

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

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

**FORFEITURE ORDER**

**Adopted: November 23, 2004**

**Released: November 24, 2004**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order*, we issue a monetary forfeiture in the amount of \$3,500 to WXDJ Licensing, Inc., licensee of Station WXDJ(FM), North Miami, Florida for the willful broadcast of an unauthorized telephone conversation in violation of section 73.1206<sup>1</sup> of the Commission's rules.

**II. BACKGROUND**

2. The Enforcement Bureau received an informal complaint alleging that on June 17, 2003, 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. They telephoned the Cuban Ministry of Foreign Relations, requesting to speak to Mr. Castro. After the DJs convinced several Cuban officials that President Chavez was on the line waiting to speak to Mr. Castro on an urgent matter, Mr. Castro answered the phone. When Mr. Castro did so, 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).<sup>3</sup>

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

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<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*").

<sup>3</sup> This conversation was pre-recorded on June 17, 2003 at 11:08 AM and broadcast three times later that day from 5:30 PM to midnight, and two additional times on the following day.

recorded telephone conversation between WXDJ's radio personnel and Cuban government officials.<sup>4</sup> In its response, WXDJ admitted it 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.<sup>5</sup>

4. Based on the Bureau's review of the facts and circumstances of this case and after considering WXDJ's response to our LOI, we concluded that WXDJ broadcast a conversation between employees of WXDJ and officials of the Cuban government without providing prior notice that the licensee intended to air their conversation, in apparent willful violation of section 73.1206 of the Commission's rules. The Bureau therefore proposed a forfeiture at the base amount of \$4,000 for the unauthorized broadcast of a telephone conversation.<sup>6</sup>

### III. DISCUSSION

5. In its response to the NAL, WXDJ does not dispute that it broadcast a conversation between employees of WXDJ and officials of the Cuban government without providing prior notice that it intended to air their conversation.<sup>7</sup> Instead, WXDJ seeks cancellation or reduction of the proposed forfeiture based on its claim that Mr. Castro received notice of the station's intent to record and air the conversation prior to its broadcast but after its recording.<sup>8</sup> Section 73.1206 of the Commission's rules, however, clearly requires a licensee to notify parties to a telephone call *before* it initiates recording 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> Further, the absence of a complaint or objection lodged with the Commission by

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<sup>4</sup> See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to WXDJ Licensing, Inc., dated November 18, 2003.

<sup>5</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 ("LOI Response").

<sup>6</sup> *WXDJ Licensing, Inc.*, Notice of Apparent Liability, DA 04-1047, 2004 WL 868562 (Enf. Bur. rel. April 23, 2004 ("NAL")).

<sup>7</sup> See *Request for Cancellation or Reduction of Forfeiture*, dated May 18, 2004 at 1-2. ("NAL Response").

<sup>8</sup> *Id.* at 2.

<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 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

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Mr. Castro or the other Cuban officials does not indicate, as WXDJ argues, that the recipients of the phone call consented to having their conversation broadcast, and we reject that claim. Finally, we reject the claim that the licensee is not liable for the broadcast because an unidentified third party, not one of the recipients of the phone call, complained to the Commission.<sup>11</sup> Given the important privacy interest that the rule serves, and the fact that WXDJ's conduct was exactly the type of conduct that the rule was meant to prohibit, we conclude that the forfeiture proposed in the NAL is appropriate.

6. WXDJ also requests that we provide it with the name of the complainant who filed the informal complaint revealing WXDJ's unauthorized telephone broadcast, maintaining that it is entitled to know the identity of the individual. WXDJ cites no authority in support of its request. By contrast, Commission rules prohibit the release of investigatory records compiled for law enforcement purposes where production of such records would "constitute an unwarranted invasion of personal privacy."<sup>12</sup> We believe that is the case here, in which the complainant specifically requested anonymity. To disclose the complainant's identity in such cases might have a chilling effect on the willingness of the listening public to assist the Commission in monitoring compliance with our rules and undermine our ability to obtain such information from the public. Thus, we will not divulge the requested information.

7. Finally, WXDJ asserts that it has a history of overall compliance and no record of any prior offenses.<sup>13</sup> Based on WXDJ's history of overall compliance, we will lower the forfeiture to \$3,500.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended,<sup>14</sup> that WXDJ Licensing, Inc., licensee of Station WXDJ(FM), North Miami, Florida,

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based on, parties' responses in answering the telephone are subject to section 73.1206's prior notification requirement).

<sup>11</sup> Contrary to WXDJ's unsupported contention that the complaint lacks standing to object to the broadcast in question, section 73.1206 does not impose a standing requirement. *See Tempe Radio, Inc.*, Notice of Apparent Liability and Forfeiture, 18 FCC Rcd 20102 (Enf. Bur. 2003) (forfeiture paid). In *Tempe*, the Enforcement Bureau issued an NAL based on a complaint from a member of the listening public rather than the recipient of the phone call unlawfully broadcast by the licensee. In that case, a radio personality phoned the recently widowed wife of a baseball pitcher, told her on the air that she was "hot," and asked whether "she had a date for Thursday's game." The radio personality then broadcast the conversation without informing the widow. Despite the complaint being initiated by someone other than the recipient of the call, the Bureau found the station liable for forfeiture.

<sup>12</sup> 47 C.F.R. § 0.457(g)(3); *see also William McConnell, Broadcasting and Cable*, Memorandum Opinion and Order, 18 FCC Rcd 26371, ¶4 (2003) (Enforcement Bureau properly granted respondent's request for confidential treatment of names supplied in response to an investigation, finding that release of the information "could reasonably be expected to 'constitute an unwarranted invasion of personal privacy.'" *Lenona E. Shook*, Memorandum Opinion and Order, FCC 86-46, 1986 FCC Lexis 3437 (rel. May 15, 1986) (Field Operations Bureau properly denied request by Citizens' Band operator to obtain identities of individuals who filed complaints with the Commission and expressly requested confidentiality); *Brian L. Snyder*, Memorandum Opinion and Order, FCC 85-138, 1985 FCC Lexis 3664, ¶ 3 (rel. March 22, 1985) (Field Operations Bureau properly denied respondent the name of complainants who had written letter to assist Commission in "effecting its duty to maintain and assure the proper use of the electromagnetic spectrum," despite respondent's desire to pursue civil remedies for alleged defamatory qualities of letter).

<sup>13</sup> *See* NAL Response at 3-4 (citing 47 C.F.R. § 1.80(b)(4)).

<sup>14</sup> *See* 47 U.S.C. § 503(b).

FORFEIT to the United States the sum of \$3500.00 for willfully broadcasting an unauthorized telephone conversation in violation of section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206.

9. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

10. IT IS FURTHER ORDERED that a copy of this *Forfeiture Order* shall be sent, by Certified Mail Return Receipt Requested, to WXDJ Licensing, Inc., care of its attorney, Allan G. Moskowitz, Esq., Kaye Scholer, LLP, 901 Fifteen Street, N.W., Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau