

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

In the Matter of)	File No. EB-05-IH-2006
RCK 1 Group, LLC)	NAL Account No. 200732080020
Licensee of Station WKKX(AM))	Facility ID No. 72172
Wheeling, West Virginia)	FRN No. 0011339769
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 6, 2007

Released: March 6, 2007

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

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"),¹ and Section 1.80 of the Commission's Rules,² we find that RCK 1 Group, LLC (the "Licensee"), Licensee of Station WKKX(AM) Wheeling, West Virginia, (the "Station") apparently willfully violated Section 73.1206 of the Commission's rules,³ by broadcasting a live telephone conversation without giving prior notice to the individual being called of the Licensee's intention to do so. Based on review of the facts and circumstances, we find the Licensee apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. On September 8, 2005, the Commission received a complaint (the "Complaint") from David Delk (the "Complainant") alleging that on August 31, 2005, at approximately 7:05 a.m., David Blomquist, a radio personality from the Station, called the Complainant's home and asked Complainant's wife to speak with Complainant. The Complaint states that Mr. Blomquist did not identify himself or inform the Complainant's wife that the conversation was being broadcast live on a morning radio program. Moreover, when the Complainant picked up the phone, Mr. Blomquist identified himself as having a radio show, but did not state that the caller's voice and his wife's voice were on the air.⁴ The Complaint indicates that the Complainant then hung up the phone.⁵

3. After reviewing the Complaint, we issued a letter of inquiry ("LOI") to the Licensee, asking whether the Licensee initiated the August 31, 2005, telephone call.⁶ Furthermore, we inquired whether the

¹ See 47 U.S.C. § 503(b).

² See 47 C.F.R. § 1.80.

³ See 47 C.F.R. § 73.1206.

⁴ See Complaint filed by David Delk to the Consumer and Governmental Affairs Bureau, Federal Communications Commission ("FCC"), received September 8, 2005.

⁵ See *id.*

⁶ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC, to RCK 1 Group, LLC, licensee of Station WKKX(AM), Wheeling, West Virginia, dated January 20, 2006 (the (continued....))

Licensee informed the Complainant and his wife of its intention to broadcast the telephone call over the Station, and whether the Licensee broadcast live all or any portion of the telephone call over the Station.⁷ In its February 17, 2006, response (“the “LOI Response”), the Licensee responds that Mr. Blomquist initiated a phone call to the Complainant on August 31, 2005, as part of a talk show segment titled “Wake Your Lazy Carcass Up,” whereby the Station randomly selects individuals from a telephone directory, and calls them with the opportunity to answer trivia questions to win prizes.⁸ The LOI Response includes an affidavit from Mr. Blomquist, and Mr. Blomquist states that he first spoke to Complainant’s wife and told her that she was “live on the radio” and asked “could I speak with [Complainant]?” Mr. Blomquist further asserts that the Complainant then picked up the phone, and that Mr. Blomquist said “Good morning. You’re live on the radio with the BloomDaddy Experience,” to which the Complainant promptly hung up the phone.⁹ The LOI Response further states that Mr. Blomquist advised both the Complainant and his wife that they were live on the radio and, at most, each said “hello” and Complainant’s wife also said “hold on.”¹⁰

III. DISCUSSION

4. Under section 503(b)(1) of the Communications Act of 1934, as amended (the “Act”), 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 monetary forfeiture penalty.¹¹ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹² The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹³ As set forth in greater detail below, we conclude under this standard that the Licensee is apparently liable for a forfeiture for its apparent willful violation of section 73.1206 of the Commission's rules.

5. Section 73.1206 of the Commission’s rules requires that, *before* broadcasting or recording a

(...continued from previous page)
“LOI”).

⁷ *See id.*

⁸ *See* Letter and Response to Complaint from Robert P. Fitzsimmons to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 12, 2006.

⁹ *See id.*

¹⁰ *See id.* at 5.

¹¹ [47 U.S.C. § 503\(b\)\(1\)\(B\)](#); [47 C.F.R. § 1.80\(a\)\(1\)](#); *see also* [47 U.S.C. § 503\(b\)\(1\)\(D\)](#) (forfeitures for violation of 14 U.S.C. § 1464). 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. [47 U.S.C. § 312\(f\)\(1\)](#). 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, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the [section 503\(b\)](#) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, [6 FCC Rcd 4387, 4388 \(1991\)](#) (“*Southern California Broadcasting Co.*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, [16 FCC Rcd 1359 \(2001\)](#) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶9.

¹² [47 U.S.C. § 503\(b\)](#); [47 C.F.R. § 1.80\(f\)](#).

¹³ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast 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.¹⁴ 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.”¹⁵

6. Section 73.1206 reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.¹⁶ The Commission has held that the prior notification requirement ensures the protection of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.¹⁷ Thus, aside from the narrowly-tailored exceptions noted above, neither of which is applicable here, a licensee must notify a party to a telephone call of its intention to broadcast a conversation before it commences such broadcast.

