

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

In the Matter of)	
)	File Number: EB-11-IH-1561
Nassau Broadcasting III, LLC,)	Facility ID No.: 39806
Debtor-in-Possession)	NAL/Acct. No.: 201232080023
)	FRN #: 0011378676
Licensee of Station WWEG(FM), Myersville,)	
Maryland)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 17, 2012

Released: May 17, 2012

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

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we assess a monetary forfeiture in the amount of \$2,000 against Nassau Broadcasting III, LLC, Debtor-in-Possession (hereinafter referred to as “Nassau”), licensee of Station WWEG(FM), Myersville, Maryland (WWEG or the Station), for its apparent willful violation of Section 73.1206 of the Commission’s rules (Section 73.1206 of the Rules).¹ As discussed below, we find that Nassau apparently violated the telephone broadcast rule by recording a telephone conversation for broadcast without giving prior notice to the individual being recorded.

II. BACKGROUND

2. The Enforcement Bureau (Bureau) received a complaint alleging that, on May 27, 2011, employees of the Station made two telephone calls to the complainant on or around 6 a.m. and recorded the telephone conversations without the complainant’s knowledge or consent.² The complainant alleges that the calls were “attempts to bait [complainant] into a conversation regarding a previous dispute with a neighboring business which conducts considerable business with [Nassau].”³

3. The Bureau issued a letter of inquiry to Nassau on November 10, 2011, regarding the issues raised in the complaint.⁴ In its response, Nassau states that it initiated two telephone calls to the

¹ See 47 C.F.R. § 73.1206 (the telephone broadcast rule).

² See Complaint to the Federal Communications Commission, IC No. 11-C00339374-1, submitted on October 16, 2011 (Complaint).

³ *Id.*

⁴ See Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Nassau Broadcasting III, LLC (Nov. 10, 2011) (on file in EB-11-IH-1561) (Scheibel Letter). Nassau requested a two-week extension to respond to the LOI on November 17, 2011, which the Bureau granted. Nassau submitted a timely LOI Response on December 9, 2011. See *infra* note 5.

complainant, but that one of the two calls was immediately disconnected without any conversation.⁵ In its LOI Response, it included the following transcript of the recorded telephone conversation:

Complainant: "Hello"
 Arrianna: "Hi, is this [Complainant]?"
 Complainant: "Yah"
 Arrianna: "Hi [Complainant], good morning, this is Phil and Arrianna with 106.9 The Eagle."
 Complainant: "okay"
 Arrianna: "Good morning, how are you doing [Complainant]?"
 Complainant: "Am I on the air?"
 Arrianna: "Technically you're being recorded right now."
 Complainant: "But we are not live on the air?"
 Phil: "But we are not live on the air."
 Complainant: "Okay well you don't have any permission to use any of my voice on the radio."
 Arrianna: "Oh bummer."
 Phil: "Okay but can we at least discuss with you about tonight and" [recording stopped]⁶

4. Nassau explains that during the phone conversation, the Station employees "immediately identified themselves,"⁷ and then stopped recording mid-sentence after the complainant stated that the Station did not have consent to use his voice.⁸ It asserts that the Station employees apologized for calling the complainant so early in the morning, and that the phone call was ended shortly thereafter.⁹ Nassau confirmed that the recording was made with the intention to broadcast the recording over the Station, but that the recording was never broadcast.¹⁰

III. DISCUSSION

5. Under Section 503(b)(1) of the Communications Act of 1934, as amended (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.¹¹ 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.¹² 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,¹³ and the Commission has so interpreted the term in the Section

⁵ See Letter from Janet Fitzpatrick Moran, counsel for Nassau Broadcasting III, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission at 3 (Dec. 9, 2011) (on file in EB-11-IH-1561) (Nassau December 9 Letter).

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.* at 4, 6.

¹¹ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹² 47 U.S.C. § 312(f)(1).

¹³ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

503(b) context.¹⁴ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁵ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹⁶ 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.¹⁷ 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.¹⁸ As described in greater detail below, we conclude under this procedure that Nassau is apparently liable for a monetary forfeiture for its apparent willful violation of Section 73.1206.

6. Section 73.1206 of the 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.¹⁹ 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.”²⁰

7. Section 73.1206 of the Rules reflects the Commission’s longstanding policy that prior notification is essential to protect individuals’ legitimate expectation of privacy and to preserve their dignity by avoiding the broadcast or recording of their conversations without adequate prior notice.²¹ In 1988, when assessing whether the rule should be modified, the Commission specifically favored an individual’s privacy interest over the interests that broadcasters might have in enhancing program appeal by using telephone conversations to increase spontaneity and entertainment value.²² The Commission found that the potential increase in programming appeal was not “sufficiently critical as to justify intruding on individual privacy,”²³ and declined to alter the prior notice provisions of the rule.²⁴ The Commission further held that the prior notification requirement ensures the protection of an individual’s “right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station” live or recorded for delayed airing.²⁵ Consistent with this reasoning, the Commission has defined “conversations” broadly “to

¹⁴ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁵ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

¹⁶ *Southern California Broadcasting*, 6 FCC Rcd at 4388, para. 5; *Callais Cablevision*, 16 FCC Rcd at 1362, para. 9.

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

¹⁸ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

¹⁹ See 47 C.F.R. § 73.1206.

²⁰ *Id.*

²¹ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64, paras. 19-21 (1988) (*1988 Report and Order*); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972); *Amendment of Part 73 of the Commission’s Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970).

²² See *1988 Report and Order*, 3 FCC Rcd at 5464, para. 21.

²³ *Id.*

²⁴ See *id.* at 5463, para. 18.

²⁵ *Id.*

include *any* word or words spoken during the telephone call,” and specifically has rejected arguments that “utterances made by parties called in answering the phone” are not subject to the rule’s prior notification requirement.²⁶

8. We find that Nassau apparently violated Section 73.1206 of the Rules by recording a telephone conversation for broadcast without first providing the complainant the requisite notice. In this case, Nassau does not dispute that Station employees began recording the telephone conversation with the complainant prior to giving the complainant the required notice. Nassau further acknowledges that Station employees made the recording with the intention of broadcasting the conversation.²⁷ Although the Station employees identified themselves and the Station, they did not notify the complainant that he was being recorded before actually recording the telephone conversation. The record shows that the Station employees only disclosed to the complainant that he was being recorded after the complainant asked if he was on the air, and only stopped recording after the complainant affirmatively denied his permission to use his voice on air.²⁸ Nassau made no arguments nor cited any Commission precedent suggesting that its actions in this case were excusable, and we find none. Based on the evidence before us, we find that Nassau apparently willfully violated Section 73.1206 of the Rules by recording the conversation described in the foregoing without first providing the required notice to the complainant.²⁹

9. Pursuant to the *Forfeiture Policy Statement* and Section 1.80(a)(4) of the Commission’s rules, the base forfeiture for the unauthorized broadcast or recording of a telephone conversation is \$4,000.³⁰ The Commission’s rules provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act³¹ and Section 1.80(a)(4) of the Commission’s rules, which include “the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”³² In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(E).³³ In this case, the Licensee failed to give the complainant the required notice that the telephone conversation was being recorded with the intent of subsequent broadcast. However, the Licensee took the remedial measure of not broadcasting the recorded conversation. While this corrective action does not exculpate Nassau from violating Section 73.1206, we acknowledge that Nassau took corrective measures *sua sponte*, and prior to the Bureau’s involvement,

²⁶ See *Cumulus Licensing, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1667, 1670 (Enf. Bur. 2009), citing *1988 Report and Order*, 3 FCC Rcd 5461, 5463-64 (1988).

²⁷ See Nassau December 9 Letter at 4.

²⁸ See *id* at 5.

²⁹ See Complaint, *supra* note 2; Nassau December 9 Letter at 2-3.

³⁰ 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, 17115 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*); 47 C.F.R. §1.80.

³¹ See 47 U.S.C. § 503(b)(2)(E).

³² 47 C.F.R. § 1.80(a)(4).

³³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100–01; see also *In Re Application of Texas Educational Broadcasting Co-operative, Inc., for Renewal of License for Station KOOP(FM)*, 22 FCC Rcd 13038, 13042 (Media Bur. 2007) (*Texas Educational Broadcasting*) (reducing forfeiture because licensee noted its error and took corrective action *sua sponte*).

which warrants a downward adjustment in the forfeiture amount.³⁴ Accordingly, having considered the record in this case, we find that Nassau is apparently liable for a forfeiture in the amount of \$2,000.

IV. ORDERING CLAUSES

10. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁵ and Sections 0.111, 0.311, 0.314, and 1.80 of the Commission's rules,³⁶ that Nassau Broadcasting III, LLC, Debtor-in-Possession, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$2,000 for apparently willfully violating Section 73.1206 of the Commission's rules.³⁷

11. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release date of this *NAL*, Nassau Broadcasting III, LLC, Debtor-in-Possession, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

12. 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. An FCC Form 159 (Remittance Advice) must be submitted with all payments. 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. Nassau Broadcasting III, LLC will also send electronic notification on the date said payment is made to Terry.Cavanaugh@fcc.gov, Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, and Jennifer.Lewis@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules. The written statement shall be mailed to Terry Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and **MUST INCLUDE** the *NAL*/Account Number referenced above. To the extent practicable, any response should also be sent by e-mail to Terry.Cavanaugh@fcc.gov, Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, and Jennifer.Lewis@fcc.gov.

³⁴ See *Texas Educational Broadcasting*, 22 FCC Rcd at 12042. See, e.g., *In the Matter of Southern Adventist University*, 26 FCC Rcd 11254, 11256 (Med. Bur. 2007) ("Reductions of proposed forfeitures based on good faith efforts to comply generally involve situations where violators demonstrate that they initiated measures to correct or remedy violations prior to the Commission's involvement.")

³⁵ See 47 U.S.C. § 503(b).

³⁶ See 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

³⁷ See 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 73.1206.

14. 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.

15. **IT IS FURTHER ORDERED**, that the Complaint filed **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the Complaint proceeding **IS HEREBY TERMINATED**.³⁸

16. **IT IS FURTHER ORDERED**, that a copy of this NAL shall be sent, by Certified Mail/Return Receipt Requested, to Nassau Broadcasting III, LLC, Debtor-in-Possession, at its address of record and to its counsel, Janet Fitzpatrick Moran, Patton Boggs, LLP, 2550 M Street, N.W., Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

Theresa Z. Cavanaugh
Chief, Investigations and Hearings Division
Enforcement Bureau

³⁸ For purposes of this forfeiture proceeding initiated by this *NAL*, Nassau Broadcasting III, LLC, Debtor in Possession, shall be the only party to this proceeding.