

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

In the Matter of	)	
	)	
Noe Corp., L.L.C.	)	File No. EB-03-IH-0508
	)	NAL/Acct. No. 200532080026
Licensee of Station KNOE-TV, Monroe, Louisiana	)	Facility ID No. 48975
	)	FRN No. 0001716588
	)	

**FORFEITURE ORDER**

**Adopted: July 14, 2005**

**Released: July 18, 2005**

By the Chief, Investigations and Hearings Division, Enforcement Bureau

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture against Noe Corp., L.L.C. (“Noe”), licensee of Station KNOE-TV, Monroe, Louisiana, for willfully and repeatedly violating section 73.1206 of the Commission’s rules<sup>1</sup> by twice recording telephone conversations for broadcast without informing the other party to the calls of its intention to record for broadcast the conversations. We find that a Noe news reporter twice recorded for broadcast the complainant’s voice, including the complainant’s answering machine, without informing the complainant beforehand. We reject Noe’s claims that the answering machine message did not constitute a “conversation” under our rules and that the purpose and the factual background for the recordings exempted Noe from any notice requirement. Although we affirm our earlier finding<sup>2</sup> that Noe twice violated section 73.1206, in light of Noe’s history of compliance with our rules, we reduce the forfeiture amount from \$10,000 to \$8,000.

**II. BACKGROUND**

2. The Bureau received a series of three complaints from Mack Calhoun, who serves on a Police Jury for Ouachita Parish in Louisiana. In the first complaint, a letter dated September 23, 2003,<sup>3</sup> Mr. Calhoun asserted that, on or about September 12, 2003, Station KNOE-TV news reporter Ken Booth telephoned Mr. Calhoun’s residence and, without providing prior notice to Mr. Calhoun, recorded his outgoing voice mail message with the intent to broadcast the recording.<sup>4</sup> According to Mr. Calhoun, Station KNOE-TV broadcast the recorded voice mail message later that day, during the evening news.<sup>5</sup> Mr. Calhoun filed additional complaints with the Commission on September 26, 2003, and April 20, 2004,<sup>6</sup>

<sup>1</sup>47 U.S.C. §503(b), 47 C.F.R. §1.80, 47 U.S.C. § 73.1206.

<sup>2</sup>*Noe Corp., LLC*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 595 (Enf. Bur 2005).

<sup>3</sup> See Letter from R. Steven Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated September 23, 2003 (“September 23 Complaint”).

<sup>4</sup>*Id.* at 1.

<sup>5</sup>*Id.*

<sup>6</sup> See Letter from R. Steven Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated September 26, 2003 (“September 26 Complaint”); Letter from R. Steven

stating that Mr. Booth telephoned Mr. Calhoun's residence again on September 25, 2003.<sup>7</sup> According to the complaints, when Mr. Calhoun answered the telephone and Mr. Booth identified himself as the caller, Mr. Calhoun immediately hung up.<sup>8</sup> Mr. Calhoun alleges that Mr. Booth again did not notify him at the time that he was recording the exchange with the intent of broadcasting it over Station KNOE-TV.<sup>9</sup> Mr. Calhoun states that Station KNOE-TV broadcast a recording of that brief dialogue during its newscast that evening.<sup>10</sup> He also alleges in the April 20 Complaint that Station KNOE-TV rebroadcast the September 12 recording of his outgoing voice mail message during another evening newscast, on April 20, 2004.<sup>11</sup>

3. After reviewing the complaints, the Bureau issued a letter of inquiry ("LOI") to Noe, directing Noe to provide information about its broadcast of telephone conversations involving Mr. Calhoun.<sup>12</sup> In its initial response and subsequent filing,<sup>13</sup> Noe admitted that, on September 12, 2003, Mr. Booth telephoned Mr. Calhoun's residence for the purpose of conducting and recording for later broadcast an interview with Mr. Calhoun about an upcoming news story.<sup>14</sup> Noe maintained that it had no intention at the time to record Mr. Calhoun's outgoing voice mail message, but, admitted that, when no one answered, Mr. Booth recorded the message and that Station KNOE-TV broadcast the recording that evening and again in April 2004.<sup>15</sup> Noe conceded that Mr. Booth did not notify Mr. Calhoun at the time of the telephone call that he was recording it for broadcast.<sup>16</sup> Noe also conceded that Mr. Booth telephoned Mr. Calhoun on September 25, 2003, and recorded their exchange without notifying Mr. Calhoun, but maintained that the broadcast did not include Mr. Calhoun's voice.<sup>17</sup>

4. On January 13, 2005, the Bureau issued the *NAL* against Noe, proposing a forfeiture in the amount of \$10,000. In the *NAL*, the Bureau tentatively concluded that Noe had broadcast conversations between Mr. Booth and Mr. Calhoun without providing prior notice to Mr. Calhoun that the licensee intended to air the conversations, in apparent willful and repeated violation of section 73.1206 of the

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Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated April 20, 2004, ("April 20 Complaint").

<sup>7</sup>September 26 Complaint at 1; April 20 Complaint at 1-2.

<sup>8</sup>April 20 Complaint at 1-2.

<sup>9</sup>*Id.* at 3.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Noe Corp. LLC, dated May 17, 2004.

<sup>13</sup>See Letter from Robert B. Jacobi, counsel for Noe Corp., L.L.C., to William Knowles-Kellett, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 16, 2004 ("Noe June 16, 2004, letter"). Letter from Robert B. Jacobi, counsel for Noe Corp., L.L.C., to William Knowles-Kellett, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 13, 2004 ("Noe August 13, 2004, letter").

<sup>14</sup>Noe June 16, 2004, letter at 2.

<sup>15</sup>*Id.* at 3; Noe August 13, 2004, letter at 4.

<sup>16</sup>Noe June 16, 2004, letter at 4.

<sup>17</sup>Noe August 13, 2004, letter at 4.

Commission's rules.<sup>18</sup> Particularly in light of Noe's rebroadcast of the first recording, the Bureau found that an upward adjustment to the base forfeiture amount was appropriate for the September 12, 2003 violation.<sup>19</sup> Therefore, based upon the facts and circumstances presented, Noe was found to be apparently liable in the amount of \$10,000 for violating the telephone broadcast rule on two occasions, \$6,000 for the September 12 recording and \$4,000 for the September 25 recording.

5. Noe has submitted a response to the *NAL* challenging the Bureau's conclusion that it violated section 73.1206 or, in the event a violation is found, seeking reduction or cancellation of the proposed forfeiture.<sup>20</sup> Although we conclude that Noe willfully and repeatedly violated section 73.1206, we hereby grant Noe's request for a reduction of the forfeiture amount.

### III. DISCUSSION

6. In its response to the *NAL*, Noe challenges the Bureau's conclusion that it apparently willfully and repeatedly violated section 73.1206 of the Commission's rules for the following reasons: 1) the voice mail message and "hello" should not be considered to constitute conversations; 2) that no notice was required under the circumstances in this case as Mr. Calhoun's status as a public official, his status as suspect in a public corruption scandal, the call was made during an investigative report, and/or Mr. Calhoun's invitation that members of the public contact him to discuss the situation, resulted in a waiver of his rights to privacy; and 3) Noe's broadcast of Mr. Calhoun's voice mail message was "fully protected by the First Amendment to the Constitution of the United States."<sup>21</sup>

7. We reject Noe's argument that no notice was necessary because the material broadcast did not constitute a conversation. The Commission has previously stated that the term "[c]onversation" as used in section 73.1206 includes any word or words spoken during the call.<sup>22</sup> As we have held previously, an outgoing voice mail message satisfies the requirements of a conversation.<sup>23</sup> In the instant case, Mr. Calhoun's outgoing voice mail message warrants the same treatment. Moreover, the Commission has previously held that "it is reasonable and desirable to retain for individuals the right to answer the telephone without having their voices or statements transmitted to the public by a broadcast station in the absence of prior notice."<sup>24</sup> As we noted in the *NAL* in rejecting a similar argument by Noe,<sup>25</sup> the "right to answer without having one's voice transmitted to the public exists irrespective of whether the voice broadcast or recorded for later broadcast is live or is lifted from an answering machine."<sup>26</sup> This rule

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<sup>18</sup>*Id.* at 1.

<sup>19</sup>*Id.* at 5-6.

