

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

In the Matter of)	
)	
Capstar TX Limited Partnership)	File No. EB-07-IH-4902
)	NAL/Acct. No. 200832080090
Former Licensee of Station KFGO(AM))	Facility ID No. 34421
Fargo, North Dakota)	FRN No. 0010028835

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 7, 2008

Released: July 7, 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”) and Section 1.80 of the Commission’s rules,¹ we find that Capstar TX Limited Partnership (“Capstar” or “Licensee”), former licensee of Station KFGO(AM), Fargo, North Dakota (the “Station”),² broadcast a telephone conversation without first informing a party to the conversation of its intention to do so, in apparent willful and repeated violation of Section 73.1206 of the Commission’s rules.³ Based upon our review of the facts, we find that the Licensee is apparently liable for a forfeiture in the amount of \$12,000.⁴

II. BACKGROUND

2. On January 4, 2007, the Commission received a complaint (the “Complaint”) from Mr. Sandy Blunt alleging that KFGO(AM) broadcast a telephone call from Mr. Blunt without his permission.⁵ According to the Complaint, sometime between January and March 2006, Mr. Blunt left a voicemail message on the private cell phone of one of the Station’s on-air personalities, Joel Heitkamp, who hosts a radio program called “News and Views.”⁶ Mr. Blunt alleges that on several occasions in December 2006, the Station broadcast the voicemail message without his permission.⁷ Along with his Complaint, Mr. Blunt provided an audio recording of one of the broadcasts that took place on December 15, 2006.⁸

¹ See 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

² Capstar assigned the license for KFGO(AM) to Radio Fargo-Moorhead, Inc. on January 19, 2007 (FCC File No. BAL-20061121AIP).

³ See 47 C.F.R. § 73.1206.

⁴ We note that although the license for KFGO(AM) was assigned in January 2007, the Station was licensed to Capstar at the time of the alleged violation, and Capstar remains a Commission licensee.

⁵ See Complaint filed by Sandy Blunt, received January 4, 2007 (“Complaint”).

⁶ See *id.*

⁷ See *id.*

⁸ On the tape, the Station’s DJ plays a message left on his voicemail by the Complainant. He also reveals that the message was played over the air the day before. Thus, it appears that the message was broadcast on at least two occasions.

3. By Letter of Inquiry (“LOI”), the Enforcement Bureau directed Capstar to provide information concerning the broadcast of Mr. Blunt’s voicemail message.⁹ In its response as the ultimate parent company of Capstar, Clear Channel Communications, Inc. (“Clear Channel”) neither denies that Station KFGO(AM) aired the voicemail message left for its employee by Mr. Blunt,¹⁰ nor claims that it provided the required notice to Mr. Blunt prior to any broadcasts.¹¹ In addition, Clear Channel admits that the “News and Views” program was regularly scheduled and broadcast live by several affiliates.¹² Clear Channel states, however, that none of its employees or managers have any knowledge concerning the allegations in the Complaint, and that it “is not in the possession of any information that is responsive to the LOI.”¹³

III. DISCUSSION

4. Under Section 503(b)(1) of the Communications Act of 1934, as amended (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 monetary forfeiture penalty.¹⁴ In order to impose such a forfeiture 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 forfeiture penalty should be imposed. The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule. As set forth in greater detail below, we conclude under this standard that Capstar is apparently liable for a forfeiture for its apparent willful and repeated violation of Section 73.1206 of the Commission’s rules.¹⁵

5. Section 73.1206 of the Commission’s rules requires broadcast licensees to notify parties to a telephone conversation of the licensee’s intention to broadcast the conversation prior to either

⁹ See Letter from Jennifer Lewis Hershman, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Capstar TX Limited Partnership, dated October 10, 2007 (“LOI”).

¹⁰ See Letter from Andrew W. Levin, Clear Channel Communications, Inc. to Guy Benson, Attorney, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, filed October 29, 2007 (“LOI Response”).

¹¹ See *id.*

¹² See *id.* at 2. According to the LOI Response, Clear Channel Stations KFYZ(AM) and KCJB(AM) also aired “News and Views” in December 2006.

¹³ *Id.* at 1-2. Clear Channel also states that the only employee retained from KFGO(AM) after the Station was assigned also knows nothing about the matters raised in the LOI.

¹⁴ See 47 U.S.C. § 503(b)(1).

¹⁵ See 47 C.F.R. § 73.1206. This Section provides that:

[b]efore recording a telephone conversation for broadcast, or broadcasting such a 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.

broadcasting the conversation live or recording the conversation for subsequent broadcast.¹⁶ An exception to this obligation is provided where the party to the conversation is aware or may be presumed to be aware that the exchange is likely to be aired by the licensee.¹⁷ The rule is meant to prevent nonconsensual broadcasts of telephone conversations and reflects the Commission's concern with protecting the legitimate expectations of privacy and dignity of individuals.¹⁸ The Enforcement Bureau has previously held that an outgoing personal answering machine message is a "conversation" for purposes of this rule.¹⁹ It has also held that the nonconsensual broadcast of a conversation taken from an answering machine recording violates Section 73.1206.²⁰

6. We believe that this case warrants similar treatment. In particular, we find that a voice mail message left for a station employee is a protected "conversation" that may not be broadcast without prior consent of the caller. This is in line with precedent regarding the protection of answering machine conversations²¹ as well as the Commission's longstanding concern with avoiding invasions of privacy.²² For example, in *Citicasters*, the Enforcement Bureau found the Licensee apparently liable for broadcasting a conversation as it played back from a person's answering machine.²³ In that case, the Bureau acknowledged that the facts were not like a typical telephone broadcast case, where a station calls a person directly and broadcasts the resulting conversation without giving prior notice.²⁴ It nonetheless found that, whether the call is live or taken from an answering machine, Section 73.1206 "requires prior notice before a conversation is broadcast."²⁵ Further, the Commission has made it clear that "conversation," as used in the rule, includes "any word or words spoken during the telephone call."²⁶

7. The evidence in this case demonstrates that Mr. Blunt left a voice mail message on the private cell phone of an employee of the Station, there was no expectation or understanding that the

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 ¶¶ 20-21 (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*, Report and Order, 23 FCC 2d 1, 2 (1970); see also *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445, 22446 at ¶5 (Enf. Bur. 2004).

¹⁹ See *AM/FM Radio Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5032 (Enf. Bur. 2002); *NOE Corp., LLC*, Forfeiture Order, 20 FCC Rcd 12339 (Enf. Bur., Investigations & Hearings Div. 2005).

²⁰ See *Citicasters Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 13805 (Enf. Bur. 2000) ("*Citicasters*").

²¹ See *supra* notes 18-19.

²² See, e.g., *Hefstel Broadcasting-Contemporary, Inc.*, Memorandum Opinion and Order, 52 FCC.2d 1005, 1006 ¶ 5 (1975) ("*Hefstel*").

²³ See *Citicasters*, 15 FCC Rcd 13805, *supra* note 20. The DJ called a person's home and cracked the access codes required to play back messages.

²⁴ See *id.*

²⁵ *Id.* at 13806 ¶ 5. See also *NOE Corp., LLC*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 595 (Enf. Bur., Investigations & Hearings Div. 2005) (finding that a person's outgoing voice mail message is protected under Section 73.1206 and, thus, requires appropriate notice).

²⁶ *Hefstel*, Memorandum Opinion and Order, 52 FCC.2d at 1006 ¶ 5; see also *AMFM Radio Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5032 (Enf. Bur. 2002).

message would be broadcast, the content of Mr. Blunt's voice mail message was aired on at least two occasions by the Station, and that the Station failed to notify and obtain Mr. Blunt's consent before airing the subject conversation. The Enforcement Bureau's LOI detailed the allegations made in the Complaint and offered the Licensee an opportunity to fully respond. Clear Channel does not dispute the veracity of the allegations, but simply submits that it no longer holds the licensee for KFGO(AM) and that it "has no knowledge of the matters raised in the LOI."²⁷ This response is insufficient to counter the specific allegations made by the Complainant. The Commission has long held that each licensee is responsible for material broadcast over its station and for compliance with the Communications Act and its rules, and a licensee may not avoid liability for any violation merely by claiming that it does not know what did or did not go out over the station.²⁸ The overall record evidence, therefore, supports a finding that the Licensee violated Section 73.1206. Further, the fact that Clear Channel is no longer the licensee of the Station does not necessarily preclude the Commission from imposing a forfeiture for conduct that occurred while the Station was licensed to Capstar.²⁹ As a result, in the absence of any argument or evidence to the contrary, we conclude that Station KFGO(AM), while still licensed to Capstar in December 2006, apparently violated Section 73.1206 of the Commission's rules.

8. Pursuant to the Commission's *Forfeiture Policy Statement*³⁰ and Section 1.80 of the rules,³¹ 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."³²

9. As we have stated elsewhere, we regard the Station's repeated broadcast of an improperly recorded telephone conversation as an aggravating circumstance requiring an upward adjustment of the forfeiture amount.³³ We have evidence demonstrating that Clear Channel rebroadcast the subject conversation at least two times, and not only on the Station that originally aired the material, but on other

²⁷ LOI Response at 1.

²⁸ See *Community Broadcasters, Inc.*, 55 FCC.2d 28, 35 ¶ 18 (1975); see also *Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 17 FCC Rcd 9892, 9896 ¶ 18 (Enf. Bur. 2002) (finding licensee's "ignorance" insufficient to counter allegations in complaint).

²⁹ See, e.g., *Broadcast Entertainment Corporation*, 23 FCC Rcd 5431, 5432 ¶ 4 (Enf. Bur. 2008) (finding that sale of a station is not a basis for cancelling a proposed forfeiture); *Vista Point Communications, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 14 FCC Rcd 140 ¶ 1 n.2 (MMB 1999) (finding licensee liable for forfeiture for violations of the Commission's rules that took place when station was under its stewardship); *Petition for Reconsideration Concerning Liability of First Media of Monterey, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 4589 ¶ 3 (MMB 1992) (finding that, although license was assigned to another party, assignor is still liable for forfeiture because it owned the station during the period the violation occurred).

³⁰ *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*").

³¹ See 47 C.F.R. § 1.80.

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

³³ See, e.g., *KOFI, Inc.*, Notice of Apparent Liability, 20 FCC Rcd 5995, 5997, ¶ 6 (Enf. Bur., Investigations & Hearings Div. 2005) (rebroadcast of conversation that violated telephone broadcast rule warranted adding \$2,000 to base forfeiture amount).

Clear Channel stations.³⁴ We also note that Clear Channel has a history of violations relating to the telephone broadcast rule.³⁵ Finally, to ensure that the forfeiture is not simply an affordable cost of doing business, we must also consider Clear Channel's exceptional size and ability to pay.³⁶ Therefore, based upon the facts and circumstances presented here, we find that Clear Channel is apparently liable in the amount of \$12,000 for violating the telephone broadcast rule.

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules,³⁷ that Clear Channel Communications, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$12,000 for apparently willfully and repeatedly violating Section 73.1206 of the Commission's rules.

11. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, Clear Channel 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.

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. Clear Channel Communications, Inc. will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, and Guy.Benson@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.,

³⁴ See LOI Response at 1-2.

³⁵ See, e.g., *Citicasters Licenses, L.P.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 1633 (Enf. Bur., Investigations & Hearings Div. 2007) (imposing \$10,000 forfeiture) (forfeiture paid) (*Citicasters*); *AMFM Radio Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 24518 (Enf. Bur. 2004) (forfeiture paid); *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5893 (Enf. Bur. 2002) (forfeiture paid); *Citicasters, Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 13805 (Enf. Bur. 2000) (forfeiture paid).

³⁶ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 24. In 2005, Clear Channel Communications, Inc. had more than \$ 6.6 billion in annual revenue. See Clear Channel Communications, Inc., 2005 Annual Report on Form 10-K, Securities and Exchange Commission at 29 (filed March 10, 2006). See also *Citicasters*, 22 FCC Rcd 1633.

³⁷ 47 C.F.R. § 1.80.

Room 4-C330, Washington D.C. 20554, and **MUST INCLUDE** the NAL/Account Number referenced above. If any response is filed, Clear Channel 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 Guy.Benson@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 Sandy Blunt **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the complaint proceeding **IS HEREBY TERMINATED**.³⁸

16. **IT IS FURTHER ORDERED** that copies of this **NOTICE OF APPARENT LIABILITY SHALL BE SENT**, by First Class Mail and Certified Mail to Mr. Andrew W. Levin, Executive Vice President, Clear Channel Communications, Inc., 200 East Basse Road, San Antonio, Texas 78209, and to Sandy Blunt, 4716 Amberglow Drive, Bismarck, ND 58503.

FEDERAL COMMUNICATIONS COMMISSION

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

³⁸ Consistent with Section 503(b) of the Act and with Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, Capstar TX Limited Partnership shall be the only party to this proceeding.