facility #54428
)	
Licensee of Noncommercial Educational Station)	
WHPR-FM, Highland Park, Michigan)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2001

Released: June 14, 2001

By the Chief, Enforcement Bureau:

I. Introduction

1. In this Order, we admonish R. J.' s Late Night Entertainment Corporation ("Late Night"), licensee of noncommercial educational station WHPR-FM, Highland Park, Michigan, for broadcasting advertisements in violation of Section 399B of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §399b, and Section 73.503 of the Commission's rules, 47 C.F.R. §73.503.¹ Late Night responded to our January 19, 2001, inquiry by submission dated February 8, 2001. We have carefully reviewed the record, including Late Night's response, and conclude that the licensee has violated the pertinent statutory and Commission underwriting rule provisions. While we believe that no monetary sanction is warranted at this time, we find that an admonishment is necessary to redress the statutory and rule violations. Moreover, we believe that it is appropriate to specifically advise Late Night of our concerns so that rule compliance may be fully achieved.

II. Background

2. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. §399b(a). As noted above, noncommercial educational stations may not broadcast advertisements. Although contributors of funds to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business.

3. The Commission noted that it may be difficult at times for licensees to distinguish between language that promotes versus that which merely identifies the underwriter, but expects that licensees exercise "reasonable, good faith judgment" in this area. See Xavier University, 5 FCC Rcd 4920 (1990); Public Notice, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," (April 11, 1986), *republished*, 7

¹ Our January 19, 2001, inquiry followed an earlier December 4, 2000, letter cautioning Late Night to comply with the pertinent Commission rules and policies regarding noncommercial underwriting messages.

FCC Rcd 827 (1992). As the Commission made clear in Xavier, it will not deem announcements impermissible where the “language at issue . . . is not clearly promotional as opposed to identifying and . . . the licensee exercised reasonable, good-faith judgment regarding the language. . . .”

III. Discussion

4. The key facts in this case are not in dispute. Late Night does not deny that the station broadcast the sponsored announcements described in our letter of inquiry and set forth in the attached transcript. Late Night also admits that “5 of the 6 announcements”² appear to exceed what is permissible under Section 399B of the Act, and the pertinent Commission policies and rules, “because these acknowledgments go beyond pure identification and are arguably promotional in nature.” However, Late Night argues that the “inappropriate nature” of the announcements subject to our January 19, 2001, inquiry is “very different from the inappropriate nature” of those subject to our earlier inquiry.³ Therefore, Late Night contends that the station’s broadcast of the later announcements does not undermine the veracity of its November 24, 2000, representation to the Commission that the station’s underwriting announcement practices have been remedied.

5. Regarding the issue of penalty, Late Night argues that the Commission should not impose a sanction for several reasons. In this regard, it asks that we take into account the fact that the station received no direct remuneration for broadcast of the announcements contained in the programming donated by “The Thomas Pope Show” and Dudley Broadcasting Network, Inc. (“DBN”). Further, Late Night asks that we consider the fact that it made a good-faith effort to comply with our rules after our earlier inquiry letter, but that during “the remedial process commenced in November [2000],” it did not fully grasp the thorough manner in which such announcements must be scrutinized in order to ensure rule compliance. As a result of a recent station policy change, Late Night claims that the station has “formally established a 3-member screening team” to ensure that the content of future underwriting announcements is acceptable and compliant with the Commission’s pertinent rules and policies.

6. We agree that a monetary sanction is not necessary to redress the statutory and rule violations at issue. This disposition is based upon the fact that Late Night appears to have taken further significant steps to ensure compliance with our underwriting rules. However, certain aspects of Late Night’s response warrant further examination.

7. Specifically, we caution Late Night to observe that, even in those instances where noncommercial licensees do not receive direct payment from for-profit sponsors, “consideration” that renders the broadcast of such underwriters’ promotional announcements inappropriate may nonetheless be present. In this connection, “remuneration” and “consideration” have been construed to include various forms. *See, e.g., Fuqua Communications, Inc.*, 30 FCC 2d 94, 97 (1971); *Window to the World Communications, Inc.*, 12 FCC Rcd 20239, 20241 (MMB 1997), *affirmed in part, modified in part*, 15 FCC Rcd 10025 (EB 2000). In the instant case, Late Night indicates that the live-feed of “The Tom Pope Show,” received from DBN, contained the prohibited announcements, and that DBN supplied the program to its station free of charge. Thus, the program itself appears to have been the “consideration” supporting the prohibited announcements’ broadcast. Consequently, in the future, Late Night should observe that

² Late Night claims that The Cotillion Club Banquet Center is a not-for-profit entity and that it is therefore permissible for a noncommercial station to broadcast promotional underwriting announcements on its behalf. We agree.

³ Late Night refers to our letter of inquiry dated November 6, 2000.

underwriting announcements accepted through a “live-feed” from a network programmer also warrant similar textual scrutiny to those produced by the station itself. Id.

8. Finally, contrary to Late Night’s explanation, the text of at least one of the current announcements undercuts its earlier claim of good-faith rule compliance efforts. In this regard, we note that the station’s own internal policy guide entitled “Rules and Regulations WHPR 88.1 FM Sponsored Programming,” submitted to the Commission in its November 24, 2000, response, contains as its first underwriting announcement instruction the admonition that “[t]here cannot be any mention of sale prices, percentages, discounts, or bargains when advertising sponsors.” Despite the station’s internal policy, it thereafter repeatedly broadcast a State Farm Insurance announcement that conveyed, in addition to its comparative and qualitative message, obviously prohibited price information.⁴ As Late Night was admittedly aware by virtue of its own submission, prohibited price information includes not only specific price information, but also sponsor discounts and products or services offered by the sponsor at no cost or “free.” See Xavier, supra. We caution Late Night to ensure in the future not only that it has appropriate written policies in place but also that station management and other relevant employees fully understand and consistently apply the policies.