<sup>20</sup>See Letter from Robert B. Jacobi, Esquire, counsel for Noe Corp., L.L.C., to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 14, 2005 ("Response to *NAL*")

<sup>21</sup>*Id.* at 1-4 and supporting Memorandum of Law at 11 *et seq.*

<sup>22</sup>*Heftel Broadcasting*, Memorandum Opinion and Order, 52 FCC 2d 1005, 1006 ¶4 (1975). See also *AMFM Radio Licenses*, Notice of Apparent Liability, 17 FCC Rcd 5032, 5033 ¶ 6 (Enf. Bur. 2002) (forfeiture paid).

<sup>23</sup>*AMFM Radio Licenses*, 17 FCC Rcd at 5033 ¶ 6; *Citicasters, Co.*, Notice of Apparent Liability, 15 FCC Rcd 13805, 13806-07 ¶¶ 5-6 (Enf. Bur. 2000) (forfeiture paid).

<sup>24</sup>*Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463 (1988).

<sup>25</sup>*NAL*, 20 FCC Rcd 595 at 598, ¶ 9 (quoting *AMFM Radio Licenses*, 17 FCC Rcd at 5033, ¶ 6).

<sup>26</sup>*Id.*

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>27</sup> Thus, in order to ensure the protection of an individual’s “privacy rights, the Commission has determined that a broadcast station must give notice of its intent to broadcast the conversation before transmitting or recording for later transmission of the telephone call.”<sup>28</sup>

8. We also reject Noe’s contention that no notice was necessary because there were no privacy rights to protect. Noe asserts that Mr. Calhoun waived his right to privacy because 1) at the time of the report, he was a public official, 2) he was a suspect in a public corruption scandal, 3) he was the subject of an investigative report, and/or 4) he invited members of the public to call him to discuss the matter.<sup>29</sup> As we noted in the *NAL* in rejecting this contention by Noe,<sup>30</sup> Mr. Calhoun’s status as a public official involved in a matter of public interest does not establish a legal basis for assuming that any telephone conversation with Mr. Calhoun could be recorded and subsequently broadcast without prior notice.<sup>31</sup> In *El Mundo Broadcasting Corporation*,<sup>32</sup> we explicitly refused to recognize an exception to section 73.1206’s notice requirements where a licensee failed to inform a government official of the licensee’s intention to record and broadcast the conversation between the official and an on-air personality.<sup>33</sup> In section 73.1206, the Commission specifically enumerated the instances in which a licensee is not required to inform a party of the licensee’s intention to broadcast a conversation: “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.”<sup>34</sup> Specifically section 73.1206 provides that the licensee may make such a presumption only when the party to the call is “associated with the station,” such as an employee or part-time reporter, or when the other party originates the call and it is obvious that the call is “in connection with a program in which the station customarily broadcasts telephone conversations.” Noe does not claim that either of these exceptions applies to this case. Accordingly, because the requirements for the exception are not met in this case, Noe was not exempted from the requirement to provide Mr. Calhoun with notice of its intention to record the conversations for broadcast.

9. We also note that Mr. Calhoun did not forego his right to the notice required by section 73.1206 by inviting the public to call and discuss the matter with him. Noe would have us take from the alleged invitation that Mr. Calhoun invited them to broadcast their calls to him. The facts as presented by Noe make it clear that Mr. Calhoun objected to being the subject of any broadcast -- Noe admits that he repeatedly rejected its invitation to be interviewed in this matter.<sup>35</sup>

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<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 2.

<sup>30</sup> *NAL*, 20 FCC Rcd 595 at 599, ¶ 11.

<sup>31</sup> *El Mundo Broadcasting Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 20377, 20379 (Enf. Bur. 2000).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>47 C.F.R. § 73.1206.

<sup>35</sup>Response to *NAL* at 3.

10. Finally, we again reject Noe's claim that Station KNOE-TV's broadcast of the telephone conversations "was fully protected by the First Amendment."<sup>36</sup> Although the Commission recognizes broadcasters' First Amendment concerns regarding section 73.1206 notice requirements,<sup>37</sup> the rule requires only that broadcasters provide prior notice to any party to a call and does not restrict a broadcaster's right to free speech. The Commission has held that "these limitations are both reasonable and necessary to protect the legitimate interests of the public in privacy in communications" and do not infringe upon broadcasters' right to gather information "important to their broadcast function."<sup>38</sup> For the foregoing reasons, we hereby conclude that Noe willfully and repeatedly violated section 73.1206 of the Commission's rules.

