

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

In the Matter of)	
)	
WLFL Licensee, LLC)	Facility I.D. No. 73205
Licensee of Station WLFL(TV))	NAL/Acct. No. 0841420044
Raleigh, North Carolina)	FRN: 0005019781

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: May 20, 2008

Released: May 21, 2008

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 WLFL Licensee, LLC (the “Licensee”), licensee of Station WLFL(TV), Raleigh, North Carolina (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 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 sixteen thousand, five hundred dollars (\$16,500).

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”).⁴

3. On July 30, 2004, the Licensee filed its license renewal application (FCC Form 303-S) for Station WLFL(TV) (the “Application”) (File No. BRCT-20040730ARF). In response to Section IV,

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

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 and in a March 1, 2007 amendment to the Application, the Licensee indicated that between March 11, 1997, and December 23, 2006, the Station exceeded the children's television commercial limits on eleven occasions. Of these overages, one was 24-seconds in duration, two were 30-seconds in duration, one was 60-seconds in duration, six were program-length commercials, and one was a host-selling violation. The Licensee attributed the 24-second overage to human error on the part of a Station employee, one of the 30-second overages to a commercial make good, and the 60-second overage to a technical failure. The Licensee stated that the remaining 30-second overage was caused by the WB Network's GDMX commercial insertion system. Specifically, the Licensee attributed this overage to human error on the part of an employee of GDMX.

4. The Licensee also reported that on June 3, 1997, and September 5, 1997, the Station aired advertisements containing images of the Batman character during the "Batman" program. In addition, the Licensee indicated that on December 16, 1997, and December 19, 1997, the Station aired advertisements containing images of the Spiderman character during the "Spiderman" program. Further, the Licensee stated that on October 28, 1998, a commercial for a Batman toy was aired during "Animaniacs", a program in which the Batman character appears.

5. Also, the Licensee reported that on September 24, 2002, the Station aired a commercial for the Gameboy Advance E-Reader during the "Pokemon" program. According to the Licensee's description, three "Pokemon" game cards were shown for approximately 1.04 seconds during the commercial. The Licensee also claimed that the cards were partially hidden and only the letters "MON" were identifiable. Further, the Licensee indicated that the "Pokemon" characters on the cards were not identifiable and were not verbally identified during the commercial. The Licensee asserted that the appearance of the cards in this case could not have confused the viewer. For these reasons, the Licensee argued that the broadcast of the commercial for the Gameboy Advance E-Reader during the "Pokemon" program does not violate the children's television commercial limits.

6. The remaining incident the Licensee reported was a violation of the Commission's host-selling policy. It occurred on December 23, 2006, when the Station aired a CW Network commercial for Post Cereal's Cocoa Pebbles during the "Xiaolin Showdown" program. According to the Licensee, images from Post Cereal's postopia.com website appeared, including images of the website's navigation bar. The Licensee stated that the navigation bar included a "very brief" appearance of characters from the "Xiaolin Showdown" program. The Licensee also described the steps it has taken to prevent future violations of the children's television commercial limits.

III. DISCUSSION

7. Station WLFL(TV)'s record during the last license term of exceeding the Commission's commercial limits on nine occasions constitutes an apparent willful and repeated violation of Section 73.670. We note that six of the overages were program-length commercials.⁵ With respect to the

⁵ As discussed above, the Licensee attributed one conventional overage to a technical failure. In *Children's Television Programming*, the Commission specifically recognized that licensees may experience "occasional emergency scheduling change[s]," which would be taken into consideration in determining whether "extenuating circumstances" mitigated any resulting children's television commercial limits violations. 6 FCC Rcd at 2126 n.123. On reconsideration, the Commission affirmed this policy, stating that "where the facts demonstrate that a slight overage is caused by a last-minute emergency scheduling change, we will consider such a lapse to be *de minimis*." *Children's Television Programming (Recon.)*, 6 FCC Rcd at 5096. Although this conventional overage did not involve a last-minute emergency scheduling change, we believe the technical failure which caused it constitutes an extenuating circumstance. Accordingly, this overage shall be considered *de minimis*, and shall not be

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Station's broadcast of the commercial for the Gameboy Advance E-Reader, the Licensee contended that the "Pokemon" game cards appeared for approximately 1.04 seconds during the commercial. However, 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, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.⁶ 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 identifiable given the image of a "Pokemon" game card contained in the commercial and the consequent likelihood that children may associate it with the program.

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.⁷ 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.⁸ 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,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ 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."¹¹

9. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.¹² 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."¹³

10. The reasons that the Licensee cited for the 24-second commercial overage and one of the

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considered in determining the sanction deemed appropriate for the other violations of the children's television commercial limits reported by the Licensee.

⁶ *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").

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

⁸ 47 U.S.C. § 312(f)(1).

⁹ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁰ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹¹ 47 U.S.C. § 312(f)(2).

¹² S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

¹³ *Children's Television Programming*, 6 FCC Rcd at 2118.

30-second commercial overages, human error and a commercial make good, do not mitigate or excuse the violations. In this regard, the Commission has rejected human error and/or inadvertence and make goods as a basis for excusing violations of the children's television commercial limits.¹⁴ To the extent the Licensee has argued that one of the 30-second overages and one of 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. The Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with the Commission's children's television rules and policies will not excuse or mitigate violations which do occur.¹⁵ Furthermore, corrective actions may have been taken to prevent subsequent violations of the children's television rules and policies, but that, too, does not relieve the Licensee of liability for the violations which have occurred.¹⁶

11. 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 73.670.¹⁷ 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."¹⁸

12. 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 \$16,500 for its apparent willful and repeated violation of Section 73.670.

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 WLFL Licensee, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of sixteen thousand, five hundred dollars (\$16,500) 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*, WLFL Licensee, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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.

¹⁸ 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.

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 in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

16. 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.

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 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁹

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WLFL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128, and to its counsel, Kathryn R. Schmeltzer, Esquire, Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁹ See 47 C.F.R. § 1.1914.