

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

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| In the Matter of |) | |
| |) | |
| Mercury Broadcasting Company, Inc. |) | Facility I.D. No. 77063 |
| Licensee of Station KMTW(TV) ¹ |) | NAL/Acct. No. 0841420049 |
| Hutchinson, Kansas |) | FRN: 0004995882 |

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: June 16, 2008

Released: June 18, 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”),² by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,³ we find that Mercury Broadcasting Company, Inc. (the “Licensee”), licensee of Station KMTW(TV), Hutchinson, Kansas (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.⁴ 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 dollars (\$16,000).

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”).⁵

¹ On August 1, 2006, the Station’s Call Sign was changed from KSCC(TV) to KMTW(TV).

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

³ See 47 C.F.R. § 0.283.

⁴ See 47 C.F.R. § 73.670.

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

3. On January 26, 2006, the Licensee filed its license renewal application (FCC Form 303-S) for Station KMTW(TV) (the "Application") (File No. BRCT-20060126AEM). 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 May 31, 2002, and July 10, 2002, the Station exceeded the children's television commercial limits on six occasions when it aired a commercial featuring the character, "Buzz Lightyear" during the "Buzz Lightyear" program. The Licensee described measures that were taken to prevent the recurrence of such errors.

III. DISCUSSION

4. Station KMTW(TV)'s record of exceeding the Commission's commercial limits on children's television programming on six occasions, all program-length commercials, constitutes an apparent willful and repeated violation of Section 73.670. 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."⁶

5. 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 1990.⁷ 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.⁸

6. 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.⁹ 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.¹⁰ 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,¹¹ and the Commission has so interpreted the term in the Section 503(b) context.¹² 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

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

⁷ *Children's Television Programming*, 6 FCC Rcd at 2117-18.

⁸ 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).

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

¹⁰ 47 U.S.C. § 312(f)(1).

¹¹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹² 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.”¹³

7. 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 73.670.¹⁴ 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.”¹⁵

8. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages. Indeed, all of the overages were program-length commercials. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$16,000 for its apparent willful and repeated violation of Section 73.670.

IV. ORDERING CLAUSES

9. 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 Mercury Broadcasting Company, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of sixteen thousand dollars (\$16,000) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

10. 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*, Mercury Broadcasting Company, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. 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).

12. 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.

13. 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

¹³ 47 U.S.C. § 312(f)(2).

¹⁴ 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.

¹⁵ 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.

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.

14. 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. 20554.¹⁶

15. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Mercury Broadcasting Company, Inc., 115 E. Travis, Suite 533, San Antonio, Texas 78205, and to its counsel, Harry C. Martin, Esquire, Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, Virginia 22209-3801.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁶ See 47 C.F.R. § 1.1914.