

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

In the Matter of	)	
	)	
KHCW Inc.	)	Facility I.D. No. 23394
Licensee of Station KHCW(TV)	)	NAL/Acct. No. 0741420058
Houston, Texas	)	FRN: 0003802501

**NOTICE OF APPARENT  
LIABILITY FOR FORFEITURE**

**Adopted: August 24, 2007**

**Released: August 31, 2007**

By the Chief, Video Division, Media 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"), and Section 1.80 of the Commission's Rules (the "Rules"),<sup>1</sup> by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that KHCW Inc. (the "Licensee"), licensee of Station KHCW(TV), Houston, Texas (the "Station"), apparently willfully and repeatedly 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 twelve thousand dollars (\$12,000).

**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>

3. On March 31, 2006, the Licensee filed its license renewal application (FCC Form 303-S)

<sup>1</sup> 47 U.S.C. § 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).

for Station KHCW(TV) (the “Application”) (File No. BRCT-20060331BBF).<sup>5</sup> 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 December 14, 2000, and October 18, 2003, the Station exceeded the children’s television commercial limits on four occasions. Of these four overages, one was 90 seconds in duration and two were characterized as program-length commercials. The Licensee attributed the program-length commercials to human error and/or inadvertence and indicated that the 90-second overage was caused by human error on the part of an employee of GDMX, an entity that provides the WB Network with program format, content integration, and satellite uplink services. The Licensee described the corrective procedures it implemented following these incidents to prevent future violations.

4. The fourth and remaining incident the Licensee reported occurred on September 24, 2002, when 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 its 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, did not depict any “Pokemon” character. According to the Licensee’s description, the “Pokemon” card appeared as the third of six cards arranged in the shape of a fan during the display and “Pokemon” was not mentioned in the audio of the commercial. The Licensee maintained that the program-length commercial policy is inapplicable in this case because there is no likelihood that children would perceive any linkage between the “Pokemon” program and the GameBoy commercial. Further, the Licensee contended that the WB Network expressed its belief that the GameBoy commercial does not violate the Commission’s rules or policies of the Children’s Television Act’s commercial time limits.

### III. DISCUSSION

5. On four occasions, including three program-length commercials, the Station’s broadcast of material that exceeded the children’s television commercial limits constitutes an apparent willful and repeated violation of Section 73.670. 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 approximately 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>6</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.

6. Congress was particularly concerned about program-length commercials because young

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<sup>5</sup> On May 8, 2006, the Licensee filed an amendment to its Application to reflect a change in its name from KHWB Inc. to KHCW Inc., and to reflect a change in the Station’s callsign from KHWB(TV) to KHCW(TV).

<sup>6</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”).

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>7</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>8</sup> Although the Licensee indicated that two 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>9</sup> Regarding the reasons given for the 90-second overage and one program-length commercial, the fact that they resulted from errors which occurred in the programming supplied by the Station's television network or were inserted into the program by the Station's television network 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>10</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>11</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>12</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>13</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>14</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>15</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more

<sup>7</sup> *Children's Television Programming*, 6 FCC Rcd at 2118.

<sup>8</sup> *Children's Television Programming*, 6 FCC Rcd at 2117-18.

<sup>9</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., supra*; *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

<sup>10</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>11</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>12</sup> 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

<sup>13</sup> 47 U.S.C. § 312(f)(1).

<sup>14</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>15</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

than once or, if such commission or omission is continuous, for more than one day.”<sup>16</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>17</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering 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>18</sup>

10. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$12,000 for its apparent willful and repeated violation of Section 73.670.

#### IV. ORDERING CLAUSES

11. 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 KHCW Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of twelve thousand dollars (\$12,000) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

12. 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*, KHCW Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. 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 911-6229.

14. 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.

15. 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.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment

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<sup>16</sup> 47 U.S.C. § 312(f)(2).

<sup>17</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>18</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>19</sup>

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KHCW Inc., 7700 Westpark Drive, Houston, Texas 77063, and to its counsel, Jennifer Tatel, Esquire, Sidley Austin Brown & Wood LLP, 1501 K Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

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<sup>19</sup> See 47 C.F.R. § 1.1914.