

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
CAYUGA COUNTY COMMUNITY)	File No. EB-05-IH-1078
COLLEGE)	NAL/Acct. No. 200932080001
)	Facility ID No. 9426
Licensee of Noncommercial Educational Station)	FRN # 0003414620
WDWN(FM) Auburn, New York)	

FORFEITURE ORDER

Adopted: June 26, 2009

Released: June 26, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we impose a monetary forfeiture of \$2,000 against Cayuga County Community College (“Cayuga” or “Licensee”), licensee of noncommercial educational Station WDWN (FM), Auburn, New York, (“Station”), for violating Section 399B of the Communications Act of 1934, as amended (the “Act”),¹ and Section 73.503(d) of the Commission’s rules² by broadcasting advertisements over the Station.

II. BACKGROUND

2. On August 26, 2005, Mr. Jim Seward filed a complaint with the Commission, alleging that noncommercial educational Station WDWN (FM) had aired prohibited commercial announcements during its August 13, 2005, broadcast of an Auburn Doubledays baseball game.³

3. Following Mr. Seward’s complaint, the Enforcement Bureau (“Bureau”), by letter dated October 20, 2006,⁴ inquired of Cayuga concerning these allegations. Cayuga responded on December 19, 2006,⁵ acknowledging that the Station did air underwriting announcements on the alleged date in the Complaint and that the underwriters listed therein “appear to be the same list of underwriters that would have been included in the broadcast.”⁶ Cayuga contends that it did not receive consideration from any of the for-profit entities for broadcasting the announcements, but that donations of \$100 each, per season, were made by the underwriters directly to the Auburn Doubledays nonprofit baseball club to help defray

¹ See 47 U.S.C. § 399b.

² See 47 C.F.R. § 73.503(d).

³ See Letter of Jim Seward to the Enforcement Bureau, received August 26, 2005 (“*Complaint*”) at 1.

⁴ See Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Cayuga, dated October 20, 2006 (“*LOI*”).

⁵ See Letter from Cary S. Tepper, Esq., Counsel to Cayuga, to Elizabeth H. Valinoti, Assistant Division Chief, Investigations and Hearings Division, Enforcement Bureau, dated December 19, 2006 (“*LOI Response*”).

⁶ See *LOI Response* at 1.

their travel expenses.⁷ Finally, after receiving the Bureau's inquiry, Cayuga claims that it revised its practices for the inclusion of underwriting announcements.⁸ On January 16, 2009, the Bureau issued a Notice of Apparent Liability ("NAL")⁹ finding that the Licensee had broadcast prohibited announcements in exchange for consideration.¹⁰ In so doing, the *NAL* found that Cayuga had apparently violated the pertinent statute and Commission rules.¹¹ Additionally, the Bureau found that Cayuga's *post-facto* remedial efforts were not mitigating.¹² Consequently, the *NAL* issued a forfeiture of \$2,500 against Cayuga.¹³

4. On January 26, 2009, Cayuga responded to the *NAL*.¹⁴ In its response, Cayuga argues that the Bureau's finding is erroneous as to four of the ten announcements cited in the *NAL*.¹⁵ Cayuga also urges the Commission to cancel or substantially reduce the *NAL*'s proposed forfeiture amount asserting that it is unable to pay that amount and that the amount should reflect its history of compliance with the Commission's rules.¹⁶

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,¹⁷ Section 1.80 of the Commission's Rules,¹⁸ and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹⁹ In assessing forfeitures, Section 503(b) of the Act requires that we take into account 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 other matters as justice may require.²⁰ As discussed further below, we have examined Cayuga's response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find that cancellation or reduction of the forfeiture on the basis of inability to pay is not appropriate in this case; nor are we persuaded by Cayuga's arguments that the Bureau erred in its findings with respect to four announcements at issue in the *NAL*. We find, however, that a reduction is warranted based on Cayuga's good overall prior record.

⁷ See *id.* at 2.

⁸ See *id.* at 3-5.

⁹ See *Cayuga County Community College*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 248 (Enf. Bur. 2009) ("*NAL*").

¹⁰ See *NAL*, 24 FCC Rcd at 250-251.

¹¹ See *id.* at 252.

¹² See *id.*

¹³ See *id.*

¹⁴ See *Cayuga County Community College*, Response to the Notice of Apparent Liability for Forfeiture, dated January 26, 2009 ("*NAL Response*").

¹⁵ See *id.* at 3.

¹⁶ See *id.* at 2-3.

¹⁷ See 47 U.S.C. § 503(b).

¹⁸ See 47 C.F.R. § 1.80.

¹⁹ See *The 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 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²⁰ See 47 U.S.C. § 503(b)(2)(E).

A. Cayuga Willfully and Repeatedly Broadcast Advertisements in Violation of Section 399B of the Act and Section 73.503 of the Commission's Rules

6. Advertisements are defined by the Act as program material broadcast “in exchange for any remuneration” and intended to “promote any service, facility, or product” of for-profit entities.²¹ The pertinent statute specifically provides that noncommercial educational stations may not broadcast advertisements.²² Although contributors of funds to such stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors’ products, services, or businesses.²³ Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.²⁴ At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, the Commission expects that licensees exercise reasonable, “good faith” judgment in this area, and affords some latitude to the judgments of licensees who do so.²⁵

7. Cayuga does not dispute the *NAL*’s finding that six of the ten announcements violated the Commission’s underwriting rules and so we adopt the *NAL*’s apparent conclusion concerning those six announcements. Cayuga does argue, however, that the Bureau erred in finding that the remaining four announcements cited in the *NAL*, those made on behalf of Adelpia Cable,²⁶ Savannah Bank,²⁷ Finger Lakes Bottling,²⁸ and Bank of America,²⁹ violated the Commission’s underwriting rules by promoting their respective sponsors.³⁰ With respect to the Adelpia and Savannah Bank announcements, Cayuga argues that the announcements are permissible because they are factual in nature and do not contain calls to action or promotional language.³¹ Regarding the Finger Lakes Bottling announcement, Cayuga avers that it is not violative of the rules because the word “refreshing” is not a “hardsell adjective.”³² Finally, Cayuga argues that the Bank of America announcement is “entirely permissible” because it describes the

²¹ See 47 U.S.C. § 399b(a).

²² See 47 U.S.C. § 399b(b).

²³ See Public Notice, *In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations* (1986), republished, 7 FCC Rcd 827 (1992) (“Public Notice”).

²⁴ See *id.*

²⁵ See *Xavier University*, Letter of Admonition (Mass Med. Bur. November 14, 1989), *recons. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (“*Xavier*”).

²⁶ See *NAL*, 24 FCC Rcd at 254 (citing to the Adelpia Cable announcement, “Targeted advertising through specialized channels such as ESPN. Jack and John are available for advertising at [telephone number].”).

²⁷ See *id.* (citing to the Savannah Bank announcement, “Meets all your banking needs. Visit one of our four branches in the Finger Lakes. Banking the old fashioned way.”).

²⁸ See *id.* (citing to the Finger Lakes Bottling announcement, “Miller Beer is a cold refreshing beer served at Falcon Park.”).

²⁹ See *id.* (citing to the Bank of America announcement, “Provides flexible financing for policemen, firemen, nurses, and others in the community that serve it so well.”).

³⁰ See *NAL Response* at 3.

³¹ See *id.*

³² *Id.*

role of most banks.³³ In conclusion, Cayuga admits that “some of the sample copy listed on the *NAL* attachment is problematic but not as prevalent as the *NAL* seems to indicate.”³⁴

8. We disagree with Cayuga. We reject Cayuga’s position that the Adelphia Cable and Savannah Bank announcements are not improper because they are factual. We have held previously that the “factuality” or “truth” of the text of an announcement has no relevance to determining whether it promotes a product, service, or business.³⁵ Thus, even if the Adelphia Cable and Savannah Bank announcements were accurate or “factual,” that does not preclude them from being promotional in character and thus prohibited. We find that both announcements contain terms that attempt to favorably distinguish the respective underwriters from their competitors. For example, in the Adelphia Cable announcement, the words “specialized,” and “targeted” distinguish Adelphia Cable from competitors and seek to promote its services. Likewise, the Savannah Bank announcement contains references, such as “meets all your banking needs” and “banking the old fashioned way,” which also describe the underwriter in a comparative and qualitative manner. Also, contrary to Cayuga’s assertion, the Savannah Bank announcement contains a prohibited call to action in inviting listeners to “visit one of our four branches.”³⁶ With respect to the Finger Lakes Bottling announcement, we find its references to Miller Beer as a “cold refreshing beer” promote that product through use of qualitative terms.³⁷ Furthermore, the Bank of America announcement includes the terms “flexible financing,” which impermissibly seeks to induce patronage by encouraging listeners to explore the bank’s financing options.³⁸ Thus, we conclude that Cayuga has failed to establish that the *NAL* erred in its findings respecting these four announcements and we adopt the apparent conclusion contained in the *NAL* that these four announcements violated the Commission’s underwriting rules.

