

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

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

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 16, 2009

Released: January 16, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Cayuga County Community College (“Cayuga”), licensee of noncommercial educational Station WDWN(FM), Auburn, New York, willfully and repeatedly broadcast prohibited advertisements in apparent violation of Section 399B of the Communications Act of 1934, as amended (the “Act”),¹ and Section 73.503 of the Commission’s rules.² Based upon our review of the facts and circumstances of this case, we conclude that Cayuga is apparently liable for a monetary forfeiture in the amount of \$2,500.

II. BACKGROUND

2. This case arises from a complaint made to the Commission on August 26, 2005, 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 Thereafter, the Enforcement Bureau (“Bureau”) inquired of the licensee concerning the allegations contained in the complaint.⁴ Cayuga responded to the *LOI* on December 19, 2006.⁵

¹ See 47 U.S.C. § 399b.

² See 47 C.F.R. § 73.503 (the “Underwriting Rules”).

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 (“*Response*”).

III. DISCUSSION

3. 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.⁶ 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.⁷ 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,⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁰ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹¹ 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 be imposed.¹² 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.¹³ As described in greater detail below, we conclude under this procedure that Cayuga is apparently liable for a forfeiture in the amount of \$2,500 for its apparent willful and repeated violations of the Commission’s Underwriting Rules.

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

4. 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.¹⁴ The pertinent statute specifically provides that noncommercial educational stations may not broadcast advertisements.¹⁵ 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.¹⁶ Specifically, such announcements may not contain comparative or qualitative

⁶ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

⁷ 47 U.S.C. § 312(f)(1).

⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁰ 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).

¹¹ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

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

¹³ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

¹⁴ See 47 U.S.C. § 399b(a).

¹⁵ See *id.*

¹⁶ See Public Notice, *In the Matter of the Commission Policy Concerning the Noncommercial Nature of*

descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.¹⁷ 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.¹⁸

5. At issue here are ten underwriting announcements, transcripts of which are attached, that Cayuga does not deny that its station broadcast on August 13, 2005.¹⁹ Although Cayuga claims that it is “unable to verify the accuracy or inaccuracy”²⁰ of the language reflected in the transcripts of the announcements, it acknowledges that the station aired underwriting announcements on that date, and that the underwriters mentioned “appear to be the same list of underwriters that would have been included in the broadcast.”²¹ Cayuga further represents that all of the entities mentioned in the announcements are for-profit entities.²² Cayuga contends that it received no consideration from any for-profit entity for broadcasting the announcements, but instead claims that sponsorship donations of \$100 each, per season, were made by the underwriters directly to the Auburn Doubledays non-profit baseball club to help defray their travel expenses.²³ Cayuga claims that the station, after receipt of the Commission’s inquiry, has revised its practices for the inclusion of underwriting announcements on similar broadcasts.²⁴

6. After careful review of the record in this case, we find that the announcements set forth in the attached transcript were made on behalf of for-profit entities and apparently exceed the bounds of what is permissible under Section 399B of the Act and the Commission’s pertinent rules and policies, notwithstanding the “good faith” discretion afforded licensees under *Xavier, supra*. We conclude that they appear to constitute prohibited advertisements because they invite or urge business patronage (e.g., “[m]eets all your banking needs. Visit one of our four branches”),²⁵ distinguish favorably the respective underwriters from their competitors by stating or implying that they offer superior service, products, warranty or price (e.g., “flexible financing,”²⁶ “Budweiser and Bud Lite are discounted,”²⁷ “sport medicine guarantee,”²⁸ “where our aim is excellence and our goal perfection”²⁹), and describe their underwriters through

Educational Broadcasting Stations (1986), republished, 7 FCC Rcd 827 (1992) (“*Public Notice*”).

¹⁷ See *id.*

¹⁸ See *Xavier University*, Letter of Admonition, issued November 14, 1989 (Mass Med. Bur.), *recons. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (“*Xavier*”).

¹⁹ See *Response* at 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2.

²³ *Id.* We note that the Auburn Doubledays, participating in the New York-Penn League Class A-Short Season, are owned and operated by Auburn Community Owned Non-Profit Baseball Association, Inc.

²⁴ *Id.* at 3-5.

²⁵ See Attachment, Savannah Bank announcement.

²⁶ See Attachment, Bank of America announcement.

²⁷ See Attachment, Owasco Beverage announcement.

²⁸ See Attachment, Victory Sports Medicine announcement.

²⁹ See Attachment, Tesoros Department Store announcement.

comparative or qualitative references made either directly or indirectly (e.g., “offers advantages that are unique to any other firm, with sound investment practices based on intensive research”³⁰).

7. Moreover, we find that a *quid pro quo* exchange of consideration between the underwriter and the licensee – a prerequisite to finding a violation of Section 399B – took place in this case. Cayuga contends that it received no support of any kind from any for-profit entity, and that any consideration involved was furnished by the underwriters to the baseball club whose games were broadcast.³¹ Cayuga thus suggests that the station’s broadcast of any underwriting announcements contained in the broadcast was not supported by consideration and was therefore harmless under the Act.

8. We reject this argument. The Act does not require that the consideration involved be supplied directly by the sponsor or underwriter itself.³² Moreover, cognizable consideration may take many forms, including programming itself.³³ In this case, we find that sufficient consideration exists because the baseball club furnished the programming by permitting Cayuga to broadcast the club’s road games. Although Cayuga claims that the decision to air the material was based on its civic-minded determination to help publicize the club, the fact that Cayuga may have had other reasons for broadcasting the material does not negate the fact that Cayuga also received consideration, in this case the club’s permission to air such material.³⁴ Finally, we do not find mitigating Cayuga’s contention that it has since revised its practices to preclude further lapses.³⁵ This argument ignores settled precedent that a licensee’s *post-facto* remedial efforts are not mitigating.³⁶

B. Proposed Forfeiture

9. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$2,000 for violation of the underwriting requirements.³⁷ The *Forfeiture Policy Statement* also provides that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act, such as “the nature, circumstances, extent and

³⁰ See Attachment, Smith Barney announcement.

