

**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

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 2011

Released: February 2, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny the petition for reconsideration (“*Petition*”) filed by Rejoynetwork, LLC (the “Licensee”),¹ licensee of Station WAAW(FM), Williston, South Carolina (the “Station”), of a *Forfeiture Order* issued February 4, 2010.² The *Forfeiture Order* imposed a monetary forfeiture of \$4,000 against the Licensee for violating Section 73.1206 of the Commission’s rules³ by broadcasting multiple telephone conversations without giving prior notice to the individuals being called of its intention to do so. As discussed below, we deny the *Petition* and affirm the \$4,000 forfeiture.

II. BACKGROUND

2. The *Forfeiture Order* held that the Licensee violated Section 73.1206 on March 23, 2006, when the Station broadcast telephone conversations between a Station radio personality, Ryan B., and airport officials Willis M. (“Buster”) Boshears, Jr. and Cedric Jerome Johnson without first informing the officials that the conversations would be so broadcast.⁴ The *Forfeiture Order* rejected the Licensee’s argument that Section 73.1206 is an invalid and unenforceable restraint on free speech violating the First

¹ See Rejoynetwork, LLC, Petition for Reconsideration (filed Feb. 25, 2010) (“*Petition*”).

² See *Rejoynetwork, LLC*, Forfeiture Order, 25 FCC Rcd 830 (Enf. Bur., Investigations & Hearings Div. 2010) (“*Forfeiture Order*”), *aff’g*, *Rejoynetwork, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14917 (Enf. Bur., Investigations & Hearings Div. 2008) (“*NAL*”).

³ See 47 C.F.R. § 73.1206. That rule states, in relevant part:

Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee’s 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.

⁴ See *Forfeiture Order*, 25 FCC Rcd at 830 ¶ 1.

Amendment and Section 326 of the Communications Act of 1934, as amended (the “Act”).⁵ The Licensee seeks reconsideration of these findings and cancellation of the forfeiture.⁶ We again reject the Licensee’s argument for the reasons stated below.

III. DISCUSSION

3. Reconsideration is appropriate only where the petitioner shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner’s last opportunity to present such matters.⁷ A petition that simply repeats arguments previously considered and rejected will be denied.⁸ The Licensee has failed to either demonstrate error or to present new facts or changed circumstances, as required. In fact, the Licensee again raises the very same argument already considered and rejected in the *Forfeiture Order*: that Section 73.1206 is an invalid and unenforceable restraint on free speech violating the First Amendment and Section 326 of the Act.⁹ To the extent that the *Petition* repeats arguments previously considered and rejected, we deny the *Petition*.¹⁰ The Licensee contends, however, that the *Forfeiture Order* failed to fully consider its argument with respect to the validity of Section 73.1206 in general and as applied to the specific facts of this case.¹¹ We disagree. Nevertheless, we provide further discussion below.

4. We disagree with the Licensee’s contention that Section 73.1206 violates the First Amendment and Section 326 of the Act. As described in the *Forfeiture Order*, in enacting the rule, the Commission fully addressed the rule’s constitutionality and found that constitutional requirements were met.¹² The rule does not restrict the free speech rights of broadcasters in any way. Rather, “the rule requires only that broadcasters provide prior notice to any party to a call and does not restrict a

⁵ See *id.* at 832-33 ¶¶ 7-8. The salient facts of this case are not in dispute. A comprehensive recitation of the facts and history of this case can be found in the *NAL* and the *Forfeiture Order*, which are incorporated here by reference. See *id.* at 830-31 ¶¶ 2-3; *NAL*, 23 FCC Rcd at 14917-20 ¶¶ 2-6.

⁶ See *Petition* at 1-6.

⁷ See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

⁸ See *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004); *Bennett Gilbert Gaines*, 8 FCC Rcd 3986 (Rev. Bd. 1993).

⁹ See *Petition* at 1-5.

¹⁰ See *Forfeiture Order*, 25 FCC Rcd at 832-33 ¶¶ 7-8 (rejecting the Licensee’s First Amendment and Section 326 challenges to Section 73.1206).

¹¹ See *Petition* at 1-6.

¹² See *Forfeiture Order*, 25 FCC Rcd at 832-33 ¶ 8 (citing *Amendment of Section 73.1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5464 ¶ 21 (1988) (“*Telephone Broadcast R&O*”). Section 73.1206 is also in keeping with a larger pattern of state and federal regulation relating to restrictions on telephone call recordings. See, e.g., *Vazquez-Santos v. El Mundo Broad. Corp.*, 283 F. Supp. 2d 561, 564 (D.P.R. 2003) (noting that journalists are not exempted from the workings of the Federal Wiretap Statute by virtue of the First Amendment); “Can We Tape?” Reporters’ Committee for Freedom of the Press, <http://www.rcfp.org/taping/> (last visited March 11, 2010) (stating that twelve states require, under most circumstances, the consent of all parties for a conversation to be recorded).

broadcaster's right to free speech."¹³ As previously stated, "broadcasters are not precluded by the notice requirement from recording or broadcasting telephone conversations nor are they prevented from telephonically gathering information or testimony important to their broadcast functions."¹⁴ Still, the Licensee asserts that the Commission has not clearly and convincingly demonstrated that restricting speech under Section 73.1206 will further "a legitimate and compelling governmental interest."¹⁵ On this point, the Licensee argues that the Commission never adequately addressed the constitutionality of the rule because it referred in the *Telephone Broadcast R&O* to its "belief," as opposed to its conclusion.¹⁶ We disagree with that argument. Contrary to the Licensee's claim, and as explained previously and below, the Commission has already demonstrated that restricting speech under Section 73.1206 furthers a legitimate and substantial governmental interest, in that it safeguards personal privacy and protects against harassment.¹⁷ Therefore, the rule is consistent with both the First Amendment and Section 326 of the Act, and we reject as irrelevant the Licensee's semantic debate concerning the Commission's use of the word "belief" in supporting its conclusion.

5. In its *Petition*, the Licensee demands that the Commission "explain how the harm to the public good from the broadcast of telephone conversations is greater than harms to the public good that governmental bodies were prohibited from preventing through restrictions on speech" in cases the Licensee cites in its *Petition*.¹⁸ The Commission's rulemaking decision clearly and decisively evaluated any harm to the public good that might result from restrictions on the recorded or live broadcast of telephone conversations without proper advance notice, however, and determined that the constitutional requirements on this point were met.¹⁹ After examining comments from a variety of parties, the Commission determined that the burdens imposed by the rule were not excessive in comparison to the important benefits to be gained in the preservation of the public's right of privacy in communications.²⁰ None of the cases the Licensee cites causes us to reevaluate that conclusion.

6. The Licensee also asserts that the Commission's justification for Section 73.1206 – protecting the public's privacy in connection with telephone calls – cannot be reconciled with its failure to

¹³ *Noe Corp., LLC*, Forfeiture Order, 20 FCC Rcd 12339, 12343 ¶ 10 (Enf. Bur., Investigations & Hearings Div. 2005).

¹⁴ *Telephone Broadcast R&O*, 3 FCC Rcd at 5464 ¶ 21.

¹⁵ *Petition* at 2-4. As noted above, in its *Petition*, the Licensee uses the term "compelling governmental interest." *Petition* at 2. This term generally corresponds to the standard applicable to strict scrutiny review. See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (content-based speech restriction must be narrowly tailored to promote compelling government interest). As described herein, the Commission previously has determined that the rule at issue is not subject to that heightened level of review. The Licensee has provided no authority to justify such heightened scrutiny here.

¹⁶ See *Petition* at 2.

¹⁷ See *Forfeiture Order*, 25 FCC Rcd at 832-33 ¶ 8 (citing *Telephone Broadcast R&O*, 3 FCC Rcd at 5464 ¶ 21).

¹⁸ See *Petition* at 3-4 (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); *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975); *NAACP v. Button*, 371 U.S. 415 (1963)).

¹⁹ See *Telephone Broadcast R&O*, 3 FCC Rcd at 5464 ¶ 21.

²⁰ See *id.* at 5463-64 ¶¶ 18-24.

adopt similar rules concerning live impromptu interviews.²¹ We disagree. In regulating the broadcast of telephonic interviews, the Commission has held that some types of interviews require less notice to the prospective interviewee than others. For example, the Commission does not require prior notice for telephonic interviews where the prospective interviewee is associated with the station, or where that party originates the call and it is obvious that the call is in connection with a program in which the station customarily broadcasts its telephone conversations.²² These distinctions recognize that persons participating in such interviews should reasonably expect that their comments might be broadcast.

7. In any event, contrary to the Licensee's argument, the Commission need not demonstrate that conducting a live telephone interview (or recording it for later broadcast) without first informing the recipient of the call is more intrusive than a live in-person interview. As described above, the Commission has already found that the prior notice requirements of Section 73.1206 "pursue a legitimate and substantial governmental interest in protecting privacy with respect to the broadcast use of telephone conversations and are sufficiently narrowly drawn to achieve this purpose to pass constitutional muster."²³ The lack of Commission rules regarding impromptu live in-person interviews is irrelevant.

8. We also reject the Licensee's contention that the application of Section 73.1206 to this case violates the First Amendment and Section 326 of the Act because the broadcast is a talk program addressing a controversial local issue (rather than entertainment) and, thus, is the sort of programming that is most deserving of First Amendment protection.²⁴ The Station remained free to engage in investigative reporting and to conduct interviews, subject to the stipulation that the broadcast or recording for broadcast of any telephone conversation first be disclosed to the other party to the conversation, pursuant to Section 73.1206. The rule does not apply based on the content of the topic discussed, as the privacy interest is the same regardless of the topic discussed, and accordingly, includes no exception for programs addressing a controversial local issue.²⁵

9. Finally, we also reject the Licensee's position that the call recipients could have terminated the call, thereby protecting their own privacy, proving there is no compelling governmental interest to justify Section 73.1206.²⁶ Commission precedent has held that even a very brief pre-Section

²¹ See *Petition* at 4-5.

²² See 47 C.F.R. § 73.1206 (stating such awareness is presumed to exist only when the other party to the call is associated with the station 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 *Telephone Broadcast R&O*, 3 FCC Rcd at 5464 ¶ 21. The current telephone broadcast rule evolved from a preexisting rule that prohibited the recording of telephone conversations for broadcast. See *Report of the Commission in Docket No. 6787 (Use of Recording Devices in Connection with Telephone Service)*, 11 FCC 1033 (1947). When the live broadcast of telephone conversations became technically and legally possible, the Commission recognized the potential for harassment and abuse and adopted the current rule. See *Telephone Broadcast R&O*, 3 FCC Rcd at 5463-64 ¶¶ 20, 24.

²⁴ See *Petition* at 5-6.

²⁵ See 47 C.F.R. § 73.1206.

²⁶ See *Petition* at 6.

73.1206 notice conversation qualifies as a violation.²⁷ Nothing in the facts of this case distinguishes it from Commission precedent.²⁸

10. For the foregoing reasons, after reviewing the Licensee's *Petition* and the underlying record, we find no basis for reconsideration and therefore affirm the *Forfeiture Order*.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 1.106 of the Commission's rules,²⁹ that the *Petition for Reconsideration* filed on February 25, 2010, by Rejoynetwork, LLC, **IS DENIED**, and the *Forfeiture Order* **IS AFFIRMED**.

11. **IT IS FURTHER ORDERED** that Rejoynetwork, LLC is liable for a monetary forfeiture in the amount of \$4,000 for willful and repeated violations of Section 73.1206 of the Commission's rules.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the rules³⁰ within thirty (30) days of the release of this *Memorandum Opinion and 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.³¹ 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 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). The Licensee 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. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-

²⁷ See *Hefel Broadcasting-Contemporary, Inc.*, Memorandum Opinion and Order, 52 FCC 2d 1005, 1006 (1975) (holding that "conversation" was defined for the purpose of Section 73.1206 as including any word or words spoken during the telephone call and imposing \$ 2,000 forfeiture for failure to provide notice and obtain consent prior to recording any conversation); *Noble Broadcast Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 8530 (Enf. Bur. 2000) (NAL paid) (imposing liability for the rebroadcast of a very short conversation, consisting of the word "hello," and a subsequent answering machine message that were rebroadcast without having given prior notice).

²⁸ See, e.g., *El Mundo Broadcasting Corp.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 20377, 20379 (Enf. Bur. 2000) (Bureau refused to recognize an exception to Section 73.1206 notice requirements where the conversation recorded and subsequently broadcast involved a well known on-air personality and a government official).

²⁹ See 47 C.F.R. § 1.106.

³⁰ See 47 C.F.R. § 1.80.

³¹ See 47 U.S.C. § 504(a).

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13. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent, by Certified Mail/Return Receipt Requested, to Rejoynetwork, LLC, c/o Frank Neely, P.O. Box 861, Rock Hill, South Carolina 29731, and to its counsel, David Tillotson, Esquire, Law Office of David Tillotson, 4606 Charleston Terrace, N.W., Washington, D.C. 20007-1911.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau