

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

In the Matter of)	
)	
Winston Broadcasting Network, Inc.)	Facility ID No. 72958
)	NAL/Acct. No. 0941420002
Licensee of Station WBNX-TV)	FRN: 0003775640
Akron, Ohio)	

FORFEITURE ORDER

Adopted: May 3, 2010

Released: May 4, 2010

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”), we issue a monetary forfeiture in the amount of sixteen thousand dollars (\$16,000) to Winston Broadcasting Network, Inc. (“Licensee”), licensee of Station WBNX-TV, Akron, Ohio (“Station”), for its willful and repeated violation of Section 73.670 of the Commission’s Rules (“Rules”)¹ by failing to comply with the limits on commercial matter in children’s programming.

II. BACKGROUND

2. On June 1, 2005, Licensee filed an application to renew the license of the Station (“Application”) (File No. BRCT-20050601CLV). Section IV, Question 5 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that it has complied with the limits on commercial matter in children’s programming specified in Section 73.670 of the Commission’s Rules. Licensee indicated “No” to that certification, indicating in Exhibit 19 and in a June 4, 2007 amendment to the Application, that between February 3, 1998, and August 5, 2003, the Station violated the children’s television commercial limits on eight occasions. Of these overages, one was 15-seconds in duration, one was 30-seconds in duration, five were characterized as host-selling violations, and one was characterized as a program-length commercial violation. Licensee asserted that the 15-second overage occurred as a result of a computer software problem at the WB Network’s technical facilities, and it attributed the 30-second overage to a last minute, unforeseen schedule change. Licensee attributed the host-selling violations and program-length commercial violation to human error and/or inadvertence.

3. Licensee also reported that on ten occasions, the Station aired a commercial for a Nintendo Gameboy video game during the “Pokemon” program. Licensee indicated that the commercial contained an image of three “Pokemon” cards among a six-card fan for “slightly” more than one second. According to Licensee’s description, only half of the letter “M” and the letters “ON” of “Pokemon” were visible. Licensee stated that no “Pokemon” characters were visible and the audio portion of the commercial made no reference to “Pokemon.” Licensee asserted that children viewing the commercial would not perceive any linkage between the “Pokemon” program and the Gameboy commercial. Licensee contended that the Station was unaware of the “fleeting image” in the commercial until October 8, 2002 when it received a memo from the WB Network.

¹ 47 C.F.R. § 73.670.

4. Licensee described the remedial measures taken to prevent future violations of the commercial limits. Moreover, it indicated that between September 4, 2003, and September 21, 2003, it removed from its children's programming schedule "four half-hours" worth of commercials and replaced that time with public service announcements and promotions of educational and informational children's programs. Finally, Licensee argued that its Application demonstrates its "wealth of children's programs" and other "special nonbroadcast efforts it has taken to promote the educational and informational needs of children" and requested that the Commission take into account these "extraordinary efforts" in considering the Station's commercial overages.

5. On October 14, 2008, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of twenty thousand dollars (\$20,000) to Licensee for its violations.² In response to the NAL, Licensee filed a Response to Notice of Apparent Liability for Forfeiture on November 13, 2008 ("Response"). In its Response, Licensee argued that reduction of the proposed forfeiture is warranted because: (1) Commission precedent cited in the NAL does not support the finding that the "Pokemon" incident was a program-length commercial; and (2) it has a history of overall compliance with the Rules.

III. DISCUSSION

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,³ Section 1.80 of the Rules,⁴ and the Commission's *Forfeiture Policy Statement*.⁵ In assessing forfeitures, Section 503(b)(2)(D) 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 such other matters as justice may require.⁶

7. In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial").⁷

8. Licensee asserted that Commission precedent cited in the NAL does not support the finding that the "Pokemon" incident was a program-length commercial. Specifically, Licensee referred to the following decisions cited in the NAL, *UTV of San Francisco, Inc. (KBHK-TV)*;⁸ *WPIX, Inc.*;⁹ and *Act*

² *Winston Broadcasting Network, Inc.*, 23 FCC Rcd 14606 (MB 2008).

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ *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), *recon. denied*, 15 FCC Rcd 303 (1999).

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

⁸ 10 FCC Rcd 10986, 10988 (1995) (commercial for "Disney on Ice" show contained a brief appearance of the Chip and Dale characters aired during the program "Chip and Dale's Rescue Rangers").

*III Broadcasting License Corp. (WUTV(TV)).*¹⁰ Licensee also argued that a viewer would have no reason to believe that the letters “MON” that were visible in the commercial referred to “Pokemon.”

9. The cases Licensee referred to were cited for the proposition that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has previously stated that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.

10. We find that the Station’s broadcast of the subject commercial constitutes a program-length commercial. The Commission has consistently held that where a commercial announcement is primarily for a product otherwise unrelated to a program, but that announcement also includes references to or offers of products which are related to the program, then the broadcast of that commercial announcement during the program to which the included products relate will render that program a program-length commercial.¹¹ We believe that the “Pokemon” game cards shown in the commercial relate to the “Pokemon” television program that has the same title. Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the commercial and the “Pokemon” program regardless of whether any “Pokemon” character is depicted given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program, which bears the same title.

11. We have considered Licensee’s response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Licensee willfully¹² and repeatedly¹³ violated Section 73.670 of the Rules. However, given Licensee’s history of compliance with the Rules, we reduce the forfeiture amount to \$16,000.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission’s Rules,¹⁴ that Winston

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⁹ 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program).

¹⁰ 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

¹¹ See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (1995); *Scripps Howard Broadcasting Co. (KNXV-TV)*, 9 FCC Rcd 2547 (1994); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (1994); *Quad Cities Television (KLJB-TV)*, 9 FCC Rcd 1711 (1994).

¹² 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. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3453 (1992) (“*Southern California*”).

¹³ Section 312(f)(1) of the Act defines “repeated” as “the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(1). See also *Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

¹⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

Broadcasting Network, Inc., SHALL FORFEIT to the United States the sum of sixteen thousand dollars (\$16,000) for willfully and repeatedly violating Section 73.670 of the Commission's Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 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.¹⁵ 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. 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).

14. Licensee's request for full payment of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁶

15. IT IS FURTHER ORDERED that copies of this Forfeiture Order shall be sent by First Class and Certified Mail, Return Receipt Requested, to Winston Broadcasting Network, Inc., 2690 State Road, Cuyahoga Falls, Ohio 44223, and to its counsel, Mark J. Prak, Esquire, Brooks Pierce McLendon Humphrey & Leonard, LLP, P.O. Box 1800, Raleigh, North Carolina 27602.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁵ 47 U.S.C. § 504(a).

¹⁶ See 47 C.F.R. § 1.1914.