³¹ See *Response* at 2; 4-5.

³² We note that 47 U.S.C. § 399b(a) simply provides: “[f]or purposes of this Section, the term ‘advertisement’ means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility or product offered by any person who is engaged in such offering for profit.”

³³ See *In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895, 911-912, ¶¶ 26-28 (1982) (“1982 Policy Statement”).

³⁴ See *LOI Response* at 3. The 1982 Policy Statement specifically found that consideration exists where non-profit organizations, such as the baseball club here, furnish “live or taped performances” intended for broadcast. See 1982 Policy Statement, 90 FCC 2d at 906, ¶ 19.

³⁵ See *Response* at 3-5.

³⁶ See *Capstar TX Limited Partnership (WKSS(FM))*, Notice of Apparent Liability, 20 FCC Rcd 10636 (Enf. Bur. 2005) (forfeiture paid); *AT&T Wireless Services, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 21866, 21871 (2002); *KVGL, Inc.*, Memorandum Opinion and Order, 42 FCC Rcd 258, 259 (1973).

³⁷ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997) (“Forfeiture Policy Statement”), *recons. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b).

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.”³⁸

10. In the *Christian Voice NAL*, the Bureau proposed a \$20,000 forfeiture against a noncommercial educational broadcast licensee for airing ten separate announcements on several thousand occasions in apparent violation of the Commission’s Underwriting Rules over a fifteen-month period of time.³⁹ Here, it appears that on August 13, 2005, Cayuga willfully and repeatedly broadcast ten separate advertisements on at least one occasion in violation of Section 399B of the Act and Section 73.503(d) of the Commission’s rules. While the number of prohibited announcements here is similar to *Christian Voice NAL*, the number of repetitions is substantially fewer and the period of time over which they aired is substantially less. Based on all the circumstances, and after examining forfeiture actions in other recent underwriting cases, we believe that a forfeiture of \$2,500 is appropriate.⁴⁰

IV. ORDERING CLAUSES

11. **ACCORDINGLY**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission’s rules, Cayuga County Community College, licensee of noncommercial educational Station WDWN(FM), Auburn, New York, is hereby **NOTIFIED OF ITS APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$2,500 for willfully and repeatedly broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. § 399b, and Section 73.503 of the Commission’s rules, 47 C.F.R. § 73.503, on August 13, 2005.

12. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission’s rules, that within thirty days of the release of this Notice, Cayuga **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. 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[s] 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

³⁸ 47 U.S.C. § 503(b)(2)(E). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 ¶ 27.

³⁹ See *Christian Voice of Central Ohio, Inc. (WCVZ(FM))*, 19 FCC Rcd 23663 (Enf. Bur. 2004) (\$20,000 forfeiture initially proposed for underwriting violations), *forfeiture reduced*, 23 FCC Rcd 7594 (Enf. Bur. 2008) (forfeiture reduced to \$9,000 for good compliance record and after finding acceptable a previously sanctioned announcement), *recons. den.*, 23 FCC Rcd 15943 (2008) (forfeiture paid) (collectively “*Christian Voice*”).

⁴⁰ Cf. *Family Life Educational Foundation (KOUZ(FM))*, Notice of Apparent Liability, 17 FCC Rcd 16317 (Enf. Bur. 2002) (forfeiture paid) (\$2,000 forfeiture imposed for repeat violation involving 120 repetitions of single message over a three-month period).

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. Cayuga County Community College will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov.

14. 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., Room 4-C330, Washington DC 20554 and **SHALL INCLUDE** the NAL/Acct. No. referenced above. To the extent practicable, the response, if any, shall also be sent via e-mail to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov.

15. 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.

16. **IT IS FURTHER ORDERED** that the above-referenced complaint **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the instant complaint proceeding **IS HEREBY TERMINATED**.⁴¹

17. **IT IS FURTHER ORDERED** that a copy of this Notice 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

⁴¹ For purposes of the forfeiture proceeding initiated by this *NAL*, Cayuga shall be the only party to this proceeding.

ATTACHMENT

Set forth below is the relevant text of underwriting announcements allegedly broadcast over Station WDWN(FM), Auburn, New York, on August 13, 2005:

Coca Cola Bottling

Coca Cola is available on Double Days Dollar Discount Nights. With over 400 brands, they have a drink for everyone.

Wegmans

Shoppers Club Cards are good for a discount.

Owasco Beverage

Budweiser and Bud Lite are discounted on Double Day Dollar Events.

Adelphia Cable

Targeted advertising through specialized channels such as ESPN. Jack and John are available for advertising at [telephone number].

Smith Barney

Time tested way of investing. Smith Barney offers advantages that are unique to any other firm, with sound investment practices based on intensive research.

Savannah Bank

Meets all your banking needs. Visit one of our four branches in the Finger Lakes. Banking the old fashioned way.

Finger Lakes Bottling

Miller Beer is a cold refreshing beer served at Falcon Park.

Bank of America

Provides flexible financing for policemen, firemen, nurses, and others in the community that serve it so well.

Victory Sports Medicine

Home of the 24-hour sports medicine guarantee.

Tesoros Department Store

Where our aim is excellence and our goal perfection.