

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

In the Matter of
KSBY Communications, Inc.
Licensee of Station KSBY(TV)
San Luis Obispo, California
Facility I.D. No. 19654
NAL/Acct. No. 0841420055
FRN: 0012634366

NOTICE OF APPARENT
LIABILITY FOR FORFEITURE

Adopted: July 28, 2008

Released: July 31, 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"), by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules, we find that KSBY Communications, Inc. (the "Licensee"), licensee of Station KSBY(TV), San Luis Obispo, California (the "Station"), apparently willfully and repeatedly violated Sections 73.3526(e)(5), (e)(7), and (e)(11)(ii) of the Rules, by failing to place in the Station's public inspection file its 2005 Biennial Ownership Report, its 2005 EEO public file report, and all required records concerning compliance with the children's programming commercial limits. We also find that the Licensee apparently violated Section 73.3526(e)(11)(iii) of the Rules, by failing to publicize the existence and location of its Children's Television Programming Reports. 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 four thousand dollars (\$4,000).

II. BACKGROUND

2. Section 73.3526 of the Rules requires a commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. Pursuant to subsection 73.3526(e)(11)(ii), each commercial television broadcast station is required to place in its public inspection file, on a quarterly basis, records sufficient to allow substantiation of the licensee's certification, in its renewal application, of its compliance with the children's television commercial limits imposed by Section 73.670 of the Rules. Further, subsection 73.3526(e)(5) requires each licensee of a commercial broadcast station to place in the public inspection file for its station, a copy of the most recent, complete Ownership Report filed with the Commission biennially. Subsection 73.3526(e)(7)

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)(5), 73.3526(e)(7), and 73.3526(e)(11)(ii).

4 See 47 C.F.R. § 73.3526.

5 47 C.F.R. § 73.670. This rule limits the amount of commercial matter that a commercial television station may air during children's programming to 10.5 minutes per hour on weekends and 12 minutes on weekdays.

provides that an EEO public file report is to be placed in a TV broadcast station's public inspection file annually, on the anniversary of the date its renewal application is due to be filed. As set forth in subsection 73.3526(e)(11)(iii), licensees are also required to file a Children's Television Programming Report with the Commission each quarter and to publicize the existence and location of the reports.

3. On July 27, 2006, the Licensee filed its license renewal application (FCC Form 303-S) for Station KSBY(TV) (the "Application") (File No. BRCT-20060727AIM). 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 reported that in reviewing its public inspection file in preparation for the filing of the Application, it discovered that documentation of the Station's compliance with the children's programming commercial limits for the first quarter of 2005 through the first quarter of 2006 was missing. The Licensee maintained that although these documents had been timely prepared each quarter, they had not been placed into the public file. The Licensee indicated that it placed these documents in the public inspection file in July 2006. Moreover, the Licensee stated that the 2005 EEO public file report and its 2005 Biennial Ownership Report were placed into the public file late.

4. In response to Section IV, Question 10 of the Application, the Licensee stated that it had failed to publicize the existence and location of the Station's Children's Television Programming Reports, as set forth in Section 73.3526(e)(11)(iii) of the Rules. In Exhibit 24, the Licensee indicated that it did not publicize the existence and location of its Children's Television Programming Reports between February 18, 2005, and June 10, 2006. Upon the discovering this error, the Licensee maintained, it immediately took steps to publicize these reports by broadcasting on a weekly basis a 30-second on-air announcement.

5. In a February 21, 2007 amendment to the Application, the Licensee reported that on December 23, 2006, 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.⁶

III. DISCUSSION

6. The Licensee's failure to place in the KSBY(TV) public inspection file all of the required documentation constitutes an apparent willful and repeated violation of Sections 73.3526(e)(5), 73.3526(e)(7), and 73.3526(e)(11)(ii). Moreover, the Licensee's failure to publicize the existence and location of the Children's Television Programming Reports constitutes an apparent willful and repeated violation of Section 73.3526(e)(11)(iii).

7. 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

⁶ From the Licensee's description of the "Xiaolin Showdown" commercial, it appears that this incident is more akin to a violation of the Commission's "host-selling" policy, rather than a program-length commercial.

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).

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

8. 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 73.3526.¹² 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.”¹³

9. In this case, the Licensee reported that required documents were missing from the public inspection file. Moreover, the Licensee conceded that it failed to publicize the existence and location of the Station’s Children’s Television Programming Reports. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$4,000 for its apparent willful and repeated violations of Sections 73.3526(e)(5), (e)(7), (e)(11)(ii), and (e)(11)(iii).

IV. ORDERING CLAUSES

10. 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 KSBY Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for its apparent willful and repeated violations of Sections 73.3526(e)(5), 73.3526(e)(7), 73.3526(e)(11)(ii), and 73.3526(e)(11)(iii) of the Commission’s Rules.

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*, KSBY 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 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).

13. The response, if any, must be mailed to Office of the Secretary, Federal Communications

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 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.

¹³ 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.

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. 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. 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. 20554.¹⁴

16. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KSBY Communications, Inc., 134 Columbus Street, Charleston, South Carolina 29403, and to its counsel, Kevin P. Latek, Esquire, Dow Lohnes PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁴ See 47 C.F.R. § 1.1914.