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

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 2005 **Released: March 17, 2005**

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture*, issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[1] we find that KOFI, Inc. ("KOFI"), licensee of Station KZMN(FM), Kalispell, Montana, apparently willfully violated section 73.1206 of the Commission's rules, 47 C.F.R. § 73.1206, by broadcasting, and recording for later broadcast, a telephone conversation without first informing a party to the conversation of its intention to do so.[2] For the following reasons, based upon our review of the facts and circumstances, we find KOFI apparently liable for a forfeiture in the amount of $6,000.

II. BACKGROUND

2. The complainant alleges that, on November 14, 2003, Station KZMN(FM) broadcast, and recorded for later rebroadcast, a telephone conversation between her and Paul Gray, an on-air personality of the station, without notifying the complainant of its intention to do so.[3] 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 the situation, Mr. Gray asked to speak with the complainant. He explained to the complainant 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

[1] 47 U.S.C. § 503; 47 C.F.R. § 1.80.

[2] 47 C.F.R. § 73.1206.

[3] *See* Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated November 14, 2003 ("Complaint").

subsequent time. She 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.[4]

3. The Enforcement Bureau issued a letter of inquiry to KOFI on August 25, 2004.[5] In its Response, KOFI admits that Station KZMN(FM) broadcast live the conversation between the complainant and Mr. Gray on November 14, 2003, and that portions of the conversation were recorded and broadcast over Station KZMN(FM) later that day.[6] Although KOFI states that Mr. Gray "believed the call was from a listener who wanted to make a donation," and that all callers who participated in live donations were informed that their calls would be broadcast, it does not contend that it so informed the complainant and admits that it did not advise her that it would subsequently rebroadcast portions of the recorded conversation.[7] KOFI states that it terminated Mr. Gray's employment with the station on November 29, 2003, "due to his inappropriate actions discussing [the complainant's] complaints on the air and rebroadcasting a portion of her call."[8] KOFI further states that the station apologized to the complainant and adopted a written policy to ensure compliance with the Commission's telephone broadcast rules.[9]

III. DISCUSSION

4. 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."[10] The purpose of section 73.1206 is to protect "the legitimate expectation of privacy in connection with the broadcast use of telephone conversations."[11] 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.

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[4] *Id.*

[5] *See* Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to KOFI, Inc., dated November 25, 2004 ("LOI").

[6] See Letter from KOFI, Inc. to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated September 22, 2004 ("Response"); Letter from KOFI, Inc. to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 14, 2005; Email from Dennis F. Begley, Esquire to William D, Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 15, 2005.

[7] *Id.* at 2.

[8] *Id.*.

[9] *Id.*

[10] 47 C.F.R. §73.1206.

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

5. KOFI states that callers donating to the food drive were made aware their calls would be taken live by the station announcers, and that Mr. Gray believed the complainant was such a caller.[12] We find the statement unavailing. The record establishes that the complainant was neither aware of nor informed that the conversation would be aired and recorded. We cannot presume such knowledge in this case, because the complainant has no association with the station and the call, which was made to the station's main line, was not in connection with a program in which Station KZMN(FM) customarily aired telephone conversations.. Thus, the limited exception to the general notice requirement of section 73.1206 is not applicable here. To the extent that Mr. Gray assumed that the complainant knew that the call would be aired, that assumption was without basis.

6. Having determined that KOFI apparently willfully violated section 73.1206 of the Commission's rules, we turn to an analysis of whether, and to what extent, we should propose a sanction in this instance. The Commission's forfeiture guidelines establish a base forfeiture amount of $4,000 for the unauthorized broadcast of a telephone conversation,[13] and provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act,[14] and section 1.80(a)(4) of the Commission's rules,[15] 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."[16] The record reflects that the conversation was not only aired live over the station, but that Mr. Gray exacerbated the violation by rebroadcasting a portion of the call on at least one occasion. Based upon the facts, we believe that an upward adjustment of the base forfeiture amount is appropriate,[17] and propose a forfeiture of $6,000.

IV. ORDERING CLAUSES

7. ACCORDINGLY, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, KOFI, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE of $6,000 for apparently willfully violating section 73.1206 of the Commission's rules.

8. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the rules, KOFI, Inc. SHALL PAY the full amount of the proposed forfeiture within thirty (30) days of the release of this Notice, or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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

[12] Response at 1.

[13] 47 C.F.R. §1.80(b)(4). *See also Commission's Forfeiture Policy Statement and Amendment of section 1.80 of the Rules to Incorporate the Forfeiture Guidelines,* Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied,* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

[14] 47 U.S.C. §503(b)(2)(D).

[15] 47 C.F.R. §1.80(a)(4).

[16] 47 C.F.R. §1.80(b)(4) note. *See also Forfeiture Policy Statement* at 17100-01.

[17] *See*, *Scripps Howard Broadcasting Company,* Notice of Apparent Liability for Forfeiture, DA 05-60 (Inv. & Hrng. Div., rel. January 13, 2005).

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, Illinois 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

10. 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 4-C330, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

11. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

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.[18]

13. IT IS FURTHER ORDERED THAT copies of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to KOFI, Inc., P.O. Box 608, Kalispell, Montana 59903, to its attorney, Dennis F. Begley, Esquire, Reddy, Begley & McCormick, LLP, 1156 15th Street, N.W., Suite 610, Washington, D.C.20005-1770, and to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

William H. Davenport,
Chief, Investigations and Hearings Division

[18] 47 C.F.R. § 1.1914.