IV. Ordering Clauses

9. In view of the foregoing, we conclude that a sanction is appropriate. Accordingly, IT IS ORDERED that R. J.’s Late Night Entertainment Corporation, licensee of noncommercial educational station WHPR-FM, Highland Park, Michigan, IS ADMONISHED for broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. §399B, and Section 73.503 of the Commission's rules, 47 C.F.R. §73.503.

10. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order shall be sent, by Certified Mail -- Return Receipt Requested, to Rosalind M. Parker, Esq., Counsel for R. J.’s Late Night Entertainment Corporation, 1140 Connecticut Avenue, N.W., Suite 1142, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

Attachment

⁴ The text of that announcement reads as follows: “Today it seems everybody is offering a discount in car insurance. But at what price? Reduced protection and personal service? At State Farm, you can earn discounts and still get full service and dependable protection. . . .”

ATTACHMENT

The following text was taken from a recording of announcements aired by noncommercial educational station WHPR-FM during the month of December 2000.

1. State Farm Insurance (35 seconds)

Today it seems everybody is offering a discount in car insurance. But at what price? Reduced protection and personal service? At State Farm, you can earn discounts and still get full service and dependable protection. See State Farm Agent George Warden in Southfield, for the State Farm Multiple Lines Discount. With State Farm, you get an agent you can depend on. See State Farm Agent George Warden at 24361 Greenfield or call 248-569-8555.

2. Aknartoons Fine Foods Eatery (60 seconds)

Aknartoons Fine Foods Eatery has the dinners you will always enjoy. Aknartoons is located at 10300 Woodward Avenue at Calvert. Open seven days a week from 11:00 a.m. until 12:00 Midnight. Come in and try our dinners, excellent sides and delicious desserts. To order by phone, call 867-3102. That's 867-3102. Aknartoons Fine Foods Eatery, located at 10300 Woodward Avenue at Calvert. Aknartoons has something special for you every Thursday and Friday between the hours of 6:00 p.m. and 8:00 p.m. At Aknartoons, there's live entertainment with a band. Every Thursday and Friday from 6:00 p.m. until 8:00 p.m. Make sure you stop by to enjoy good food, good music and good friends at Aknartoons. Aknartoons Fine Foods Eatery.

3. Glory Foods (60 seconds; contained in live-feed from "The Thomas Pope Show")

[Lyrics sung to musical score]:

When you're in the mood for some home-cooked food with that real good, feel-good, down-home taste, make it easy on yourself –Get Glory Foods! Glory Foods -- Just about the best!

Help yourself to some soulful greens; complement well with candy sweets.
Top off that spread with delicious cornbread.

And you're talkin' about real good eatin'. . . .

Female Voice: "This year add to the ummm ummm ummm goodness of your holiday turkey or ham or just about any main dish with Glory Foods. From seasoned greens to black-eyed peas, Glory Foods are easy to prepare. So you spend more time with your family. Of course, nothing can replace the tastes your family's come home to for years, but Glory Foods is just about the best!"

[Lyrics sung to musical score]:

When you're in the mood for some home-cooked food with that real good, feel-good, down-home taste, make it easy on yourself –Get Glory Foods! Glory Foods -- Just about the best!

Narrator: Available at your local supermarket.

4. Wittnauer Watches (60 seconds; contained in live-feed from “The Thomas Pope Show”)

[Announcement spoken over musical background.]

Male Voice: “I hear you’re looking for a watch.”

Female Voice: “I want a Wittnauer.”

Male Voice: “Of course you want a watch with great looks.”

Female Voice: “I want a Wittnauer.”

Male Voice: “May I show you another. . . .?”

Female Voice: “I want a Wittnauer.”

Male Voice: “Over here we have an entire showcase filled with. . . .”

Female Voice: “I want a Wittnauer.”

Narrator: “Wittnauer Watches. Whether you want to dress up or dress down. Wittnauer Watch style is just what you want. Wittnauer Watches with Swiss Quartz accuracy.”

Male Voice: “Ma’am, is there any. . . .”

Female Voice: “I want a Wittnauer.”

Male Voice: “I know; I know. . . .”

Chorus: “I want a Wittnauer.”

Narrator: “You want the right watch, you want a Wittnauer. Wittnauer Watches, products of Wittnauer International.”

Female Voice: “I want a Wittnauer!”

Narrator: “Wittnauer Watches. Fine jewelry, of course.”

Company Spokesman: “Hi, I’m Charles D. Watkins, Vice Chairman of The Wittnauer Watch Company. Please call this toll-free number for the authorized Wittnauer Jeweler nearest you, at 1-888-367-9488 or 1-888-FORWITT.”

5. Rosemond Chiropractic (75 seconds; contained in live-feed from “The Thomas Pope Show”)

Pain is you body’s way of saying something is wrong. Early history speaks of the relief of “the laying on of hands.” Today this technique is manifest in the field of chiropractic. Dr. Luther P. Rosemond is the modern-day drugless physician. If you are experiencing pain as the result of a personal injury, auto accident, or job-related injury, let Dr. Rosemond show you how chiropractic techniques can restore and maintain your good health without the use of mind-dulling drugs. Dr.

Luther P. Rosemond will teach you how to use your body's natural maintenance system to keep it functioning in peak condition. And if you really want to give your stress a rest, contact Barbara Rosemond, a licensed massage-therapist, for relaxing and therapeutic massage. Call 313-837-9355, that's 313-837-WELL. Dr. Rosemond is located at 17701 Schoolcraft. . . .