

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

In the Matter of)	
)	
Courier Communications Corp.)	File No. EB-07-IH-8314
)	NAL Account No. 200832080009
Licensee of Station)	FRN No. 0009758095
WNOV(AM), Milwaukee, Wisconsin)	Facility ID No. 36069

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 20, 2008

Released: February 20, 2008

By the Acting Chief, Investigations and Hearings Division:

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 Courier Communications Corp. (“Courier” or the “Licensee”), Licensee of Station WNOV(AM), Milwaukee, Wisconsin (the “Station”), apparently willfully violated Section 73.1206 of the Commission’s rules³ by broadcasting a telephone conversation without first informing the other party to the conversation of its intention to do so.⁴ Based on our review of the facts and circumstances, we find Courier apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. The Commission received a complaint (the “Complaint”) from Mr. Keith Conrad alleging that, on February 23, 2007, the Station called his mobile phone and played his voicemail greeting over the air without permission.⁵ After reviewing the Complaint, we issued a letter of inquiry (the “LOI”) to the Licensee, asking whether the Station broadcast the voicemail message of Mr. Conrad on or about February 23, 2007.⁶ We directed the Licensee to provide tapes and

¹ See 47 U.S.C. § 503.

² See 47 C.F.R. § 1.80.

³ See 47 C.F.R. § 73.1206.

⁴ See Complaint of Keith Conrad, submitted to the FCC on March 1, 2007 (IC Number 07-WB12797335). A second complaint regarding the same alleged violation was filed by another party with the Commission on March 5, 2007 (IC Number 07-WB12800011).

⁵ See Complaint.

⁶ See Letter from Jennifer Lewis Hershman, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Courier Communications Corp., dated November 8, 2007 (the “LOI”).

transcripts of any such broadcasts, and instructed the Licensee to serve a copy of its response to the LOI (“LOI Response”) on the Complainant.⁷

3. In its December 3, 2007 LOI Response, the Licensee states that it did not provide the programming on the day of the alleged violation, but that it had a verbal contract with an on-air personality, Michael McGee, Sr., who aired his show, “Word Warriors,” on the day of the alleged violation.⁸ The Licensee further states that “[a]ll programming decisions were made by McGee” and that it was during this program that “McGee, or his guest, made a call to Conrad on February 23, 2007 . . . without the knowledge or consent of Courier.”⁹ The Licensee does not deny that part of the voicemail greeting was broadcast over the air, but states that it “did not know of, and did not approve of, the actions taken solely by McGee,” who, it asserts, was an independent contractor.¹⁰ Courier adds that it ran its standard disclaimer informing listeners that the opinions expressed during the program were those of the host, not the Station.¹¹

III. DISCUSSION

4. 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.¹² 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.¹³ 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,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁶ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹⁷ 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

⁷ See *id.* at 4-6. Mr. Conrad did not file a response.

⁸ See Letter from M. Gustave Pick, Counsel to Courier Communications Corp. to Guy Benson, Attorney, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated December 3, 2007 (“LOI Response”).

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁵ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁶ 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).

¹⁷ See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

be imposed.¹⁸ 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.¹⁹ As described in greater detail below, we conclude under this procedure that Courier is apparently liable for a forfeiture in the amount of \$4,000 for its apparent willful failure to comply with the Commission's telephone broadcast requirements.

5. Section 73.1206 of the Commission's rules requires that, before broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of the licensee's intention to broadcast or record 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.²⁰ The purpose of Section 73.1206 is to protect "the legitimate expectation of privacy in connection with the broadcast use of telephone conversations."²¹ The Enforcement Bureau has specifically found that a recorded answering machine message is a conversation within the meaning of this rule and that airing such messages without permission is a violation.²² In this case, the Station does not deny that the material telephone call, and possibly part of a voicemail greeting, was broadcast over the air.²³ Instead, the Licensee disclaims responsibility for the broadcast, stating that all programming decisions were made by McGee, and it did not know or approve of the telephone call.²⁴

6. The Commission has long held that licensees are responsible for the programming aired on their stations and for violations of Commission rules by employees or independent contractors.²⁵ Courier concedes that it had a contract with Mr. McGee, as an independent contractor, to appear on the Station as part of his "Word Warriors" program. Thus,

¹⁸ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁹ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

²⁰ See 47 C.F.R. § 73.1206.

²¹ *Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463 (1988).

²² See *AMFM Radio Licenses*, Notice of Apparent Liability For Forfeiture, 17 FCC Rcd 5032 ¶ 6 (Enf. Bur. 2002) (finding that a right to answer without having one's voice transmitted to the public exists irrespective of whether the voice is live or is lifted from an answering machine); *NOE Corp., LLC*, Forfeiture Order, 20 FCC Rcd 12339 (Enf. Bur., Investigations & Hearings Div. 2007) (finding that an answering machine message constituted a conversation protected under Section 73.1206).

²³ See LOI Response at 2.

²⁴ See *id.*

²⁵ See, e.g., *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, 2772 ¶ 23 (2006), *Recons. Denied*, 21 FCC Rcd 6653 (2006) (broadcast licensees' responsibility for programming may not be delegated); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973) (affirmed action of Commission reminding broadcast licensees of their duty to have knowledge of the content of their programming); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972) (reliance on independent contractor does not absolve licensee of responsibility for compliance with Commission rules); *Eure Family Ltd. Partnership*, 17 FCC Rcd 7042, 7044 ¶ 7 (Enf. Bur. 2002) ("[I]t is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and 'the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.'"). *Id.*

defenses offered by the Licensee that Courier did not know of the telephone call, that the programming decisions were made by Mr. McGee, and that the Station ran its standard disclaimer prior to the broadcast, are all unavailing. As a result, we find that the Licensee apparently violated Section 73.1206 by allowing the Complainant's voicemail greeting to be aired over the Station without first obtaining his consent.²⁶

7. Pursuant to the Commission's *Forfeiture Policy Statement*²⁷ and Section 1.80 of the rules,²⁸ 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)(D) 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."²⁹ Based upon our review of all the pertinent factors as required by Section 503(b)(2)(D) of the Act, the *Forfeiture Policy Statement*, and Section 1.80, we conclude that Courier is apparently liable for a forfeiture in the amount of \$ 4,000 for violating Section 73.1206 of the Commission's rules.

IV. ORDERING CLAUSES

8. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁰ and Sections 0.111, 0.311, and 1.80 of the Commission's rules Courier Communications Corp. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for willfully violating Section 73.1206 of the Commission's rules.³¹

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules within thirty (30) days of the release of this Notice, Courier Communications Corp. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. 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

²⁶ See 47 C.F.R. § 73.1206.

²⁷ See *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²⁸ 47 C.F.R. § 1.80.

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

³⁰ See 47 U.S.C. § 503(b).

³¹ See 47 C.F.R. § 73.1206.

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.

11. The response, if any, must be mailed to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-A465, Washington, D.C. 20554 and **MUST INCLUDE** the NAL/Account Number referenced above.

12. 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.

13. **IT IS FURTHER ORDERED** that the complaint filed by Keith Conrad **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the complaint proceeding **IS HEREBY TERMINATED**.

14. **IT IS FURTHER ORDERED** that copies of this **NOTICE OF APPARENT LIABILITY SHALL BE SENT** by Certified Mail - Return Receipt Requested to M. Gustave Pick, Gatzke & Ruppelt, S.C., counsel to Courier Communications Corp., 15730 W. National Avenue, New Berlin, Wisconsin 53151, and to Mr. Keith Conrad, 5119 Brookwood Valley Circle, Atlanta, Georgia 30309.

FEDERAL COMMUNICATIONS COMMISSION

Benigno E. Bartolome
Acting Chief, Investigations & Hearings Division
Enforcement Bureau