

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

LETTER
July 16, 1990

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C8-517

Released: July 24, 1990

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Wayne Brewies, President
Southern Arkansas Radio Company
Licensee, Station KKOL(FM)
P.O. Box 1066
Hampton, Arkansas 71744

Dear Mr. Brewies:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. This letter also constitutes an admonishment for violations of the Communications Act and the Commission's Rules as set out below.

This action results from the August 15, 1989, complaint against KKOL filed by Ian V. Vickery, Esq., on behalf of Congressman Beryl Anthony, Jr, and concerns KKOL's conduct during the period preceding and following the November 1988 general election. The complaint alleged that KKOL discriminated against the Anthony candidacy when it broadcast "disclaimers" in your voice after each of his spot announcements which stated, "these views are not necessarily the views of this station." The complaint asserted that, by comparison, no such disclaimers were aired after Roger Bell's spot announcements, but rather that "tags" in your voice were broadcast which stated, "vote for Roger, he's one of us." It also claimed that Bell's role as your co-host of KKOL's "The Friday Journal" is relevant to the discrimination allegation.

The complaint further contended that when Mr. Vickery visited KKOL to obtain information in preparation for filing this complaint and to review the station's compliance with the lowest unit charge provision, no political file and only a small part of the public inspection file were made available. The complaint also raised questions about whether KKOL had complied with the political editorializing rule in connection with its endorsement of the Bell candidacy.

Based on the complainant's pleadings and your responses to our September 6, 1989, and January 22, 1990, inquiries, it appears that KKOL violated the political and public inspection rules during Vickery's visits in 1989 and that KKOL violated the political editorializing rule and the lowest unit charge provision during the period prior to the November 1988 election. Finally, it does not ap-

pear that KKOL discriminated against the Anthony candidacy in violation of any Commission rule or the Communications Act.

POLITICAL FILE

Section 73.1940(d) requires broadcast stations to maintain and permit public inspection of a complete record of all requests for time made by or on behalf of political candidates, the disposition of each request, and the charges, if any, made for the time. This information must be maintained for two years. Mr. Vickery alleged that when he visited KKOL on June 1, 1989, he was told that such a file was not available. Vickery asserted that he then contacted the station by telephone, confirmed by a June 7 follow-up letter, notifying the station that he would return to the station on June 19, 1989, to inspect the political file. During the June 19 visit, Vickery claimed he was told once more that a political file was not available. On July 28, 1989, Vickery states he again visited the station and was advised that a political file was not available. In reply to our letter of inquiry about the maintenance of a "political file," you admitted that a file was not maintained during the 1988 general election period, nor at any time until this complaint was filed in August 1989, because you did not know one was required. We note that with your response, you enclosed a political file which you contend is now being kept in accordance with the rule.

PUBLIC INSPECTION FILE

Section 73.3526 details the various materials which a station must maintain for public inspection. The complaint indicated that during Vickery's July 28 visit, he asked to look at the public inspection file as well as the political file. Vickery claimed that the public inspection file was incomplete in that it contained only the most recent Form 395, the Annual Employment Report. Your response to our inquiry did not deny the complainant's allegation that a complete public inspection file was unavailable at the time of Mr. Vickery's July 28 visit to the station. It appears from your response that a complete public inspection file is now available.

In view of the foregoing it appears that KKOL wilfully and repeatedly violated Section 73.1940(d) from one year prior to the date of the issuance of this NAL until at least July 28, 1989, and wilfully violated Section 73.3526 on July 28, 1989. Accordingly, pursuant to 47 U.S.C. Section 503(b), Southern Arkansas Radio Company is hereby advised of its apparent liability for a forfeiture of four thousand dollars (\$4,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act.

POLITICAL EDITORIALIZING

Section 73.1930 sets out the requirements to be followed when a broadcaster either endorses or opposes a legally qualified candidate. When this occurs, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate(s) for the same office or the candidate opposed in the editorial, (a) notification of the date and time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for the candidate or a spokesperson of the candidate to re-

spond on the air. You acknowledged that KKOL supported the Bell candidacy and broadcast station endorsements during "The Friday Journal" prior to the 1988 general election. Moreover, you admitted that the station "was not aware of Section 73.1930 at the time" and, thus, did not notify Congressman Anthony in writing within 24 hours of the endorsement, provide a script or tape of the endorsement, or provide a reasonable opportunity for Anthony or his representative to respond on the air to the endorsement. Although you admitted lack of knowledge of the rule, you claimed that unsuccessful attempts were made by telephone to invite Anthony to appear with Bell during KKOL's "Friday Journal." However, since Anthony was not notified of the endorsement or provided with a tape or transcript of its content, the telephone offers did not satisfy your obligation to afford a reasonable opportunity for reply to the endorsement. Therefore, you failed to comply with the requirements of the political editorializing rule.

LOWEST UNIT CHARGE

Section 73.1940(b) requires that during the 45 days preceding a primary election and the 60 days preceding a general election, stations must charge legally qualified candidates no more than the station's "lowest unit charge" (LUC), i.e., rates no higher than those charged the station's most favored commercial or political advertisers "for the same class and amount of time for the same period." It appears that KKOL violated the LUC provision during the period preceding the November 1988 election.

Your "Broadcast Order" sales sheets show that John Dawson purchased 42 30-second spots for \$3.50 to be aired October 31 to November 7, 1988, while Congressman Anthony purchased 72 30-second spots and Roger Bell purchased 46 30-second spots, each paying \$7.00 per spot for time to be aired October 23 to November 7. There is nothing on the face of the order sheets to explain whether the spots may have been different classes of time justifying different LUC's.

Your explanation for this disparity is unavailing. You explained that KKOL serves several communities of varying populations and generally charges commercial advertisers disparate rates within the various classes and time periods based on the size of the community the advertiser intends to reach. When applied to purchases of time by legally qualified candidates, this policy is in conflict with Commission precedent. In *The Law of Political Broadcasting and Cablecasting*, 100 F.C.C. 2d 1476, 1516 (1984), the Commission stated that under the LUC provision, broadcasters may not charge candidates different rates based on their charges for the "national" or "local" status of their commercial advertisers. Nor can they charge differing rates based on whether the candidate is running for local, state, or federal office. This interpretation of the LUC provision prohibits KKOL's disparate charges to candidates based on their intention to reach different size communities within the station's service area. Thus, your decision to charge both Congressman Anthony and Roger Bell more than John Dawson because of the sizes of the voting populations of their respective electoral jurisdictions was in violation of the LUC provision, and rebates of the overcharges must be made. In the case of Congressman Anthony, the rebate should be 72 times the overcharge amount of \$3.50, or \$252.00 total. Roger Bell should be rebated 46 times the overcharge of

\$3.50, or \$161.00 total. You are directed to review all of your available records, and to the extent that these candidates or any other candidates paid more than the LUC in sales not shown on material provided the Commission, the station must also rebate those overcharges.

Based on the above you are ADMONISHED for your violations of Sections 73.1930 and 73.1940(b) of the Commission's Rules. Were it not for the expiration of the statute of limitations (*See* 47 U.S.C. Section 503(b)(6)) we would issue a forfeiture for these violations.

You are directed to submit to the Commission within twenty (20) days of your receipt of this letter, the procedures implemented by KKOL to ensure that this type of conduct does not recur, the further rebates required as a result of your review of possible additional overcharges, and the steps you have taken to refund the overcharges in connection with the LUC violations. The response must be signed by an officer or director of the licensee corporation.

Finally, it does not appear that KKOL is in violation of Section 73.1940(c) of the Commission's rules that prohibit discrimination between competing candidates for public office. Although the Commission *en banc* has not had the occasion to so rule, the staff of the Political Programming Branch, for a number of years, has advised broadcasters and candidates that content-neutral disclaimers are permissible, even when utilized on a selective basis. In particular, the staff has determined that disclaimers such as that used in this case -- "these views are not necessarily the views of the station" -- are not violative of the discrimination rule or the "no censorship" provision of Section 315(a) of the Act. The facts of this complaint, however, suggest that some modification of our previous advice is appropriate to better advance the intent of the no-discrimination rule. In the future, therefore, broadcasters who choose to use a content-neutral disclaimer in connection with a particular candidate's advertising, must use such a disclaimer with all subsequent advertising broadcast on behalf of every candidate for the same office. Thus, while the use of content-neutral disclaimers remains permissible, they can no longer be utilized selectively within any particular race for public office. With respect to the statement "vote for Roger, he's one of us," because it was ordered by the candidate as a part of his spot, we find no discrimination.

With respect to the forfeiture imposed herein, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall contain a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Application for Review of the admonishment by the full Commission may be requested within 30 days of the release date of this letter by writing to the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. 47 C.F.R. Section 1.115.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau