

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

In re Application of	)	
	)	
WDKA Acquisition Corp.	)	Facility I.D. No. 39561
	)	NAL/Acct. No. 0641420042
For Renewal of License for Station WDKA(TV)	)	FRN: 0005013164
Paducah, Kentucky	)	File No. BRCT-20050317ACP

**MEMORANDUM OPINION AND ORDER  
AND NOTICE OF APPARENT  
LIABILITY FOR FORFEITURE**

**Adopted: June 2, 2006**

**Released: June 6, 2006**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. The Commission has before it the above-captioned license renewal application of WDKA Acquisition Corp. (the "Licensee") for Station WDKA(TV), Paducah, Kentucky (the "Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),<sup>1</sup> by the Commission, by the Chief, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that the Licensee apparently violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children's programming.<sup>3</sup> Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of eighteen thousand dollars (\$18,000) and we grant the license renewal application.

**II. BACKGROUND**

2. In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial").<sup>4</sup>

<sup>1</sup> 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. § 73.670.

<sup>4</sup> *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

3. On March 17, 2005, the Licensee filed its above-captioned license renewal application (FCC Form 303-S) for Station WDKA(TV) (the "Application"). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children's programming specified in Section 73.670 of the Rules. In Exhibit 19, the Licensee indicated that between June 15, 1997, and July 5, 2004, the Station exceeded the children's television commercial limits on 12 occasions. Of these overages, one was 15 seconds in duration, one was 30 seconds in duration, three were 60 seconds in duration and seven were program-length commercials. The Licensee attributed the conventional overages to human error and/or inadvertence. As for the program-length commercials, the Licensee stated that, between May 8, 2001, and May 17, 2001, the Station aired on five occasions, a Kellogg's Fruit Loops commercial containing an image of a "Pokemon" character, which ran inside or adjacent to the "Pokemon" program. The Licensee claimed that the commercial arrived by a satellite feed and that there was no warning from the advertiser that the commercial contained an image of a "Pokemon" character and that the station employee who originally downloaded the commercial did not notice the "Pokemon" character in the commercial. Further, the Licensee reported that, on July 4, 2000, the Station aired a commercial featuring "Pokemon" characters before the "Pokemon" program. The Licensee attributed this violation to an error on the part of the program distributor.

4. Finally, the Licensee stated that, on September 24, 2002, the Station aired a WB Network commercial for the Nintendo Gameboy E-Reader, during the "Pokemon" program. The Licensee asserted that the Station was not warned, and did not know until after broadcast, when the WB Network brought the matter to the Licensee's attention, that the commercial contained a "fleeting, obscured image" of a "Pokemon" game card. The Licensee stated that the image, in which only the letters "MON" are visible for just over one second, does not depict any "Pokemon" character. According to the Licensee's description, the "Pokemon" card appeared as three of six cards arranged in the shape of a fan during the display and "Pokemon" was not mentioned in the audio of the commercial. Finally, the Licensee described corrective measures taken and policies implemented subsequently to prevent future violations.

### III. DISCUSSION

5. On twelve occasions, Station WDKA(TV)'s broadcast of material that exceeded the children's television commercial limits constitutes an apparent willful and repeated violation of Section 73.670. We note that seven of the overages were program-length commercials. With respect to the Station's broadcast of the commercial for the Nintendo Gameboy E-Reader, although the Licensee contended that the "Pokemon" game card only appeared for one second during the commercial, it is well established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.<sup>5</sup> Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Gameboy commercial and the "Pokemon" program regardless whether any "Pokemon" character is depicted given the image of a "Pokemon" game card contained in the commercial and the consequent likelihood that children may associate it with the program.

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<sup>5</sup> *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for "Spirit of Mickey" home video showing brief image of Donald Duck on cover of video aired during "Quack Pack" program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff'd*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program "Goof Troop").

6. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 24 (1989). Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children's television commercial limits, stating that the program-length commercial policy "directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter."<sup>6</sup>

7. The number and magnitude of overages at issue here mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990.<sup>7</sup> Although the Licensee indicated that the conventional overages and five of the program-length commercials resulted from human error and/or inadvertence, this does not mitigate or excuse the violations. In this regard, the Commission has repeatedly rejected human error and inadvertence as a basis for excusing violations of the children's television commercial limits.<sup>8</sup> To the extent the Licensee has argued that the program-length commercials resulted from the insertion of commercial matter in programming supplied by a program distributor or were inserted into the program by the station's television network, this does not relieve it of responsibility for the violations. In this regard, the Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with our children's television rules and policies will not excuse or mitigate violations which do occur.<sup>9</sup> Furthermore, the Licensee's implementation of policies to prevent subsequent violations of the Commission's children's television rules and policies does not relieve the Licensee of liability for violations which have occurred.<sup>10</sup>

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, 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 forfeiture penalty.<sup>11</sup> 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.<sup>12</sup> 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,<sup>13</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>14</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with

<sup>6</sup> *Children's Television Programming*, 6 FCC Rcd at 2118.

<sup>7</sup> *Children's Television Programming*, 6 FCC Rcd at 2117-18.

<sup>8</sup> See, e.g., *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (MMB 1995); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

<sup>9</sup> See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995).

<sup>10</sup> See, e.g., *WHP Television, L.P. (WHP-TV)*, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation WTWS(TV)*, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc. (KEVN-TV)*, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

<sup>11</sup> 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

<sup>12</sup> 47 U.S.C. § 312(f)(1).

<sup>13</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>14</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”<sup>15</sup>

9. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.<sup>16</sup> In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>17</sup>

10. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages in this case. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$18,000 for its apparent willful and repeated violation of Section 73.670.

11. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k)(1) of the Act. Section 309(k)(1) provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>18</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>19</sup>

12. On balance, we find that the Licensee’s violation of Section 73.670 does not constitute “serious violations” of the Rules warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse. Further, we find that Station WDKA(TV) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.

#### IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that WDKA Acquisition Corp. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of eighteen thousand dollars (\$18,000) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, WDKA Acquisition Corp. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation

<sup>15</sup> 47 U.S.C. § 312(f)(2).

<sup>16</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

<sup>17</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

<sup>18</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 6363 (1996).

<sup>19</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

of the proposed forfeiture.

15. Payment of the proposed 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, at 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.

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

17. 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.

18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12<sup>th</sup> Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>20</sup>

19. IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the application (File No. BRCT-20050317ACP) of WDKA Acquisition Corp. for renewal of license for Station WDKA(TV), Paducah, Kentucky IS HEREBY GRANTED.

20. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WDKA Acquisition Corp., 20230 Harbour Ridge, Smithfield, Virginia 23430, and to its counsel, Arthur V. Belendiuk, Esquire, Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg  
Chief, Media Bureau

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<sup>20</sup> See 47 C.F.R. § 1.1914.