

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

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| In re Application of |) | |
| |) | |
| SAGA COMMUNICATIONS OF ARKANSAS, LLC |) | Facility I.D. No. 53473 |
| |) | NAL/Acct. No. MB-200841410022 |
| |) | FRN: 000804932 |
| For Renewal of License for |) | File No. BRH-20040202AVV |
| Station KEGI(FM) |) | |
| Jonesboro, Arkansas |) | |

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: April 25, 2008

Released: April 28, 2008

By the Chief, Audio Division:

I. INTRODUCTION

1. The Media Bureau has before it the captioned application (“Application”) of Saga Communications of Arkansas, LLC (“Saga”) for renewal of the license of radio station KEGI(FM) (formerly, KDEZ(FM)), Jonesboro, Arkansas. American Heritage Media, Inc. (“AHM”) filed an Informal Objection to the Application on May 21, 2004, alleging that KEGI(FM) violated statutes and rules involving the broadcast of lottery advertisements¹ and the broadcast of indecent material² during the license term.³ Saga filed an Opposition to Informal Objection on June 10, 2004, and AHM filed a Reply to Opposition to Informal Objection on June 21, 2004. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),⁴ by the Chief, Audio Division, Media Bureau by authority delegated under Section 0.283 of the Rules,⁵ we find that Saga apparently willfully and repeatedly violated Section 1304 of Title 18 of the United States Code (the “Lottery Statute”) and Section 73.1211(a) of the Rules.⁶ Based upon our review of the facts and circumstances before us, we conclude that Saga is apparently liable for a monetary forfeiture in the amount of four thousand dollars (\$4,000). We grant in part and deny in part AHM’s Informal Objection, and we grant the Application.

¹ See 18 U.S.C. § 1304; 47 C.F.R. § 73.1211(a).

² See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

³ The Informal Objection included tapes and transcripts of broadcasts by KEGI(FM) on May 15 and 16, 2004. See Informal Objection, Attachment 1, Attachment 2, Attachment 4. Saga does not dispute that KEGI(FM) aired this material.

⁴ 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

⁵ See 47 C.F.R. § 0.283.

⁶ See Note 1.

II. BACKGROUND

2. *Lottery Issue.* Stations that are licensed to communities in states that do not conduct state lotteries (including Arkansas) are not allowed to broadcast advertisements or promotions for lotteries conducted by other states.⁷ The tape and transcript provided by AHM show that on May 16, 2004, KEGI(FM) aired a remote broadcast from Mr. T's Liquor Store and More in Cardwell, Missouri. The KEGI(FM) announcer on location urged listeners to "come on by and see us" and described some "great deals" on products such as beer, liquor and soft drinks. The announcer next described a fishing boat that was being given away in a contest, and then stated:

Come on by, check it out, get some details on it, plus party accessories, they got 'em, snacks, tobacco products at Missouri state minimum prices, **a whole Lotto luck and a whole lot more, if you know what I mean, nudge, nudge, wink, wink**, and while you're here, get some of those Z-100 stickers. . . .

[Commercial break]

. . . Party accessories, snacks, tobacco products at Missouri state minimum prices, **Lotto Missouri luck** and a whole lot more!⁸

3. *Indecency Issue.* On May 15, 2004, between 2 and 4 p.m., KEGI(FM) aired a similar live remote broadcast. The tape and transcript provided by AHM includes the following advertisement in that broadcast:

Announcer One: It's 10,000 T's and T's Weekend on Z-100 Rocks!
Announcer Two: Last night, I grabbed a handful of Hooter's T's . . . and I got thrown out of the restaurant!
Announcer One: Not those T's. . . Hooter's Golf Tees (sound effect: Fore!). You know, the kind you put your balls on!
Announcer Two: Huh?
Announcer One: Never mind.
Announcer Three: It's a T's and T's Weekend! That's the all-new Z-100 10th anniversary T-shirt and a handful of Hooter's Golf Tees.
Announcer Two: Oh, now I get it.
Announcer One: From the station that knows where to put our balls!
Announcer Two: On the Hooter's Tees.

4. Similarly, during the live remote broadcast on May 16, 2004, between the hours of 1 and 4 p.m., KEGI(FM) aired an advertisement with the following material: "Get a limited edition 10th anniversary T-shirt along with a handful of Hooter's Tees . . . Golf tees, that is, because everybody knows that the best thing to rest your balls on is a big set of Hooter's . . . golf tees." AHM argues that this

⁷ See 18 U.S.C. §§ 1304 and 1307(a)(1)(B); 47 C.F.R. § 73.1211; *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

⁸ Informal Objection, Attachment 1 and Attachment 2 (emphasis added).

material violates the restriction on indecent material on broadcast stations between the hours of 6 a.m. and 10 p.m.⁹

5. Title 18 of the United States Code, Section 1464 prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.”¹⁰ The Commission is responsible for enforcing the statutory and regulatory provisions restricting obscenity, indecency and profanity. Consistent with a subsequent statute and court case,¹¹ Section 73.3999 of the Rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.¹² The Commission may impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Act,¹³ upon a finding that a licensee has broadcast obscene, indecent or profane material in violation of 18 U.S.C. § 1464 and Section 73.3999 of the Rules.

6. The Commission’s role in overseeing program content is limited, however, by the First Amendment to the United States Constitution and Section 326 of the Act, which prohibit the Commission from interfering with broadcasters’ freedom of expression and from censoring program material.¹⁴ Thus, any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment, and demands that we proceed cautiously and with appropriate restraint when considering enforcement action in such matters.¹⁵

7. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.¹⁶

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.¹⁷

⁹ Informal Objection at 3-6.

¹⁰ 18 U.S.C. § 1464.

¹¹ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), *as modified by Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996).

¹² *See* 47 C.F.R. § 73.3999.

¹³ *See* 47 U.S.C. § 503(b)(1). *See also* 47 U.S.C. § 312(a)(6) (authorizing license revocation for indecency violations).

¹⁴ U.S. CONST., amend. I; 47 U.S.C. § 326.

¹⁵ *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”); *id.* at 1340 n.14 (“the potentially chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

¹⁶ *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

¹⁷ *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 (2001) (“*Indecency Policy Statement*”) (emphasis in original).

8. In determining whether material is patently offensive, the Commission has indicated that the “*full context* in which the material appeared is critically important,”¹⁸ and has articulated three “principal factors” for its analysis: “(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*”¹⁹ In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”²⁰ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,²¹ or, alternatively, removing the broadcast material from the realm of indecency.²²

III. DISCUSSION

9. *Proposed Forfeiture for Lottery Violations.* The KEGI(FM) announcer’s references to “Lotto” in the May 16, 2004 live remote broadcast from the Cardwell, Missouri liquor store promoted sales of Missouri lottery tickets by the liquor store and, therefore, apparently violated the Lottery Statute and Section 73.1211 of the Rules. The Lottery Statute and Section 73.1211 of the Rules generally prohibit broadcast of lottery advertisements, subject to certain exceptions.²³ The exception to the prohibition for stations licensed in a state that conducts a state lottery is inapplicable to KEGI(FM). The station is licensed to Jonesboro, Arkansas, and Arkansas does not conduct a state lottery.²⁴ The announcer’s references to “Lotto” constituted “advertisement of or information concerning any lottery” within the meaning of the Lottery Statute and Section 73.1211 of the Rules.²⁵ Accordingly, we conclude that the KEGI(FM) announcer’s “Lotto” references apparently violated the Lottery Statute and the Rules.

10. 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

¹⁸ *Indecency Policy Statement* (emphasis in original). In *Pacifica*, the Court “emphasize[d] the narrowness of [its] holding and noted that under the Commission rationale that it upheld, “context is all-important.” 438 U.S. at 750.

¹⁹ *Indecency Policy Statement* at 8003 (emphasis in original).

²⁰ *Id.*

²¹ *Id.* at 8009 (citing *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same)).

²² *Indecency Policy Statement* at 8010 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

²³ See 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211.

²⁴ See 18 U.S.C. § 1307(a)(1)(B) and 47 C.F.R. § 73.1211(c); see also *Oak Ridge FM, Inc.*, Letter, 7 FCC Rcd 6350 (MMB 1992).

²⁵ See *Commonwealth Broadcast of Northern California*, Letter, 7 FCC Rcd 4951 (MMB 1992) (airing a commercial that, *inter alia*, included a jingle with the phrase “The Palace Station, play the favorite” violated the Commission’s anti-lottery proscriptions); see also *Fernal, Inc.*, Notice of Apparent Liability, 10 FCC Rcd 13652 (MMB 1995) (references in casino shuttle service advertisement to “match play on the blackjack tables” and “the largest casino” in Colorado violated the Lottery Statute and Section 73.1211 of the Rules), Forfeiture Order, 11 FCC Rcd 9911 (MMB 1996), *vacated on other grounds by Channel 33, Inc.*, Order, 14 FCC Rcd 16025 (MMB 1999).

United States for a forfeiture penalty.²⁶ 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.²⁷ 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,²⁸ and the Commission has so interpreted the term in the Section 503(b) context.²⁹ 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.”³⁰ 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.”³¹

11. The announcer’s references to “Lotto” in the May 16, 2004 live remote broadcast from the Cardwell, Missouri liquor store were promotional statements for sales of Missouri state Lotto tickets by the liquor store, and apparently violated 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211. In this case, the announcer made willful and repeated references to the availability of Lotto tickets at the store. Moreover, the announcer’s “nudge, nudge, wink, wink” comments strongly suggest that he knew the Lotto tickets could not be advertised on the station. Longstanding Commission precedent holds that licensees are responsible for the actions of their employees and contractors.³² Taking into account the factors enumerated in Section 503(b)(2)(D) of the Act, we conclude that the base forfeiture amount of \$4,000 is appropriate for this apparent violation.

12. *Indecency Allegations.* Neither of the allegedly indecent broadcasts described above meets the “patently offensive” portion of the Commission’s indecency standard. To the extent that the references to “T’s” or “Tees” allude to female breasts, the references are not sufficiently graphic or explicit to be patently offensive under contemporary community standards for the broadcast medium. Similarly, to the extent that the references to “balls” allude to testicles, the references are not sufficiently graphic or explicit to be patently offensive under contemporary community standards for the broadcast medium. In the context of the advertisements cited in the Informal Objection, the use of such double entendres does not render the material patently offensive under contemporary community standards.³³

²⁶ 47 U.S.C. § 503(b)(1)(B). *See also* 47 C.F.R. § 1.80(a)(1).

²⁷ 47 U.S.C. § 312(f)(1).

²⁸ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁹ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³⁰ 47 U.S.C. § 312(f)(2).

³¹ 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.

³² *See Dial-a-Page, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2767 (1993), *recon. denied*, 10 FCC Rcd 8825 (1995) (rule violation resulting from employee error was fully attributable to licensee under doctrine of respondeat superior and “willful” within the meaning of Section 503(b)(1) of the Act); *see also Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) (“licensees are responsible for the selection and presentation of program material over their stations, including . . . acts or omissions of their employees”).

³³ *See Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1925-26 (2005), and Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938 (2005) (vague innuendo or references to sexual organs or activities were not sufficiently graphic or explicit to violate the Commission’s indecency standards).

13. *KEGI(FM) Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act. That section provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.³⁴ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”³⁵

14. On balance, we find that Saga's apparent violation of the restriction on lottery advertising does not constitute a “serious violation” of the Rules warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.³⁶ Further, we find that KEGI(FM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant Saga's Application to renew the station's license.³⁷

IV. ORDERING CLAUSES

15. 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 Saga Communications of Arkansas, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for the apparent willful and repeated violations of Section 1304 of Title 18 of the United States Code and Section 73.1211(a) of the Commission's Rules.

16. 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*, Saga Communications of Arkansas, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. 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.

³⁴ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

³⁵ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

³⁶ For example, we do not find here that the licensee's station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. See also *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992); *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991).

³⁷ See 47 U.S.C. § 309(k).

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).

18. 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: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

19. 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.

20. 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. 20554.³⁸

21. IT IS FURTHER ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.283, that the Informal Objection filed May 21, 2004, by American Heritage Media, Inc. IS GRANTED in part and DENIED in part, and all related pleadings ARE DISMISSED.

22. IT IS FURTHER ORDERED that that the application (File No. BRH-20040202AVV) of Saga Communications of Arkansas, LLC, for renewal of license for station KEGI(FM), Jonesboro, Arkansas, IS GRANTED.

23. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Saga Communications of Arkansas, LLC, 73 Kercheval Avenue, Gross Pointe Farms, Michigan 48236, and to its counsel, Gary S. Smithwick, Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, DC 20016. Copies shall also be sent to American Heritage Media, Inc., 430 Southwest Drive, Jonesboro, Arkansas 72401, and to its counsel, Dan J. Alpert, 2120 N. 21st Road, Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁸ See 47 C.F.R. § 1.1914.