

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

In the Matter of)	
)	
ACME Television Licenses of Wisconsin, LLC)	Facility I.D. No. 73042
Licensee of Station WIWB(TV))	NAL/Acct. No. 0841420047
Suring, Wisconsin)	FRN: 0006578413

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: May 22, 2008

Released: May 27, 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 ACME Television Licenses of Wisconsin, LLC (the “Licensee”), licensee of Station WIWB(TV), Suring, Wisconsin (the “Station”), apparently willfully and repeatedly violated Section 73.3526(e)(11)(i) of the Rules, by failing to place in the Station’s public inspection file all required TV issues/programs lists, and Section 73.670 of the Rules, by exceeding the commercial limitations 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 fourteen thousand dollars (\$14,000).

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”).⁴

3. Section 73.3526 of the Rules requires a commercial broadcast licensee to maintain a

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. §§ 73.3526(e)(11)(i) and 73.670.

⁴ *Children’s Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

public inspection file containing specific types of information related to station operations.⁵ As set forth in subsection 73.3526(e)(11)(i), a TV issues/programs list is to be placed in a commercial TV broadcast station's public inspection file each calendar quarter by the tenth day of the succeeding 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.⁶

4. On August 1, 2005, the Licensee filed its license renewal application (FCC Form 303-S) for Station WIWB(TV), (the "Application") (File No. BRCT-20050801AGI). 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 during an inspection of its public inspection file it discovered that TV issues/programs lists had not been placed in the file since June 1999. The Licensee stated that copies of all missing lists have since been placed in the public file.

5. In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, it failed to comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Rules. In Exhibit 19, the Licensee indicated that it violated the children's television commercial limits by one minute and thirty seconds on October 18, 2003. The Licensee attributed this overage to an automation system failure on the part of the WB Television Network, which originated the programming in question.

6. The Licensee also stated in Exhibit 19 that on September 24, 2002, the Station aired a WB Television Network commercial for the Gameboy Advance E-Reader, during the "Pokemon" program. According to the Licensee's description, the commercial contained "fleeting partial images of three Pokemon game cards" displayed as three cards within a six-card fan arrangement. The Licensee reported that the partially hidden "Pokemon" cards were visible for approximately 1.04 seconds and that "Pokemon" was not mentioned in the audio of the commercial. In addition, the Licensee indicated that only the letters "MON" were visible and that no "Pokemon" characters were discernible. The Licensee asserted that this incident differs from the instances in which the Commission has concluded that a program constitutes a program-length commercial. Specifically, the Licensee argued that in previous cases, the commercials depicted characters for a longer period of time than the "Pokemon" game cards were shown in this case. Therefore, contended the Licensee, the characters in prior cases were more recognizable than the "Pokemon" cards in this case. The Licensee opined that, since no "Pokemon" characters were discernible and only the letters "MON" were visible, children would not perceive any linkage between the "Pokemon" program and the Gameboy Advance E-Reader commercial. Thus, the Licensee asserted that this incident does not constitute a program-length commercial.

III. DISCUSSION

7. The Licensee's failure to place in its Station WIWB(TV) public inspection file all required TV issues/programs lists constitutes an apparent willful and repeated violation of Section 73.3526(e)(11)(i). Moreover, the Licensee's failure to comply with the limits on commercial matter in children's programming constitutes an apparent willful and repeated violation of Section 73.670. With respect to the Station's broadcast of the commercial for the Gameboy Advance E-Reader, although the Licensee contended that the "Pokemon" game cards appeared for only 1.04 seconds during the commercial, it is well established that the determination as to whether a particular program is a program-

⁵ See 47 C.F.R. § 73.3526.

⁶ 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).

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.⁷ In this case, the Licensee has acknowledged that the commercial contained images of three “Pokemon” game cards. 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 images of “Pokemon” game cards 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.⁸ 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.⁹ 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,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ 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.”¹²

9. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st 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.”¹³

10. Regarding the reasons given by the Licensee for the conventional overage and the program-length commercial, 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 the Licensee 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

⁷ *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”).

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

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹¹ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹² 47 U.S.C. § 312(f)(2).

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

children's television rules and policies will not excuse or mitigate violations which do occur.¹⁴

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of Section 73.3526 and a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁵ 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

12. In this case, the Licensee acknowledged that the Station's TV issues/programs lists had not been placed in the public inspection file since June 1999. In addition, the Station exceeded the commercial limitations in children's television programming on two occasions, including one program-length commercial in violation of Section 73.670. Considering the record as a whole, we believe that a proposed forfeiture in the amount of \$14,000 is appropriate for the apparent willful and repeated violations of Sections 73.3526(e)(11)(i) and 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 ACME Television Licenses of Wisconsin, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of fourteen thousand dollars (\$14,000) for its apparent willful and repeated violations of Sections 73.3526(e)(11)(i) and 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*, ACME Television Licenses of Wisconsin, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation 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 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.

¹⁴ 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).

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.

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. 20554.¹⁷

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to ACME Television Licenses of Wisconsin, LLC, 2101 East Fourth Street, Suite 202, Santa Ana, California 92705, and to Rick Ervin, ACME Television, 2101 East Fourth Street, Suite 202, Santa Ana, California 92705.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁷ See 47 C.F.R. § 1.1914.