

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
WXDJ LICENSING, INC.	)	File No. EB-03-IH-0275
	)	NAL Account No. 200432080026
Licensee of Station WXDJ(FM),	)	Facility No. 48368
North Miami, Florida	)	FRN No. 0004976874
	)	
	)	
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: April 22, 2004**

**Released: April 23, 2004**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that, on June 17, 2003, WXDJ Licensing, Inc. (“WXDJ”), licensee of Station WXDJ(FM), North Miami, Florida, apparently willfully violated Section 73.1206 of the Commission’s rules.<sup>1</sup> Based upon our review of the facts and circumstances in this case, and for the reasons discussed below, we conclude that WXDJ is apparently liable for a monetary forfeiture in the amount of Four Thousand Dollars (\$4,000.00).

**II. BACKGROUND**

2. The Commission received an informal complaint that Station WXDJ(FM) broadcast a telephone conversation between radio personalities Joe Ferrero and Enrique Santos of WXDJ and President Fidel Castro of the Republic of Cuba and four officials of the Cuban government.<sup>2</sup> According to the complaint, and a recording of the broadcast available on WXDJ(FM)’s website, Mr. Santos and Mr. Ferrero pretended to be President Hugo Chavez of Venezuela and a high-ranking Venezuelan government official, and telephoned the Cuban Ministry of Foreign Relations, requesting to speak to President Castro. Each Cuban official was informed that President Chavez was on the line waiting to speak to President Castro on an urgent matter and each official transferred the caller to another official closer to the intended recipient until President Castro answered the phone. When Mr. Castro answered the phone, Mr. Ferrero informed him that President Chavez was on the line and wished to speak to him concerning the loss of some sensitive material. Moments later, Mr. Ferrero revealed the ruse to Mr. Castro and identified himself and Mr. Santos as employees of Station WXDJ(FM).

3. After reviewing the complaint, we issued a letter of inquiry to WXDJ, in which we requested that the licensee confirm whether Station WXDJ(FM) had broadcast either a live or recorded

<sup>1</sup> 47 C.F.R. § 73.1206.

<sup>2</sup> Ferrero and Santos are morning talk show hosts of “*El Vacilón de la Mañana*” (“*The Morning High Jinks*”).

telephone conversation between WXDJ's radio personnel and Cuban government officials, and the time and date of each such broadcast.<sup>3</sup> We further requested that WXDJ identify whether the station's personnel had provided each party to the telephone conversation with prior notice that they intended to air the conversation.

4. In its response to our letter of inquiry,<sup>4</sup> WXDJ admitted that, on June 17, 2003, at 11:08 a.m., Station WXDJ(FM) recorded a telephone conversation between Joe Ferrero and Enrique Santos and President Fidel Castro of the Republic of Cuba and four officials of the Cuban government prior to its broadcast; that the Cuban officials were not provided with notice that their conversations were to be broadcast prior to recording; and that Mr. Castro was only provided with notice of the station's intent to record and broadcast the conversation after the conversation had commenced. WXDJ further admits that the telephone conversation was broadcast a total of five times between June 17 and 18, 2003. Finally, WXDJ maintains that section 73.1206 of the Commission's rules does not apply "to a head of state of a foreign nation whose trade is embargoed and to which travel by U.S. [c]itizens is restricted, and is therefore considered to be 'hostile' to the United States."<sup>5</sup>

### III. DISCUSSION

5. Under section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"),<sup>6</sup> any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>7</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>8</sup> As we set forth in greater detail below, we conclude under this standard that WXDJ is apparently liable for a forfeiture for its apparent willful violation of section 73.1206 of the Commission's rules.

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<sup>3</sup> See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to WXDJ Licensing, Inc., dated December 11, 2003.

<sup>4</sup> Letter from Allan G. Moskowitz, Esq., attorney for WXDJ Licensing, Inc., to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated January 7, 2004 ("Response").

<sup>5</sup> Id. at 5.

<sup>6</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>7</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>8</sup> See, e.g., *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

6. Section 73.1206 of the Commission's rules provides, in pertinent part:

Before recording a telephone conversation for broadcast . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as [sic] employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

Thus, section 73.1206 requires licensees to notify parties to a telephone call *before* it initiates recordings for simultaneous or later broadcasts. The Commission has stated that “[t]he recording of such conversation with the intention of informing the other party later – whether during the conversation or after it is completed but before it is broadcast -- does not comply with the Rule . . . .”<sup>9</sup> The rule reflects the Commission's longstanding belief that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoidance of nonconsensual broadcasts of their conversations.<sup>10</sup> Thus, the Commission has held that the prior notification requirement ensures the protection of an individual's “right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station” live or by recording for delayed airing.<sup>11</sup> Applying this reasoning, the Commission has defined “conversations” broadly “to include any word or words spoken during the telephone call,” and specifically has rejected arguments that “utterances made by parties called in answering the phone” are not subject to the rule's prior notification requirement.<sup>12</sup> In this case, Mr. Santos and Mr. Ferrero failed to provide prior notification to the recipients of the phone calls that they intended to record and broadcast the conversation, and spoke to all five recipients on the air before informing the last one that they were employees of WXDJ. Nor is there any basis for presuming that the recipients would have been aware that the conversations would be broadcast.

7. Further, we find no merit in WXDJ's claim that it was somehow exempt from complying with the telephone broadcast rules because the recipients of the phone calls reside in Cuba, a country in which the United State maintains no diplomatic relations and to which travel by US citizens is restricted. It is the specific conduct of the licensee that section 73.1206 of the Commission's rules seeks to proscribe, and we find nothing in the rule that excuses the prohibited conduct on the basis of the recipients' residence or their political status.<sup>13</sup> The rule is designed to promote disclosure by licensees

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<sup>9</sup> *Station-Initiated Telephone Calls which Fail to Comply with Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972) (“1972 Public Notice”).

<sup>10</sup> *See Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) (“1988 Order”); *1972 Public Notice*, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); *see also EZ Sacramento, Inc. and Infinity Broadcasting Corporation of Washington, D.C.*, Memorandum Opinion and Order, 16 FCC Rcd 4958, 4958 (2002) (finding that prior notifications “effectively cease” when callers are put on hold, and that thus explicit notice must be given if stations plan to continue such broadcasts or record such conversations for later broadcasts); *Hefel Broadcasting-Contemporary, Inc.*, Memorandum Opinion and Order, 52 FCC 2d 1005, 1006 (1975) (finding that “cash call” promotions that simultaneously broadcast, and award prizes based on, parties' responses in answering the telephone are subject to section 73.1206's prior notification requirement) (emphasis added).

<sup>11</sup> *1988 Order*, 3 FCC Rcd at 5463.

<sup>12</sup> *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC 2d at 1006.

<sup>13</sup> *See, e.g., Tempe Radio, Inc.*, 18 FCC Rcd 20102 (2003) (Notice of Apparent Liability issued for violation of section 73.1206 where complaint was filed by member of listening public and not recipient of telephone call).

before a conversation is recorded and/or broadcast and to curb behavior that would result in a recipient of a call being embarrassed or surprised by a licensee. It was in fact the intention and result of WXDJ's actions to fool and surprise the recipients of the call. While Fidel Castro was the ultimate target of WXDJ, none of the other recipients were informed prior to the commencement of the conversation that their exchange was being recorded for later broadcast.

8. Based upon the information before us, we conclude that, on June 17, 2003, WXDJ broadcast a conversation between employees of WXDJ and officials of the Cuban government without providing prior notice that it intended to air their conversation, in apparent willful violation of section 73.1206 of the Commission's rules. In light of this apparent violation, we find that WXDJ should be assessed a monetary forfeiture. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000.00 for the unauthorized broadcast of a telephone conversation<sup>14</sup> and provides that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) and 1.80(a)(4), which include "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>15</sup> Based upon the facts and circumstances presented here, we find the base amount of Four Thousand Dollars (\$4,000.00) to be the appropriate proposed forfeiture amount.<sup>16</sup>

#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>17</sup> and Sections 0.111, 0.311 and 1.80 of the Commission's rules,<sup>18</sup> WXDJ Licensing, Inc., licensee of WXDJ(FM), North Miami Beach, Florida, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of Four Thousand Dollars (\$4,000.00) for willfully violating Section 73.1206 of the Commission's rules on October 3, 2002.<sup>19</sup>

10. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the rules,<sup>20</sup> within thirty (30) days of this NOTICE OF APPARENT LIABILITY, WXDJ Licensing, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) referenced above and also must note the NAL/Acct. No. referenced above.

11. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

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<sup>14</sup> See *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *Forfeiture*, 15 FCC Rcd 303 (1999).

<sup>15</sup> *Id.* at 17100-01.

<sup>16</sup> See, e.g., *El Mundo Broadcasting Corp.*, 15 FCC Rcd. 20377 (EB 2000), *Forfeiture Order*, 16 FCC Rcd 4513 (EB 2001) (forfeiture lowered from \$6,000.00 to \$4,000.00).

<sup>17</sup> 47 U.S.C. § 503(b).

<sup>18</sup> 47 C.F.R. §§ 0.111, 0.311 and 1.80.

<sup>19</sup> 47 C.F.R. § 73.1206.

<sup>20</sup> 47 C.F.R. § 1.80.

12. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>21</sup>

13. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

14. Accordingly, IT IS ORDERED that the complaint filed against WXDJ Licensing, LLC, licensee of WXDJ(FM), North Miami, Florida, IS GRANTED to the extent set forth herein.

15. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to WXDJ Licensing, Inc., 2601 South Bayshore Drive, Penthouse 2, Coconut Grove, FL 33133 and to Allan G. Moskowitz, Esq., Kaye Scholer LLP, 901 15<sup>th</sup> Street, NW, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>21</sup> 47 C.F.R. § 1.1914.

## Attachment A

### FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

<b>(1) Small Organization</b>	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
<b>(2) Small Governmental Jurisdiction</b>	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
<b>(3) Small Business</b>	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
<b>Industry Type</b>	<b>Description of Small Business Size Standards</b>
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

**Note:** With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<i>Mass Media Services</i>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – <b>Small Business</b> is less than \$40M in annual gross revenues for three preceding years
<i>Wireless and Commercial Mobile Services</i>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - <b>Small Business</b> is \$40M or less in annual gross revenues for three previous calendar years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - <b>Small Business</b> is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	

Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	<b>Small Business</b> is 1,500 employees or less <b>Small Government Entities</b> has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	<b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – <b>Small Business</b> has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years <b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – <b>Small Business</b> is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	<b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) <b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
<b>Miscellaneous</b>	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer



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Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)