7. In the instant case, the Licensee admits that its customary practice on the morning show is to select a telephone number at random and notify the person *after* answering the telephone that they are “live on the radio with the BloomDaddy Experience.”¹⁸ We find that this admission concedes conduct that constitutes a rule violation. Although the Complainant and Licensee present different versions of the facts, it appears there can be no dispute that the Complainant's voice and his wife's voice, each stating the word “hello,” were broadcast on the air before they received notice from Mr. Blomquist that their voices would be broadcast.

8. In the *1988 Order re the Broadcast of Telephone Conversations*, the Commission specifically considered and rejected a proposal by the National Association of Broadcasters that would allow the broadcast of calls where no substantive conversation occurs before the notice required by Section 73.1206 is given.¹⁹ Moreover, the Commission clarified that the notice required by Section 73.1206 must be given prior to the call being placed on the air.²⁰ The precedent with respect to this issue is clear in that it is not sufficient to give the notice required by Section 73.1206 after the broadcast or recording for broadcast has commenced.²¹ In this case, the notice that the Licensee allegedly gave the Complainant -- “you are live

¹⁴ See 47 C.F.R. § 73.1206.

¹⁵ *Id.*

¹⁶ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) (“*1988 Order re the Broadcast of Telephone Conversations*”); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972); *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 *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004) (forfeiture paid).

¹⁷ See *1988 Order re the Broadcast of Telephone Conversations*, 3 FCC Rcd at 5463, ¶ 19.

¹⁸ See Affidavit of David Blomquist, attached to the LOI Response, *supra* n. 8 at 1-3.

¹⁹ See *1988 Order re the Broadcast of Telephone Conversations*, 3 FCC Rcd at 5462-63, ¶¶ 13-19.

²⁰ See *id.* at 5463, ¶ 19 (“[W]e believe that it is reasonable and desirable to retain for individuals the right to answer the telephone without having their voice or statements transmitted to the public by a broadcast station in the absence of prior notice.”).

²¹ See *CXR Holdings Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 1467, 1468 ¶ 6 (Enf. Bur. 2000) (NAL paid) (imposing liability where notice given shortly after a live broadcast call was initiated stating, “the Commission has determined that it is not sufficient for a station to give notice that a conversation is being recorded or broadcast at the beginning of a telephone call, if the conversation is already being taped or broadcast”); see also *Noble Broadcast Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 8530 (Enf. Bur. 2000) (NAL paid) (imposing liability for the rebroadcast of a very short conversation, consisting of the word “hello” and an answering machine message, that was rebroadcast without having given prior notice).

on the air..." -- is by its very nature insufficient especially when it is given after a person's voice has already been broadcast live, as in this case.

IV. PROPOSED FORFEITURE

9. Based upon the evidence before us, we find that the Licensee apparently willfully violated Section 73.1206 of the Commission's rules. The Commission's forfeiture guidelines establish a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation.²² In addition, the Commission's rules provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act²³ and Section 1.80(a)(4) of the Commission's rules, 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."²⁴ Having considered the record in this case and the statutory factors, we find that the Licensee is apparently liable for a forfeiture in the amount of \$4,000.²⁵

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,²⁶ and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's rules,²⁷ that RCK 1 GROUP, LLC is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$4,000 for violating Section 73.1206 of the Commission's rules.²⁸

11. **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 Notice, RCK 1 GROUP, LLC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

12. 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 FCC Registration Number ("FRN") and the NAL/Account Number specified in the caption of this NAL. 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 9116229.

13. The response, if any, shall be mailed to Hillary S. DeNigro, 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/Account Number referenced above.

²² See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. §1.80 (2005).

²³ See 47 U.S.C. § 503(b)(2)(D).

²⁴ 47 C.F.R. § 1.80(a)(4).

²⁵ See *KOFI, Inc.*, Forfeiture Order, 20 FCC Rcd 17886 (Enf. Bur. 2005) (forfeiture paid--imposing a \$4,000 forfeiture for failing to give the prior notice required by the telephone broadcast rule).

²⁶ See 47 U.S.C. § 503(b).

²⁷ See 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

²⁸ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

14. 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.

15. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Deputy Chief Financial Officer, Room 1-A637, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554.²⁹

16. **IT IS FURTHER ORDERED**, that the Complaint filed by David Delk **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the Complaint proceeding **IS HEREBY TERMINATED**.³⁰

17. **IT IS FURTHER ORDERED**, that a copy of this **NOTICE OF APPARENT LIABILITY** shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to the Licensee at its address of record: Robert P. Fitzsimmons, Esq., Fitzsimmons Law Offices, 1609 Warwood Ave., Wheeling, WV 26003-7110.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

²⁹ See 47 C.F.R. § 1.1914.

³⁰ For purposes of this forfeiture proceeding initiated by this *NAL*, **RCK 1 Group, LLC**, shall be the only party to this proceeding.