

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

In the Matter of)	
)	
KOFI, INC.)	File No. EB-03-IH-0742
)	NAL Account No. 200532080129
Licensee of Station KZMN(FM),)	Facility ID No. 35369
Kalispell, Montana)	FRN No. 0005072467
)	
)	
)	

FORFEITURE ORDER

Adopted: November 14, 2005

Released: November 15, 2005

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we impose a monetary forfeiture of \$4,000 against KOFI, Inc. (“KOFI”), licensee of Station KZMN(FM), Kalispell, Montana for violating section 73.1206 of the Commission’s rules¹ by broadcasting and recording for rebroadcast a telephone conversation without first informing the other party to the conversation of its intention to do so.

II. BACKGROUND

2. On March 17, 2005, we issued a Notice of Apparent Liability (“NAL”)² for \$6,000 based on a complaint from Lisa Simmer. Ms. Simmer alleged, and KOFI acknowledged, that Station KZMN(FM) broadcast live and recorded for rebroadcast a telephone conversation between herself and the on-air personality Paul Gray, without providing her prior notice of such recording and broadcast.³ Specifically, Ms. Simmer stated that on November 14, 2003, Station KZMN(FM) broadcast, and recorded for later rebroadcast, a telephone conversation between her and Mr. Gray, without notifying Ms. Simmer of its intention to do so.⁴ The complainant states that she witnessed a turkey being suspended from a second floor window of the station’s building and expressed to a coworker her concern that this action was inhumane. When her coworker called the station to complain, the person who answered the phone transferred her call to Mr. Gray, who was taking phoned-in donations for a local food bank drive called “Save the Turkey” live and over the air. After the coworker advised Mr. Gray of her unhappiness with

¹ 47 C.F.R. § 73.1206.

² See *KOFI, Inc.*, Notice of Apparent Liability, 20 FCC Rcd 5995 (2005) (“NAL”).

³ See Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated November 16, 2003 (“*Complaint*”).

⁴ See Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated November 14, 2003 (“*Complaint*”).

the situation, Mr. Gray asked to speak with Ms. Simmer. He explained to Ms. Simmer that the hanging turkey was intended to promote the station's food bank drive, told her to quit complaining and directed her to listen to the station. The complainant later learned that the station had broadcast the conversation live and then broadcast of a recording of it at a subsequent time. Ms. Simmer states that she was neither aware of nor informed that she was on the air live or that portions of her conversation with Mr. Gray were being recorded for later broadcast.⁵

3. On April 15, 2005, KOFI responded to the *NAL*. In its response to the *NAL*, KOFI states that Mr. Gray did not advise Ms. Simmer that her "call was being broadcast live or that the station would subsequently rebroadcast portions of the recorded conversation since Mr. Gray believed the call was from a listener who wanted to make a donation and that all callers who participated in the live donations had been advised over the air that such calls would be broadcast."⁶ It does, however, concede that "once Mr. Gray realized Ms. Simmer was not calling to make a donation he never should have rebroadcast a recording of the conversation."⁷ KOFI further states that, in any case, it terminated Mr. Gray's employment with Station KZMN(FM) due to "his inappropriate actions discussing Ms. Simmer's complaint on the air and rebroadcasting a portion of her call,"⁸ and adopted a written policy to ensure future compliance with the Commission's telephone broadcast rules.⁹

4. KOFI argues the forfeiture should be cancelled or reduced because its conduct in this matter "was not willful" and that it "has a history of overall compliance with the Commission's rules."¹⁰ Specifically, KOFI contends that its "inability to predict that its employee would broadcast the conversation" indicates that the violation was not "conscious and deliberate."¹¹ It also states that it has "rectified the problem and took steps to prevent a reoccurrence."¹²

III. DISCUSSION

5. Section 73.1206 of the Commission's rules requires that, before broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast and/or record 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. The Commission will presume such awareness only where the "other party to the call is associated with the station (such as an 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."¹³ The purpose of section 73.1206 is to protect "the legitimate

⁵ *Id.*

⁶ See Response to Notice of Apparent Liability for Forfeiture dated April 15, 2005 at 3. ("*NAL Response*").

⁷ *Id.* at 4.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4.

¹² *Id.*

¹³ 47 C.F.R. §73.1206.

expectation of privacy in connection with the broadcast use of telephone conversations.”¹⁴

6. KOFI admits that it broadcast and recorded the telephone conversation between Mr. Gray and the complainant on November 14, 2003, and that it did not inform her of its intent to do so. We reject KOFI’s contention that the forfeiture should be rescinded under these circumstances. As discussed in more detail in the *NAL*, the facts simply do not indicate that Mr. Gray believed he had acquired or did not need to acquire consent to broadcast the live conversation.¹⁵ First, the call was transferred from a receptionist, and was not directed to the studio. During the conversation, Mr. Gray directed Ms. Simmer to listen to the station. Second, KOFI acknowledges that “once Mr. Gray realized Ms. Simmer was not calling to make a donation he never should have rebroadcast a recording of the conversation.”¹⁶

7. We also reject KOFI’s argument that the violation was not “willful.” A “willful” violation under section 503(b) means “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁷ KOFI argues that it did not “consciously or deliberately” broadcast Ms. Simmer’s conversation. It claims that it “should not be held liable for a forfeiture for a willful violation where it has taken all reasonable precautions to avoid the violation and an employee simply went beyond his authority and violated the rule.”¹⁸ But the “Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,”¹⁹ and when the actions of independent contractors or employees have resulted in violations, the Commission has “consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”²⁰ Nothing in the record here suggests that this precedent does not apply.

8. A review of KOFI’s broadcast record, however, reveals no other sanctions for violation of Commission rules. In light of KOFI’s history of overall compliance prior to this broadcast,²¹ we will

¹⁴ *Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463 (1988).

¹⁵ See *NAL*, 20 FCC Rcd at 5997 ¶ 5. Compare *Long Nine, Inc.*, Forfeiture Order, 15 FCC Rcd 15747, 15748 (2000) (on-air personality made an attempt to acquire consent before recording and broadcasting a telephone conversation involving two callers, but mistakenly interpreted the consent of one caller to apply to both).

¹⁶ *Response* at 4.

¹⁷ See 47 U.S.C. § 312(f)(1); *Application for Review of Southern Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁸ *Response* at 4.

¹⁹ *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64 ¶ 7 (2002); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991) (holding that a company’s reliance on an independent contractor to construct a tower in compliance of FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, Forfeiture Order, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee’s failure to conduct weekly EAS tests and to maintain the “issues/programs” list).

²⁰ *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420 ¶ 11 (Enf. & Cons. Inf. Div., Wireless Tel. Bur. 1997) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984)).

²¹ See *KGB, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 13 FCC Rcd 16396 (1998) (reducing proposed forfeiture due to licensee’s overall history of compliance with FCC rules).

lower the \$6,000 forfeiture to the statutory base of \$4,000.²²

IV. ORDERING CLAUSES

9. 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,²³ KOFI, Inc., IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$4,000 for willfully and repeatedly violating section 73.1206 of the Commission's rules.

10. IT IS FURTHER ORDERED that, payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Rules²⁴ within thirty (30) days of the release of this *Forfeiture 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.²⁵

11. Payment of the forfeiture may be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and the FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

12. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁶

12. IT IS FURTHER ORDERED that a copy of this *Forfeiture Order* shall be sent, by Certified Mail - Return Receipt Requested, to KOFI, Inc., P.O. Box 608, Kalispell, Montana 59903, and to its attorney, Dennis F. Begley, Esq., Reddy, Begley & McCormick, 1156 15th Street, N.W., Suite 610, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

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

²² 47 C.F.R. § 1.80 (b)(4).

²³ 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

²⁴ 47 C.F.R. § 1.80.

²⁵ 47 U.S.C. § 504(a).

²⁶ See 47 C.F.R. § 1.1914.