

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

In the Matter of)	
)	File Nos. EB-06-IH-1772 and
REJOYNETWORK, LLC)	EB 06-IH-1748
)	FRN: 0008498685
Licensee of Station WAAW(FM),)	NAL Account No. 200932080012
Williston, South Carolina)	Facility ID No. 4094

FORFEITURE ORDER

Adopted: February 4, 2010

Released: February 4, 2010

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we assess a monetary forfeiture in the amount of \$4,000 against Rejoynetwork, LLC (“Rejoynetwork” or the “Licensee”), licensee of Station WAAW(FM), Williston, South Carolina (the “Station”), for its willful and repeated violation of Section 73.1206 of the Commission’s Rules.¹ As discussed below, Rejoynetwork violated the Commission’s rules by broadcasting multiple telephone conversations without giving prior notice to the individuals being called of its intention to do so.

II. BACKGROUND

2. On October 16, 2008, the Investigations and Hearings Division of the FCC’s Enforcement Bureau (the “Bureau”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) in the amount of \$4,000 against Rejoynetwork for apparently broadcasting multiple telephone conversations without giving prior notice to the individuals being called of its intention to do so, in violation of Section 73.1206.² As discussed in the *NAL*, the Commission received multiple complaints that the Licensee broadcast telephone calls without giving the prior notice required by Section 73.1206.³ The complaints allege that on March 23, 2006, between approximately 10:45 a.m. and 11:15 a.m., a Station radio personality, Ryan B., called airport officials Raquel Oliver, Willis M. (“Buster”) Boshears, Jr., and Cedric Jerome Johnson and broadcast each conversation on-air over the Station without first informing the individuals being called that the conversations would be so broadcast.⁴

¹ See 47 C.F.R. § 73.1206. Station WAAW(FM) was licensed to Frank Neely at the time of the violations. The licensee of the Station was later assigned *pro forma* from Mr. Neely to Rejoynetwork. See FCC File No. BAL-20080314ABZ, granted March 20, 2008 and consummated April 4, 2008. According to that application, Mr. Neely is the sole manager and sole member of Rejoynetwork.

² See *Rejoynetwork, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14917 (Enf. Bur., Investigations & Hearings Div. 2008) (“*NAL*”).

³ See *id.*

⁴ See Complaint of Iain Crawford, submitted to the FCC on March 27, 2006 (IC Number 06-WB11627850) (alleging that Ryan B. called the city administrator and airport director on-air over the Station on March 23, 2006, and did not

3. The facts and circumstances surrounding the broadcast of the telephone conversations are described in detail in the *NAL*, incorporated by reference here, and need not be reiterated. In its *NAL Response*,⁵ the Licensee did not challenge our findings in the *NAL*, but instead argued that the *NAL* is invalid because (1) the Licensee stated that the program host identified himself by name and said that he was calling from the radio station when he called the airport officials and argued that those officials could have immediately terminated the call;⁶ (2) Section 73.1206 is an invalid and unenforceable restraint on free speech violating the First Amendment and Section 326 of the Communications Act of 1934, as amended (the “Act”);⁷ and (3) the Commission has not complied with its obligations under the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).⁸⁹ We reject these arguments, as explained in detail below.

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹⁰ Section 1.80 of the Commission’s Rules,¹¹ and the Commission’s forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹² 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.¹³ As further discussed below, we have examined Rejoynetwork’s response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find no basis for cancellation or reduction of the forfeiture.

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 its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the

inform either that they were on-air); Complaint of Willis M. Boshears, Jr., dated March 27, 2006 (including statements from Ms. Oliver and other persons allegedly with first-hand knowledge of Mr. Boshears’ telephone conversation with Ryan B.); Complaint of Tonya Riddle, submitted to the FCC on March 27, 2006 (IC Number 06-WB11628201) (alleging that Ryan B. failed to inform Mr. Boshears that the telephone conversation was being aired live); Complaint of Cedric Jerome Johnson, dated April 20, 2006 (alleging Ryan B. failed to properly notify him and Mr. Boshears that his telephone conversations with each of them were broadcast live); E-mails from Iain Crawford to FCCINFO, dated Oct. 6, 2006.

⁵ See Rejoynetwork, LLC, Opposition to Notice of Apparent Liability for Forfeiture, dated Oct. 23, 2008. On November 4, 2008, the Commission received a Supplement to Opposition to Notice of Apparent Liability for Forfeiture, dated Oct. 27, 2008, which included the supporting Declaration of Frank Neely (the Opposition to Notice of Apparent Liability for Forfeiture and Supplement to Opposition to Notice of Apparent Liability for Forfeiture, together, will be referred to hereinafter as “*NAL Response*”).

⁶ See *id.* at 5-6.

⁷ See *id.* at 2-7.

⁸ See Pub. L. No. 104-121, § 223, 110 Stat. 847, 862 (1996), 5 U.S.C. § 601 Note (hereinafter “§ 223”).

⁹ See *NAL Response* at 7-9.

¹⁰ See 47 U.S.C. § 503(b).

¹¹ See 47 C.F.R. § 1.80.

¹² 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) (“*Forfeiture Policy Statement*”), *recons. denied*, 15 FCC Rcd 303 (1999).

¹³ See 47 U.S.C. § 503(b)(2)(E).

circumstances of the conversation, that it is being or likely will be broadcast.¹⁴ The Commission will presume such awareness only where “the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.”¹⁵

6. The Licensee in the *NAL Response* admitted that the airport officials were placed directly on the air but stated that the program host identified himself by name and station and noted that either call recipient could have terminated the call after saying “hello.”¹⁶ This disclosure does not satisfy the rule. Mere identification of oneself by name and as calling from a radio station does not provide notice that the call is being broadcast or recorded for broadcast. Further, as we explained in the *NAL*, any notice Ryan B. gave on-air was given too late since it occurred after Messrs. Boshears and Johnson began speaking and after Ryan B. had started recording and broadcasting the telephone conversations.¹⁷ Section 73.1206 clearly requires that such notice be provided “[b]efore recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence” As we held in the *NAL*, the recordings themselves demonstrate that the recipients of the call were not informed they were being broadcast as required by the rule.

7. The Licensee next contends in the *NAL Response* that Section 73.1206 violates the First Amendment and Section 326 of the Act because it restrains the exercise of free speech.¹⁸ In support of its position, the Licensee argues that because Section 73.1206 restricts the manner in which broadcast stations can conduct discussions and interviews with public officials and members of the public it impinges on the ability of broadcast stations to conduct discussions of public issues, so there must be a compelling legitimate governmental interest for the rule and the rule must be narrowly drawn.¹⁹ The Licensee claims that the Commission did not establish that a legitimate and compelling governmental interest exists for the rule’s restrictions on speech or that the rule serves a legitimate public purpose.²⁰ The Licensee argues that the context in which the telephone conversations which are the subject of the *NAL* were broadcast is one especially deserving of the fullest protections accorded by the First Amendment and Section 326 of the Act because the Station was discharging its responsibility as a public trustee, airing a robust and open discussion of a current public controversy.²¹

8. In enacting this rule, the Commission explicitly addressed the rule’s constitutionality and found that constitutional requirements were met.²² The rule requires only that broadcasters provide prior notice to any party to a call that they are being broadcast. The Commission found that the prior notice requirements of Section 73.1206 “pursue a legitimate, substantial governmental interest in protecting privacy with respect to the broadcast use of telephone conversations and are sufficiently narrowly drawn

¹⁴ See 47 C.F.R. § 73.1206.

¹⁵ *Id.*

¹⁶ See *NAL Response* at 5-6.

¹⁷ See *NAL*, 23 FCC Rcd at 14922, ¶ 10 n.48.

¹⁸ See *NAL Response* at 2-7.

¹⁹ See *id.* at 2-3 (citing *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Hague v. CIO*, 307 U.S. 496 (1939)).

²⁰ See *NAL Response* at 4.

²¹ See *id.* at 5-6. The Licensee also noted that the level of possible embarrassment in this context for an on-air radio discussion is less than that of on-air television experience. See *id.* at 6-7.

²² See *Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5464, ¶ 21 (1988).

to achieve this purpose to pass constitutional muster.”²³ The Commission further stated that “these limitations are both reasonable and necessary to protect the legitimate interests of the public in privacy in communications”²⁴ and do not infringe upon broadcasters’ right to gather information “important to their broadcast functions.”²⁵ Therefore, we reject the Licensee’s challenge to the rule.

9. Finally, the Licensee contends that the *NAL* does not comply with the Commission’s obligations under the SBREFA.²⁶ The Licensee argues that until the Commission adopts a policy or program for reducing or waiving civil penalties for violations by small entities, the Commission lacks the legal authority to impose penalties on small entities, such as Rejoynetwork.²⁷

10. The SBREFA requires agencies to establish a policy providing for the reduction and, under appropriate circumstances, the waiver of civil penalties imposed on small entities.²⁸ As part of this policy, under appropriate circumstances, the agency may consider ability to pay in determining penalty assessments on small entities. Such circumstances may include, among others, violations discovered because the small entity participated in a compliance assistance or audit program, and good faith efforts demonstrated by the entity to comply with the law. The Commission has held that the Commission’s existing policies, as reflected in our precedent, comply with Section 223 of the SBREFA.²⁹ Warnings, rather than forfeitures, may be appropriate for small entities and others,³⁰ and the Commission considers inability to pay a relevant factor in assessing forfeitures.³¹ Certain factors considered by the Enforcement Bureau to adjust forfeiture amounts encompass many of the conditions and exclusions listed in Section 223 of the SBREFA.³² The Commission has found that its existing policies apply to small entities and therefore fulfill its requirements under the SBREFA.³³ Therefore the SBREFA does not prevent the Commission from imposing a forfeiture on a small entity and application of the forfeiture policy and procedure to Rejoynetwork satisfies the Commission’s obligations under the SBREFA.

