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

In the Matter of	)	
	)	
KTVU Partnership	)	Facility I.D. No. 33716
Licensee of Station KFOX-TV	)	NAL/Acct. No. 0741420062
El Paso, Texas	)	FRN: 0001543974

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 7, 2007 **Released: September 14, 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"),[1] by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,[2] we find that KTVU Partnership (the "Licensee"), licensee of Station KFOX-TV, El Paso, 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.[3] The Licensee also apparently willfully and repeatedly violated Sections 73.3526(e)(11)(i) and 73.3526(e)(11)(iii) of the Rules, by failing to place in the Station's public inspection file all required TV issues/programs lists and by failing to publicize the existence and location of its Children's Television Programming Reports. 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 three thousand dollars ($3,000).

II. BACKGROUND

2. In the Children's Television Act of 1990 (CTA),[4] 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

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

[2] See 47 C.F.R. § 0.283.

[3] *See* 47 C.F.R. § 73.670.

[4] Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394.

commercial time (a "program-length commercial").[5]

3. Under the Commission's rules implementing the CTA, each television broadcast station licensee has an obligation, during its license term, to air programming that serves the educational and informational needs of children through both the licensee's overall programming and programming "specifically designed" to educate and inform children (core programming).[6] The Commission's rules require commercial licensees to provide information to the public about the shows they air to fulfill their obligation. Subsection 73.3526(e)(11)(iii) of the Rules requires each commercial television broadcast station to prepare and place in its public inspection file a Children's Television Programming Report (FCC Form 398) for each calendar quarter reflecting, *inter alia*, the efforts it has made during the quarter to serve the educational needs of children. As set forth in Subsection 73.3526(e)(11)(iii), licensees are also required to file the reports with the Commission and to publicize for the public the existence and location of the reports.

4. Section 73.3526 of the Rules requires a commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations.[7] Subsection 73.3526(e)(11)(i) provides that a TV issues/programs list is to be placed in a commercial TV broadcast station's public inspection file each calendar quarter. Where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify the licensee's rule violation.[8]

5. On March 31, 2006, the Licensee filed its license renewal application (FCC Form 303-S) for Station KFOX-TV (the "Application") (File No. BRCT-20060331AGZ). 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 the Station exceeded the children's television commercial limits by five minutes and thirty seconds on November 21, 1998, and by four minutes on September 25, 1999. The Licensee attributed the commercial overages to inadvertence.

6. In response to Section IV, Question 10 of the Application, the Licensee further stated that it had failed to publicize the existence and location of the Station's Children's Television Programming Reports, as set forth in Section 73.3526(e)(11)(iii) of the Rules. In Exhibit 24, the Licensee indicated that, during the license term, the Station has aired announcements describing the existence and location of its Children's Television Programming Reports. The Licensee reported, however, that this announcement was mistakenly eliminated in approximately January 2004. The Licensee claimed that since February 4, 2006, the Station has aired an announcement twice a week publicizing the existence and location of its Children's Television Programming Reports.

7. In response to Section IV, Question 3 of the Application, the Licensee stated that, during the previous license term, it had failed to timely place in its public inspection file all of the documentation required by Section 73.3526 of the Commission's Rules. In Exhibit 17, the Licensee indicated that in approximately January 2004, it discovered that the TV issues/programs list for the fourth quarter of 2000 was missing from the public inspection file. The Licensee claimed that upon this discovery, the Station

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[5] *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

[6] 47 C.F.R. § 73.671.

[7] *See* 47 C.F.R. § 73.3526.

[8] *See Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999) (*citing Gaffney Broadcasting, Inc.*, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, 33 FCC 706 (1962)); *Surrey Range Limited Partnership*, 71 RR 2d 882 (FOB 1992).

immediately placed a copy of this list in the public file.

III. DISCUSSION

8. By the Licensee's admission, Station KFOX-TV broadcast material that exceeded the children's television commercial limits. Such action constitutes an apparent willful and repeated violation of Section 73.670. Although the Licensee argued that that the overages resulted from inadvertence, the Commission has repeatedly rejected human error and inadvertence as a basis for excusing violations of the children's television commercial limits.[9] In addition, the Licensee's failure to publicize the existence and location of the Children's Television Programming Reports and its failure to place in its KFOX-TV public inspection file all TV issues/programs lists constitutes apparent willful and repeated violations of Sections 73.3526(e)(11)(iii) and 73.3526(e)(11)(i), respectively.

9. 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.[10] 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.[11] 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,[12] and the Commission has so interpreted the term in the Section 503(b) context.[13] 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 than once or, if such commission or omission is continuous, for more than one day."[14]

10. 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 and a base forfeiture amount of $10,000 for violation of 73.3526.[15] 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."[16]

11. In this case, the Licensee has acknowledged that it violated the children's television commercial limits. Further, the Licensee reported that it failed to publicize the existence and location of its Children's Television Programming Reports and that it did not place all required TV issues/programs lists in the public inspection file. Considering the record as a whole, we believe that a $3,000 proposed

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[9] *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).

[10] 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(1).

[11] 47 U.S.C. § 312(f)(1).

[12] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[13] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[14] 47 U.S.C. § 312(f)(2).

[15] *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.

[16] 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.

forfeiture is appropriate for the apparent willful and repeated violations of 73.670, 73.3526(e)(11)(i), and 73.3526(e)(11)(iii).

IV. ORDERING CLAUSES

12. 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 KTVU Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of three thousand dollars ($3,000) for its apparent willful and repeated violation of Sections 73.670, 73.3526(e)(11)(i), and 73.3526(e)(11)(iii) of the Commission's Rules.

13. 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*, KTVU Partnership SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. 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.

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th 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.

16. 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.

17. 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 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[17]

[17] *See* 47 C.F.R. § 1.1914.

18. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KTVU Partnership, 6004 North Mesa Street, El Paso, Texas 79912, and to its counsel, Kevin F. Reed, Esquire, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036-6802.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau