

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

In the Matter of)	
)	File No. EB-07-IH-8189
WXDJ Licensing, Inc.)	FRN: 0005374145
)	NAL/Acct. No. 200732080005
Licensee of Station WXDJ(FM),)	Facility ID No. 70266
North Miami Beach, Florida)	

FORFEITURE ORDER

Adopted: April 23, 2010**Released: April 23, 2010**

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Forfeiture Order*, we assess a monetary forfeiture in the amount of \$16,000 against WXDJ Licensing, Inc. (“WXDJ” or the “Licensee”), licensee of Station WXDJ(FM), North Miami Beach, Florida (the “Station”) and subsidiary of Spanish Broadcasting Systems, Inc. (“SBS”), for willfully and repeatedly violating Section 73.1206 of the Commission’s rules¹ by recording a telephone conversation for broadcast without providing prior notification to the called party.

II. BACKGROUND

2. As discussed in detail in the Notice of Apparent Liability for Forfeiture (“NAL”) issued in this case,² the Enforcement Bureau (“Bureau”) received a complaint (the “Complaint”) alleging that on July 19, 2007, Station personnel made a call to a woman (the “call recipient”) falsely claiming to be employees of a local hospital. According to the Complaint, the caller then told the woman that the dead bodies of her husband and daughter were at the hospital.³ The Complaint also alleged that Station personnel did not inform the call recipient that they were recording the telephone conversation, and that the call recipient became hysterical until Station personnel finally admitted that the call was a prank.⁴

¹ See 47 C.F.R. § 73.1206.

² See *WXDJ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14933 (Enf. Bur., Investigations and Hearings Div. 2008) (“NAL”). In the same NAL, we separately assessed a \$16,000 forfeiture against Station WSKQ(FM), New York, New York, which is licensed to WSKQ Licensing, Inc. WSKQ Licensing—also a subsidiary of SBS—has paid that proposed forfeiture.

³ See Complaint, Federal Communications Commission, dated July 19, 2007 (“Complaint”). Because the complainant has not authorized the disclosure of identifying information to the Licensee, that information will remain anonymous.

⁴ See *id.* at 1.

3. The Bureau, on October 19, 2007, issued a letter to WXDJ inquiring into these allegations (“LOI”).⁵ In its response, WXDJ stated that SBS had contracted with a vendor, “Rubin Ithier,”⁶ who made the call and recorded the conversation for a show featuring prank calls to the friends and family members of WXDJ listeners.⁷ The Licensee admitted that the conversation was broadcast during its morning show and that the call was made at the request of the call recipient’s sister.⁸ WXDJ also admitted that Mr. Ithier did not inform the call recipient that the call was being recorded for later broadcast until after the prank was completed and the call had been recorded.⁹ According to the Licensee, the call recipient then gave permission to air the conversation.¹⁰ The record indicates that the call was broadcast by WXDJ twice.¹¹

4. In view of the record evidence, including WXDJ’s admissions, the *NAL* proposed a forfeiture of \$16,000 against the Licensee.¹² In its response to the *NAL*, WXDJ does not dispute that it committed a violation of our telephone broadcast rule, but asserts that the forfeiture amount is excessive and should be “reduced pursuant to established adjustment factors.”¹³ In support, WXDJ claims that although the Station failed to give the call recipient prior notice that the call was being recorded, the underlying purpose of the telephone broadcast rule—the legitimate expectation of privacy in connection with the broadcast use of telephone conversations—is not diminished in this case because the call recipient’s consent was obtained prior to the actual broadcast.¹⁴ WXDJ also claims that, in previous cases, the Commission has assessed lower forfeitures for similar violations.¹⁵ Next, WXDJ claims that because a portion of the transcript of the call was reproduced in the text of the *NAL*, and that such content constitutes “protected speech,” the Bureau improperly relied on “the substance of the conversation to adjust the forfeiture upward.”¹⁶ Finally, WXDJ argues that the “national economy and the decrease in broadcaster revenues in general” warrant a reduction in the forfeiture amount.¹⁷ We reject these arguments as explained in detail below.

⁵ See Letter from Jennifer A. Lewis Hershman, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to WXDJ Licensing, Inc., dated October 19, 2007.

⁶ Mr. Ithier’s birth name is Ramon Sierra. See Letter from Bruce A. Eisen, Counsel to WKSQ Licensing, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, dated July 21, 2008.

⁷ See Letter from Bruce A. Eisen, Counsel to WXDJ Licensing, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 19, 2007 at 3 (the “*LOI Response*”).

⁸ See *id.*

⁹ See *id.* at 3-4.

¹⁰ See *id.* at 4.

¹¹ See *NAL*, 23 FCC Rcd at 14934 ¶ 2 n.9.

¹² See *id.* at 14938 ¶ 9.

¹³ Request for Reduction of Forfeiture, filed November 12, 2008 at 2 (“Request”).

¹⁴ See *id.* at 3-4. The Licensee also notes that the conversation at issue was “recorded at a location other than at the station.” *Id.* at 2.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 7.

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (the “Act”),¹⁸ Section 1.80 of the Commission’s rules,¹⁹ and the Commission’s forfeiture guidelines set forth in its *Forfeiture Policy Statement*.²⁰ 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.²¹ As discussed further below, we have examined WXDJ’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.

6. 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 circumstances of the conversation, that it is being or likely will be broadcast.²² 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.”²³

7. Although it concedes that “the rule was violated” in this case, WXDJ contends that mitigating facts exist to warrant a downward adjustment of the forfeiture.²⁴ In support of this contention, WXDJ points to three cases—*Capstar*, *WMGO*, and *Citicasters*—that it asserts reflect “more aggravating circumstances” that resulted in lower forfeitures than proposed here.²⁵ WXDJ claims that the Bureau is therefore treating similarly situated licensees differently and that such action “is arbitrary and capricious

¹⁸ See 47 U.S.C. § 503(b).

¹⁹ See 47 C.F.R. § 1.80.

²⁰ 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*”).

²¹ See 47 U.S.C. § 503(b)(2)(E).

²² See 47 C.F.R. § 73.1206.

²³ *Id.*

²⁴ Request at 6.

²⁵ *Id.* at 4-7 (citing *Capstar TX Limited Partnership*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 10464, 10465 (Enf. Bur., Investigations & Hearings Div. 2008) (“*Capstar*”) (assessing \$12,000 for telephone broadcast rule violations involving recording and broadcasting a call without prior notice at least twice over multiple stations, taking into account the licensee’s prior history of noncompliance and ability to pay) (forfeiture paid); *WMGO Broadcasting Corp., Inc.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 4217 (Enf. Bur., Investigations & Hearings Div. 2007) (“*WMGO*”) (assessing \$8,000 for licensee’s broadcast of a call three times without prior notice), *forfeiture reduced*, Forfeiture Order, 23 FCC Rcd 3754, 3757 (Enf. Bur., Investigations & Hearings Div. 2008) (reducing forfeiture to \$6,400 due to licensee’s prior history of compliance) (forfeiture paid); and *Citicasters Licenses, L.P.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 1633 (Enf. Bur., Investigations & Hearings Div. 2007) (“*Citicasters*”) (assessing \$10,000 for licensee’s broadcast of a call at least three times over multiple stations without prior notice due to the licensee’s prior history of noncompliance and licensee’s ability to pay) (forfeiture paid)).

in the absence of an adequate explanation for doing so.”²⁶ But underlying WXDJ’s argument that the circumstances of those cases were more egregious, is its mistaken view that giving notice and obtaining consent, even if too late for compliance with the rule, somehow mitigates its conduct or should be comparatively significant in our assessment of the forfeiture amount.²⁷ On this point, WXDJ states: “The Bureau apparently believes that notice and the consent actually obtained is of no consequence. This is particularly unfair, because forfeitures of a lesser quantum have been assessed in more aggravated enforcement cases.”²⁸ Yet, in none of the three cases cited by the Licensee, or elsewhere, has the Commission considered such post-violation conduct to warrant mitigation of the forfeiture amount for any telephone broadcast case. Rather, the Bureau has consistently rejected such an argument.²⁹ The notion that somehow compliance after-the-fact means that “there was at least some mitigation of a privacy invasion,”³⁰ contradicts the Commission’s established requirement about notice.³¹

8. As reflected in the *NAL* in this proceeding, we specifically noted that the forfeiture was adjusted, in part, because of the number of times the material was aired, WXDJ’s ability to pay, and the fact that it had violated the same rule in the past.³² WXDJ attempts to simplify the circumstances of this case by arguing that the combination of those factors, in addition to obtaining a post-violation consent to broadcast (which we rejected, above, as a mitigating factor), do not justify a higher forfeiture than what was imposed in *Capstar*, *WMGO*, and *Citicasters* because the number of times it aired the conversation was the same or less than these three cases.³³ WXDJ fails to recognize, however, the significant and egregious nature of differences in circumstances between this case and other cases it cites, particularly with respect to this licensee’s history of violations. WXDJ does not deny that, like *Capstar* and *Citicasters*, it has violated the same rule in the past and that it has the ability to pay a \$16,000 forfeiture.³⁴ We also note that WSKQ(FM), another subsidiary of Spanish Broadcasting Systems, received, and has since paid, a \$16,000 forfeiture based on the same set of circumstances as here.³⁵ While we acknowledge that the number of times that the conversation was aired in the instant case was the same or less than the cases referenced by WXDJ, we determined in the *NAL* that the overall circumstances of this case outweighed any single factor in our calculus of the appropriate forfeiture and justified a significant upward adjustment. In this regard, we cannot ignore that even though the Licensee has previously been sanctioned for a violation of the telephone broadcast rule,³⁶ it hired a contractor to

²⁶ Request at 5.

²⁷ See Request at 3-4.

²⁸ *Id.* at 4.

²⁹ See, e.g., *WXDJ Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445, 22446 ¶ 5 (Enf. Bur. 2004) (forfeiture paid). WXDJ previously made the same line of argument, which the Bureau rejected and which WXDJ did not further challenge.

³⁰ Request at 3-4.

³¹ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463 ¶ 19 (1988); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972).

³² See *NAL*, 23 FCC Rcd at 14938 ¶ 9.

³³ See Request at 4-5.

³⁴ See *id.* at 7 (“WXDJ here makes no attempt to demonstrate an inability to pay the forfeiture . . .”).

³⁵ See *supra* note 2; *WSKQ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, DA No. 10-234 (Enf. Bur., Investigations and Hearings Div., rel. Feb. 4, 2010) (assessing \$16,000 for same conduct and violations).

³⁶ See *WXDJ Licensing, Inc.*, 19 FCC Rcd at 22447-48 ¶ 8.

serve as an impostor and thereby deceive members of the listening public, and that this conduct was approved and supported by the Licensee.³⁷ These circumstances are in stark contrast to the cases relied upon by the Licensee, where the violations were isolated lapses made by an on-air personality whose identity and station affiliation were known to each of the call recipients.³⁸ We, therefore, reject the Licensee's claim that the forfeiture assessment in this case is arbitrary and capricious and find that the higher forfeiture imposed is justified.

9. WXDJ also argues that because "the conversation was recorded at a location other than at the station," the violation is mitigated to some degree.³⁹ WXDJ previously made the same argument, which was properly rejected in the *NAL*.⁴⁰ As stated in the *NAL*, licensees are responsible for the acts and omissions of their employees and independent contractors.⁴¹ The fact that the call was recorded off of the Station's premises does not change our conclusion, and WXDJ fails to identify any precedent supporting the assertion that the place where the recording occurred is relevant or mitigating. Accordingly, we continue to reject these arguments here for the same reasons discussed in the *NAL*.⁴²

10. WXDJ next asserts that, because we included a transcript of the call in the background section of the *NAL*, the Bureau presumably relied on the substance of the telephone conversation, which it argues is protected speech, in assessing the forfeiture amount.⁴³ Further, the Licensee states that it "has found only one other reported enforcement case . . . where the substance of the conversation was placed in the body of the Notice of Apparent Liability."⁴⁴ WXDJ's supposition is mistaken.⁴⁵ First, we have commonly incorporated portions of such calls through transcripts to demonstrate our evaluation of the licensee's conduct and to provide context, and we have not treated WXDJ differently than any other licensee that has been alleged to violate Section 73.1206 of the Commission's rules.⁴⁶ Second, we

³⁷ See *NAL*, 23 FCC Rcd at 14938 ¶ 9.

³⁸ In *Citicasters*, see *supra* note 25, the call recipient was told at the outset by the station's radio personality that the call was from a radio show, but the call recipient nevertheless engaged the radio personality in conversation that apparently was being aired live. In *Capstar*, see *supra* note 25, the call recipient left a voicemail message on the cell phone of one of the station's on-air personalities that was later aired by the station. And in *WMGO*, see *supra* note 25, a known host of a morning show asked the call recipient, who had participated in previous interviews, to call him back; and when the call recipient did, the conversation was apparently being aired live.

³⁹ Request at 2.

⁴⁰ See *NAL*, 23 FCC Rcd at 14937 ¶ 8.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Request at 6; *NAL*, 23 FCC Rcd at 14934-935 ¶ 3.

⁴⁴ Request at 6, n.7.

⁴⁵ Because the substance of the telephone conversation was not used as a basis for determining the appropriate forfeiture to impose against WXDJ, we do not address its unsupported argument (*see id.* at 6) that the substance of the conversation is protected speech and cannot be proscribed by the Commission or the courts.

⁴⁶ See e.g., *Cumulus Licensing, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1667, 1668 ¶ 3 (Enf. Bur., Investigations & Hearings Div. 2009); *Rejoynetwork, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14917, 14918 ¶ 4 (Enf. Bur., Investigations & Hearings Div. 2008) (subsequent history omitted); *Saga Communications of New England Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 2741, 2741-42 ¶ 2 (Enf. Bur., Investigations & Hearings Div. 2004) (subsequent history omitted); *Tempe Radio, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 20102 ¶ 2 (Enf. Bur. 2003); *Infinity Broadcasting Corporation of Washington, D.C.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 12391, 12391-92 ¶ 2 (Enf. Bur. 2000) (subsequent history omitted).

pointed out in the *NAL* that the context of the call made it clear that the Licensee's conduct was precisely the type Section 73.1206 was enacted to sanction—entertainment at the expense of an individual's right to privacy.⁴⁷ Thus, contrary to WXDJ's assertion, the *NAL* did not "use the substance of the conversation to adjust the forfeiture upward."⁴⁸ Accordingly, we reject this argument as a basis to reduce the forfeiture.

11. Finally, we turn to WXDJ's contention that the "national economy and the decrease in broadcaster revenues in general" warrant a reduction in the forfeiture.⁴⁹ Although under Section 1.80 of the Commission's rules,⁵⁰ we may reduce a forfeiture based on the licensee's ability to pay, WXDJ specifically states that it is not attempting "to demonstrate an inability to pay the forfeiture pursuant to Section 1.80(a)(4)."⁵¹ Moreover, in considering a reduction under this section, the Commission first requires supporting documentation, like tax returns or financial statements, which the Licensee has not provided here.⁵² Similarly, general claims concerning the state of the economy are insufficient to warrant a reduction.⁵³ Therefore, we decline to reduce the forfeiture based on this contention alone.

12. The Commission's forfeiture guidelines establish a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation.⁵⁴ Having considered the record in this case, the statutory factors, the *Forfeiture Policy Statement*, and the matters raised by the WXDJ in response to the *NAL*, we affirm the *NAL* and issue a forfeiture in the amount of \$16,000.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,⁵⁵ Section 1.80 of the Commission's rules,⁵⁶ and authority delegated by Sections 0.111 and 0.311 of the Commission's rules,⁵⁷ WXDJ Licensing, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of sixteen thousand dollars (\$16,000) for repeated and willful violation of Section 73.1206 of the Commission's rules, as described in the paragraphs above.⁵⁸ Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the

⁴⁷ See *NAL*, 23 FCC Rcd at 14937 ¶ 7.

⁴⁸ Request at 6.

⁴⁹ *Id.* at 7.

⁵⁰ See 47 C.F.R. § 1.80(a)(4).

⁵¹ Request at 7.

⁵² See *Paulino Bernal Evangelism, Inc.*, Forfeiture Order, 19 FCC Rcd 19922, 19923-924 (Enf. Bur. 2004) (declining to reduce forfeiture assessment due to inability to pay argument supported only by assertions of economic hardship rather than supporting documentation); *Casey Network, LLC*, Forfeiture Order, 19 FCC Rcd 14800, 14801 (Enf. Bur. 2004) (same).

⁵³ See *Richard Hildreth, Esq.*, Letter, 7 FCC Rcd 6292, 6294 (Field Operations Bur. 1992) (declining to reduce forfeiture based on general contentions regarding "severely depressed" economy and consequent financial suffering of broadcasters).

⁵⁴ See *Forfeiture Policy Statement*; 47 C.F.R. § 1.80.

⁵⁵ See 47 U.S.C. § 503(b).

⁵⁶ See 47 C.F.R. § 1.80(f)(4).

⁵⁷ See 47 C.F.R. §§ 0.111, 0.311.

⁵⁸ See 47 C.F.R. § 73.1206.

Commission's rules,⁵⁹ within thirty (30) days of the release date of this 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.⁶⁰

14. 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). WXDJ 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 Guy.Benson@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.⁶¹

15. **IT IS FURTHER ORDERED**, that a copy of this **FORFEITURE ORDER** shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to the Licensee at its address of record, and to its counsel Bruce A. Eisen, Kaye Scholer LLP, 901 15th Street, NW, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

⁵⁹ See 47 C.F.R. § 1.80.

⁶⁰ See 47 U.S.C. § 504(a).

⁶¹ See 47 C.F.R. § 1.1914.