11. In support of its request for cancellation or reduction of the proposed forfeiture, Noe asks the Bureau to consider the following mitigating factors: 1) Station KNOE-TV has never previously received a notice of apparent liability, a forfeiture order or other monetary sanction, 2) other than minor technical violations approximately 15 to 20 years ago, Station KNOE-TV has been in compliance with the Commission's rules and regulations during the station's 51-year history, 3) the telephone call was not intended to pry into personal matters, was not a prank, and was not part of a contest or promotion, but rather was made in connection with an ongoing station investigation that had the objective of protecting the public interest, and 4) the station's efforts to contact Mr. Calhoun prior to the September 12 telephone call provided him with sufficient notice of the station's efforts to contact him, as well as notice that the telephone call might be broadcast as part of the ongoing news story.<sup>39</sup>

12. We reject Noe's claim that Station KNOE-TV's previous attempts to contact Mr. Calhoun provided him with sufficient notice to make him aware of the station's intent to broadcast the conversations. Section 73.1206 explicitly requires broadcasters to "inform any party to the call of its intention to broadcast and/or record the conversation."<sup>40</sup> Noe's claimed multiple attempts to contact Mr. Calhoun do not satisfy this requirement. We also reject Noe's claim that its purpose in making the recordings should cause us to reduce the proposed forfeiture. In prior telephone broadcast cases, we have not considered the fact that the violation occurred in a news gathering context as a mitigating factor.<sup>41</sup> Nevertheless, based on Noe's overall history of compliance with the Commission's rules, we find that a reduction in the forfeiture amount to the base amount of \$4,000 per violation is warranted, for a total forfeiture of \$8,000.<sup>42</sup>

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<sup>36</sup>*Id.*. See *NAL*, 20 FCC Rcd 599, ¶12.

<sup>37</sup>*Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5464, ¶ 21 (1988).

<sup>38</sup>*Id.*

<sup>39</sup>Response to *NAL* at 3-6.

<sup>40</sup>47 C.F.R. § 73.1206.

<sup>41</sup>See *Scripps Howard Broadcasting Company*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 602 (Inv. & Hearings Div., Enf. Bur. 2005) (*NAL* paid) (imposing forfeiture for recording complainant's conversation with station news reporter for broadcast without notice; increasing proposed forfeiture beyond base amount because station broadcast recording twice).

<sup>42</sup>*WXDJ Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd. 22445 (Enf. Bur. 2004). (forfeiture amount reduced based on *WXDJ*'s history of overall compliance with the Commission's regulations).

**IV. ORDERING CLAUSES**

13. ACCORDINGLY, IT IS ORDERED that, pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,<sup>43</sup> Noe Corp., L.L.C., IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$8,000 for willfully and repeatedly violating section 73.1206 of the Commission's rules.

14. IT IS FURTHER ORDERED THAT, payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Rules<sup>44</sup> within thirty (30) days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.<sup>45</sup>

15. IT IS FURTHER ORDERED that 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 Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

16. IT IS FURTHER ORDERED THAT requests for full payment under an installment plan should be sent to Chief, Revenue and Receivables Group, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554.<sup>46</sup>

17. IT IS FURTHER ORDERED that a copy of this *Order* shall be sent by First Class Mail and Certified Mail - Return Receipt Requested to Noe Corp., L.L.C., 1400 Oliver Road, Monroe, Louisiana 71201 and to its counsel, Robert B. Jacobi, Esquire, Cohn and Marks, LLP, Suite 300, 1920 N. Street, N.W., Washington, D.C. 20036; and by regular mail to R. Steven Calhoun, Esquire, The Law Office of R. Steven Calhoun, APLC, 3711 Cypress Street, Suite 4, West Monroe, Louisiana 71291.

FEDERAL COMMUNICATIONS COMMISSION

William H. Davenport  
Chief, Investigations and Hearings Division  
Enforcement Bureau

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<sup>43</sup>47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

<sup>44</sup>47 C.F.R. § 1.80.

<sup>45</sup>47 U.S.C. § 504(a).

<sup>46</sup>See 47 C.F.R. § 1.1914.