11. Furthermore, the SBREFA provides that a small business entity *may* be excluded from consideration for waiver or reduction of forfeiture if “multiple enforcement actions” have been taken against it by an agency.³⁴ It was previously held that Frank Neely, the principal of the Licensee, should

²³ *Id.*

²⁴ *Id.* at 5464, ¶ 24.

²⁵ *Id.* at 5464, ¶ 21.

²⁶ See *NAL Response* at 7-9.

²⁷ See *id.* The Declaration of Frank Neely included with the *NAL Response* notes that Rejoynetwork’s annual revenues are below the cut-off amount for a business to qualify as a “small business.” See *id.* at Declaration of Frank Neely.

²⁸ See § 223.

²⁹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17109, ¶¶ 51-52. See also *U.S. v. Frank Neely*, 595 F.Supp. 2d 662 (D.S.C. 2009) (“*U.S. v. Frank Neely*”) (finding that the FCC encompassed the spirit of the SBREFA in the mitigation factors set out in its amended Forfeiture Policy Statement and applied them as required to Frank Neely).

³⁰ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17102, ¶ 31 (stating the Commission has broad discretion to issue warnings instead of forfeitures).

³¹ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

³² Compare *id.* and *Forfeiture Policy Statement* with § 223.

³³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17109, ¶ 52.

³⁴ See § 223(b)(3) (excluding from the scope of the statute “small entities that have been subject to multiple enforcement actions by the agency.”).

be excluded from the SBREFA.³⁵ Commission records confirm that Frank Neely does not have a history of overall compliance with the requirements of the Act and the Commission's Rules.³⁶ Therefore we reject the Licensee's contention that the SBREFA precludes this forfeiture. To the extent the Licensee argued in the *NAL Response* that the forfeiture should be reduced or cancelled because Rejoynetwork is a small entity and therefore is unable to pay the forfeiture, we have not considered a reduction or cancellation of the forfeiture due to its inability to pay in this matter because the Licensee did not provide the required, supporting documentation described in the *NAL*.³⁷

12. Having considered the record in this case, the statutory factors, and the matters raised by the Licensee in response to the *NAL*, we affirm the *NAL* and issue a forfeiture in the amount of \$4,000.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Section 1.80 of the Commission's Rules, and authority delegated by Sections 0.111 and 0.311 of the Commission's Rules, that Rejoynetwork, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for repeated and willful violation of Section 73.1206 of the Commission's Rules, 47 C.F.R. § 73.1206, as described in the paragraphs above and in the *NAL*.³⁸

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the rules³⁹ within thirty (30) days of the release of this *Forfeiture Order*. 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 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. Rejoynetwork will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, and Anjali.Singh@fcc.gov.

³⁵ See *U.S. v. Frank Neely*, 595 F.Supp. 2d at 670-71 (finding sufficient grounds under Section 223(b)(3) of the SBREFA upon which to conclude that Neely is precluded from obtaining any relief under Section 223(a) of the SBREFA).

³⁶ See *Frank Neely*, Forfeiture Order, 23 FCC Rcd 11922 (Media Bur., Audio Div. 2008) (finding Neely liable for \$9,000 for repeated violation of Section 73.3526 of the Commission's Rules); *Frank Neely*, Forfeiture Order, 19 FCC Rcd 16135 (Enf. Bur. 2004) (finding Neely liable for \$4,000 for repeated violation of Section 73.1745(a) of the Commission's Rules), *recons. denied*, 22 FCC Rcd 1434 (Enf. Bur. 2007), *aff'd in part*, *U.S. v. Frank Neely*, *supra* notes 29 and 35.

³⁷ See *NAL*, 23 FCC Rcd at 14924-925, ¶ 19 (setting forth inability to pay document submission requirements).

³⁸ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 1.80, 0.111, 0.311, 73.1206.

³⁹ See 47 C.F.R. § 1.80.

15. **IT IS FURTHER ORDERED**, that a copy of this **FORFEITURE ORDER** shall be sent by Certified Mail, Return Receipt Requested, to Rejoynetwork, LLC at its address of record and to its counsel, David Tillotson, Esq., Law Office of David Tillotson, 4606 Charleston Terrace, N.W., Washington, D.C. 20007-1911.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
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