

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

In the Matter of)
) File No. EB-06-IH-1706
ProActive Communications, Inc.) NAL Account No. 200832080089
) Facility ID No. 29911
Licensee of Station KQQB-FM) FRN No. 0011343191
Newport, Washington)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 9, 2008

Released: June 9, 2008

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 ProActive Communications, Inc. (the “Licensee”), licensee of Station KQQB-FM, Newport, Washington (the “Station”), apparently willfully violated Section 73.1206 of the Commission’s rules by recording a telephone conversation for broadcast and later broadcasting that telephone conversation without first informing the party to the conversation of its intention to do so.³ Based upon our review of the facts, we find the Licensee apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. On March 27, 2006, the Commission received a complaint from Matt S. Jensen (the “Complainant”), Director of Marketing of The Davenport Hotel and Tower (the “Hotel”), alleging that on March 22, 2006, at approximately 9:30 p.m., DJ Dick, a disc jockey at the Station, broadcast over the Station a fictitious Hotel room number claiming that the rap star 50 Cent was staying there.⁴ DJ Dick then asked his listeners to go to the Hotel and try to get 50 Cent to call him at the Station for an interview.⁵ DJ Dick also asked the listeners to call the Hotel.⁶ The Complainant alleges that within approximately one hour’s time the Hotel logged over 40 phone calls from people insisting that they be connected to 50 Cent’s room. In addition, Hotel staff escorted over 20 people trying to access 50 Cent’s room out of the Hotel.⁷

3. At approximately 9:45 p.m. that evening, the Complainant allegedly called the Station, asked to speak with the Station’s manager, and was told he could only speak with DJ Dick.⁸ At the time, the

¹ See 47 U.S.C. § 503(b).

² See 47 C.F.R. § 1.80.

³ See *id.* § 73.1206.

⁴ See Complaint filed by Matt S. Jensen on FCC Form 475B, received March 27, 2006 (“*Complaint*”).

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

Complainant was not aware that DJ Dick was the Station's disc jockey.⁹ The Complainant asked DJ Dick to stop asking people to call and harass the Hotel staff. The Complainant also informed DJ Dick that 50 Cent was not staying at the Hotel and that his Station was causing severe disruption to the Hotel staff.¹⁰ At approximately 10:00 p.m., after the call ended, the Complainant heard his telephone conversation with DJ Dick aired over the Station.¹¹ DJ Dick did not ask the Complainant if he could record the conversation, and the Complainant did not give DJ Dick permission to record or broadcast the conversation over the Station.¹² For the remainder of the night and throughout the next day, DJ Dick broadcast messages over the Station insisting that his listeners have 50 Cent call him.¹³ According to the Complainant, DJ Dick's on-air messages produced "a tremendous amount of intended disruption on the hotel and to [its] staff as well as community disruption."¹⁴

4. By a Letter of Inquiry, the Enforcement Bureau directed the Licensee to provide information concerning the broadcast of the March 22, 2006 telephone conversation between the Complainant and/or any Hotel employee and any employee of the Licensee, and to serve a copy of its response upon the Complainant.¹⁵ In its *LOI Response*, the Licensee states that DJ Dick no longer works at the Station.¹⁶ The Licensee also states that the Station's then General Sales Manager and the Licensee were unaware of the alleged telephone conversation between the Complainant and DJ Dick.¹⁷ The Licensee also states that it has no information or records, such as tapes, of any phone call on the date in question and thus cannot confirm or deny whether the complained-of telephone conversation with the Complainant occurred, whether it was recorded, or whether it was broadcast over the Station.¹⁸ The Licensee notes that based on information specified in the *Complaint*, the Complainant allegedly called the Station's request line and recordings of those calls are maintained for 30 days, as such, it does not have a recording of the purported call.¹⁹ In its *LOI Response*, the Licensee acknowledges that DJ Dick urged his listeners to contact or go to the Hotel, but claims station management was not aware of his comments until after they occurred and, once aware, instructed the then program director to immediately stop discussing 50 Cent and the Hotel on-air.²⁰ Finally, the Licensee states that its company policy is to abide by Commission rules. It does not condone, and has never requested, ordered, ratified, or approved of any recording or broadcast of a telephone conversation in violation of Section

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to ProActive Communications, Inc., dated October 3, 2007 ("*LOI*").

¹⁶ *See* Letter from John Joseph McVeigh, counsel to ProActive Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 1, 2007, at 4 and Exhibit A – Declaration of Christa McDonald ("*LOI Response*").

¹⁷ *See id.* at 3 and Exhibit A – Declaration of Christa McDonald.

¹⁸ *See id.* at 3, 4, Exhibit A – Declaration of Christa McDonald. The Licensee notes that a Licensee employee, Christa McDonald, did speak on the phone to another employee of the Hotel, Lynnelle Caudill, around the date in question, but states that to the Licensee's knowledge, that conversation was not recorded, nor broadcast live or after-the-fact over the Licensee's stations. *See id.* at 4-6, Exhibit A – Declaration of Christa McDonald.

¹⁹ *See id.* at 4, Exhibit A – Declaration of Christa McDonald.

²⁰ *See id.* at 3-4, Exhibit A – Declaration of Christa McDonald.

73.1206 of the Commission's rules.²¹ The Complainant acknowledged receiving the *LOI Response*, but indicated that he had nothing further to add.²²

III. DISCUSSION

5. Under Section 503(b)(1) of 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 forfeiture penalty.²³ 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.²⁴ 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,²⁵ and the Commission has so interpreted the term in the Section 503(b) context.²⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.²⁷ "Repeated" means that the act was committed or omitted more than once, or lasts more than one day.²⁸ In order to impose such a 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 penalty should be imposed.²⁹ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.³⁰ As described in greater detail below, we conclude under this procedure that the Licensee is apparently liable for a forfeiture in the amount of \$4,000 for its apparent willful failure to notify a party to a telephone conversation of its intent to record and broadcast the conversation.

6. Section 73.1206 of the Commission's rules requires that:

Before recording a telephone conversation for broadcast, or broadcasting such conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's 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. Such awareness is presumed to exist only when 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.³¹

²¹ See *id.* at 6.

²² See Email from Matt Jensen to Melissa Marshall and Rebecca Hirselj, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated November 20, 2007 (on file with Investigations and Hearings Division).

²³ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²⁴ 47 U.S.C. § 312(f)(1).

²⁵ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁶ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²⁷ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

²⁸ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

²⁹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

³⁰ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

³¹ 47 C.F.R. § 73.1206.

Thus, under Section 73.1206, a licensee must generally notify a party to a telephone call of its intention to record the conversation for broadcast before it commences such recording. The rule 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.³² 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.³³

7. In the instant case, it appears that, on March 22, 2006, the Licensee broadcast a telephone conversation between DJ Dick and the Complainant without providing the Complainant prior notice that the Licensee intended to record and later air the conversation, in apparent willful violation of Section 73.1206 of the Commission's rules. Although the Licensee contends that it cannot confirm or deny the allegations concerning the broadcast of the complained-of telephone conversation,³⁴ the Commission has previously ruled that a licensee may not avoid liability for a rule violation by claiming ignorance as to what was broadcast over its station.³⁵ In addition, the Complainant who participated in the call at issue affirmatively stated that notice was not given.³⁶ Moreover, we have no information before us indicating that the Complainant had knowledge of the Licensee's intent to record the call for broadcast. The Complainant was not contacting a live call-in or "open mike" show or other line where he could expect to have his discussion broadcast and/or simultaneously recorded.³⁷ Furthermore, the Complainant had no apparent association with the Station. Thus, the limited exception to the general notice requirement of Section 73.1206 is not applicable here. Also, although the Licensee indicates that when he recorded the telephone conversation for broadcast without notifying the Complainant of his intention to do so, its employee, DJ Dick, acted without station management's knowledge and in violation of station policy, the Commission has consistently ruled that licensees are responsible for the selection and presentation of program material aired over their stations as well as for the acts and omissions of their employees.³⁸ Under these circumstances, we find that the Licensee apparently willfully violated Section

³² See *Amendment of Section 1206: Broadcast of Telephone Conversations*, MM Dkt. No. 85-37, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); *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*, Dkt. No. 18601, Report and Order, 23 FCC 2d 1, 2 (1970) ("1970 Order"); see also *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004).

³³ *1988 Order*, 3 FCC Rcd at 5463, ¶ 19.

³⁴ See *LOI Response* at 3, 4, Exhibit A – Declaration of Christa McDonald.

³⁵ See *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, Memorandum Opinion and Order, 17 FCC Rcd 9892, 9896, ¶ 18 (2002), citing *Community Broadcasters, Inc. (WGHN(AM)/WGHN-FM)*, Memorandum Opinion and Order, 55 FCC Rcd 28, 35 (1975).

³⁶ See *Complaint*, *supra* note 4.

³⁷ See *1970 Order*, 23 FCC 2d at 2, ¶ 5 (finding that consent will be presumed from surrounding circumstances where a caller initiates a telephone call to an "open mike" show, during which phone conversations are customarily broadcast); *Entercom New Orleans License, LLC*, Memorandum Opinion and Order, 17 FCC Rcd 22538 (Enf. Bur. 2002) (finding no additional notice was required under Section 73.1206 where a caller originated a telephone call to a station's dedicated "call-in" telephone number during a program that regularly broadcast telephone calls from listeners and the program host identified the station upon answering the call); cf. *KOFI, Inc.*, Forfeiture Order, 20 FCC Rcd 17886 (Enf. Bur., Inv. & Hearings Div. 2005) (concluding that a telephone call that is not made on a direct line to the studio, but rather transferred from a station's main-line, does not fall within 47 C.F.R. § 73.1206's presumption of awareness).

³⁸ See, e.g., *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 23839, 23840-841, ¶5 (Enf. Bur., Inv. & Hearings Div. 2000) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970); *Eleven Ten Broadcasting Corp.*, Decision, 32 FCC 706 (1962)).

73.1206 by failing to inform the Complainant that the conversation at issue was to be broadcast or recorded for later broadcast.

8. We also examined whether the Station's broadcast of DJ Dick's pleas for listeners to go to and call the Hotel violated any statutory provision within the Commission's jurisdiction or other Commission rule, since the Complainant makes general allegations to that effect. We conclude that it does not. While we recognize that the broadcast of such material may have caused some inconvenience, it does not meet the standards for which we may take action.³⁹ We therefore deny that portion of the *Complaint*.

9. Pursuant to the Commission's *Forfeiture Policy Statement*⁴⁰ and Section 1.80 of the Commission's rules,⁴¹ the base forfeiture amount for the unauthorized broadcast of a telephone conversation is \$4,000. The *Forfeiture Policy Statement* and Section 1.80 provide that a base forfeiture may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act 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."⁴² Based upon the facts and circumstances presented here, after applying the *Forfeiture Policy Statement*, Section 1.80, and the statutory factors to this case, we believe that a proposed forfeiture of \$4,000, the base amount, is appropriate for the Licensee's apparent violation of Section 73.1206.⁴³

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,⁴⁴ and Section 1.80 of the Commission's rules,⁴⁵ that ProActive Communications, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for apparently willfully violating Section 73.1206 of the Commission's rules.⁴⁶

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

³⁹ See, e.g., 47 U.S.C. § 326 (prohibition against Commission interfering with licensee's selection or presentation of programming that might be regarded as program censorship); 47 C.F.R. § 73.1217 (broadcast hoax rule); see also *Anti-Defamation League of B'nai B'rith*, Memorandum Opinion, 4 FCC 2d 190, 191 (1966) (subsequent history omitted) (citing *Terminiello v. Chicago*, 337 US 1, 4 (1949) (finding that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.")).

⁴⁰ *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 17987, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁴¹ 47 C.F.R. § 1.80.

⁴² 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

⁴³ See, e.g., *KOFI, Inc.*, *supra* note 37 (forfeiture paid--imposing a \$4,000 forfeiture for failing to give the prior notice required by the telephone broadcast rule).

⁴⁴ See 47 U.S.C. § 503(b).

⁴⁵ See 47 C.F.R. § 1.80.

⁴⁶ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 1.80, 73.1206.

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 NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, 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, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When 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). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. ProActive Communications, Inc. will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, and Melissa.Marshall@fcc.gov.

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. If any response is filed, ProActive Communications, Inc. shall also, to the extent practicable, transmit a copy of the response via email to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, and Melissa.Marshall@fcc.gov.

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. **IT IS FURTHER ORDERED**, that the *Complaint* filed by Matt S. Jensen in this proceeding **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the complaint proceeding **IS HEREBY TERMINATED**.⁴⁷

16. **IT IS FURTHER ORDERED**, that copies of this *NAL* shall be sent, by First Class Mail and Certified Mail, to Mr. Gerald D. Clifton, President, ProActive Communications, Inc., 505 West Riverside, Suite 101, Spokane, Washington, 99201, and to its counsel, John Joseph McVeigh, Esquire, 16230 Falls Road, P.O. Box 63, Butler, Maryland, 21023.

FEDERAL COMMUNICATIONS COMMISSION

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

⁴⁷ Consistent with Section 503(b) of the Act and consistent with Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, ProActive Communications, Inc. shall be the only party to this proceeding.