B. Cayuga Did Not Establish It Is Unable to Pay the Forfeiture Amount

9. With respect to Cayuga’s claim of financial hardship, as clearly stated in the ordering clause of the *NAL*,³⁹ the Commission will not consider reducing or canceling a forfeiture based on inability to pay unless the licensee submits the following: (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

³³ *Id.*

³⁴ *Id.*

³⁵ See *Window to the World Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 20239, 20241 n.2 (Mass Med. Bur. 1997), Forfeiture Order, 15 FCC Rcd 10025 (Enf. Bur. 2000) (“*WTTW*”); *Minority Television Project, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15646 (Enf. Bur. 2002), Forfeiture Order, 18 FCC Rcd 26611 (2003), *pet. for rev. den’d*, Order on Review, 19 FCC Rcd 25116 (2004), *aff’d*, Memorandum Opinion and Order, 20 FCC Rcd 16923 (2005) (forfeiture paid) (collectively “*Minority TV*”).

³⁶ See *In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations* (1986), Public Notice, *republished*, 7 FCC Rcd 827 (1992) (“*1986 Public Notice*”) (providing examples of calls to action, such as “stop by our showroom”).

³⁷ See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895 (1982) (“*1982 Policy Statement*”).

³⁸ See, e.g., *1986 Public Notice*, 7 FCC Rcd at 828 (noting that statements such as “six months’ free service,” “a bonus available this week,” and “special gift for the first 50 visitors” are examples of impermissible inducements); see also *National Farm Workers Service Center, Inc.*, Letter, 9 FCC Rcd 6855 (Mass Med. Bur. 1994) (finding that statements such as “special financing” and “different plans for financing,” are also examples of impermissible price information).

³⁹ See *NAL*, 24 FCC Rcd at 253 ¶15 (Enf. Bur. 2009).

respondent's current financial status. Commission precedent holds that any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted and that in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.⁴⁰

10. Cayuga has provided us with only the Station's budgetary information and not that of the Licensee. Specifically, Cayuga filed a one-page document reflecting the operating budget for the Humanities and Telecommunications Division of the College. From that Division's budget, Cayuga derives the Station's budget and asserts its claim of financial hardship. Pursuant to Commission precedent, this scant information is insufficient to allow us to assess whether the instant forfeiture would place an undue financial hardship on Cayuga, or to evaluate the request under relevant Commission precedent.⁴¹ Accordingly, lacking the necessary financial information, we cannot conclude that cancellation or reduction based on inability to pay is appropriate in this case.

11. Cayuga also asks that we consider reducing the forfeiture based on its overall record of compliance with the Commission's rules.⁴² We have reviewed our records and find no other violations against the Licensee. Under similar circumstances we have reduced proposed forfeitures, and find that doing so in this case is appropriate.⁴³ Consequently, we reduce Cayuga's forfeiture amount from \$2,500 to \$2,000.

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's rules,⁴⁴ Cayuga County Community College, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$2,000 for willfully and repeatedly violating Section 399B of the Act, as amended, and Section 73.503(d) of the Commission's Rules.⁴⁵

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules⁴⁶ within thirty (30) days of the release of this *Forfeiture Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.⁴⁷ 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

⁴⁰ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992).

⁴¹ See *Washington and Lee University*, Forfeiture Order, 23 FCC Rcd 15821, 15824 (Mass Med. Bur. 2008) (finding that the licensee's submission of a one-page document stating its operating budget for four years and a separate page noting the salaries of its General Managers was insufficient to analyze an inability to claim defense because it provided only a "snapshot of the Station's budget," and therefore, did not resolve the question of the licensee's finances). In another case, the Commission found that the licensee's submission of the College's overall financial state and the annual budget of the Station was sufficient to establish a claim of financial hardship. See *Cornell College*, Memorandum Opinion and Order, 19 FCC Rcd 14586, 14587-88 (Enf. Bur. 2004).

⁴² See *NAL Response* at 2.

⁴³ See, e.g., *WMGO Broadcasting Corp., Inc.*, Forfeiture Order, 23 FCC Rcd 3754 (Enf. Bur., Invest. and Hearings Div., 2008).

⁴⁴ See 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

⁴⁵ See 47 U.S.C. § 399b; 47 C.F.R. § 73.503(d).

⁴⁶ See 47 C.F.R. § 1.80.

⁴⁷ See 47 U.S.C. § 504(a).

NAL/Account No. and FRN No. 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 24A (payment type code). Cayuga will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov. 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.

14. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent, by Certified Mail/Return Receipt Requested, to Cayuga County Community College, 197 Franklin Street, Auburn, New York 13021, and by regular mail to its counsel, Cary S. Tepper, Esq., Booth, Freret, Imlay & Tepper, P.C., 14356 Cape May Road, Silver Spring, Maryland 20904-6011.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau