

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

In the Matter of)
Liability of)
)
ACT III BROADCASTING LICENSE CORP.)
Licensee of Television Station)
WUHF(TV), Rochester, New York)
)
for a Forfeiture)

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1997

Released: December 19, 1997

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, has before it for consideration (i) a Notice of Apparent Liability ("NAL") in the amount of fifteen thousand dollars (\$15,000) issued against Act III Broadcasting License Corporation ("Act III"), licensee of television station WUHF(TV), Rochester, NY;¹ and (ii) Act III's "Petition for Reconsideration and Reduction or Elimination of Forfeiture", filed on September 7, 1995. The forfeiture was assessed for apparent repeated violations of Section 73.670 of the Commission's Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter that may be aired during children's programming.

2. In the Children's Television Act of 1990,² 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 renewals 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, 47 C.F.R. §73.670.

¹ Act III Broadcasting License Corporation (WUHF(TV)), 10 FCC Rcd 8799 (1995) ("Act III NAL (WUHF(TV))"). On December 15, 1995, the Commission granted an application for transfer of control of Act III Broadcasting License Corporation, then licensee of WUHF(TV), from Act III Communications Holdings, L.P., to A-3 Acquisition, Inc. (BTCCT-950621KK). In a letter dated January 4, 1996, the Commission was informed that the transfer of control was consummated on that date; that the name of the licensee, Act III Broadcasting License Corporation, has been changed to Sullivan Broadcasting License Corporation; that the licensee's parent corporation (the entity formed by the merger of A-3 Acquisition, Inc., and Act III Broadcasting, Inc.) was now Sullivan Broadcasting Company, Inc.; and that the owner of Sullivan Broadcasting Company, Inc., was now Sullivan Broadcasting Holdings, Inc. (formerly A-3 Holdings, Inc.).

² Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b and 394.

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 reaffirmed and clarified its long-standing policy 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"). Children's Television Programming, 6 FCC Rcd 2111, 2118. recon. granted in part, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. Children's Television Programming, 6 FCC Rcd 5529, 5530 (1991).

3. On February 1, 1994, Act III filed an application for renewal of license for WUHF(TV), File No. BRCT-940201LL. In response to Question 9(b) of that application, Act III stated that WUHF(TV) had not complied with the limits on commercial matter in children's programming. In accordance with Question 9(c), Act III submitted Exhibit 3 to its application, listing each segment of children's programming which exceeded the commercial limits. Exhibit 3 revealed that between January 2, 1992, and October 27, 1993, WUHF(TV) exceeded the commercial limits on children's television on 35 occasions. Of these 35 commercial overages, six were fifteen seconds or less in duration; one was 25 seconds in duration; 19 were 30 seconds in duration; one was 40 seconds in duration; two were 45 seconds in duration; and six were program length commercials. Act III stated that at the end of the first quarter of 1992, when the first 11 overages occurred, the station "reviewed the commercial[] limits with its personnel and instructed them regarding compliance"; and that when subsequent overages occurred, procedures were modified and/or responsible personnel were "reprimanded and instructed on the station's policies for compliance." In addition, Act III cited two instances where WUHF(TV) initiated its daily schedule by joining children's programs already in progress. On Monday, March 16, 1992, the station broadcast five minutes of commercial matter in the 22 remaining minutes of a half-hour children's program joined in progress; and on Monday, August 16, 1993, the station broadcast five minutes of commercial matter in the 17 remaining minutes of a half-hour children's program joined in progress. Act III provided no explanation or information concerning the two instances where it joined children's programs in progress.

4. In Act III NAL (WUHF(TV)), supra, the Commission stated with regard to the two occasions when the station initiated its daily schedule by joining children's programs already in progress that Children's Television Programming (recon.), 6 FCC Rcd at 5096, specifically provides that broadcasters are required to prorate application of the commercial limits to program segments five minutes or longer in duration; that the licensee did not allege that the incidents were caused by last-minute emergency scheduling changes; that the commercial limits therefore were applicable pro rata to the portions of the children's programs which were joined in progress; and that, under the formula established in Children's Television Programming (recon.), id. at note 40, the two programs joined in progress exceeded the commercial limits by 36 seconds, and 96 seconds, respectively. The Commission further stated that the total of 37 commercial overages was a high number of violations; and that six of the overages were program-length commercials, about which Congress was particularly concerned because young children often have difficulty distinguishing between commercial matter and programming. Finally, the Commission stated that the only reasons for the cited violations proffered by WUHF(TV), inadvertence and/or human

error, did not justify or excuse those violations; and that the fact that WUHF(TV) may have implemented a plan to prevent future violations of the children's television commercial limits did not relieve the licensee of liability for violations which had occurred. Accordingly, the Commission determined that a forfeiture in the amount of \$15,000 was appropriate. With regard to the forfeiture amount, the Commission stated that

[t]he amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. See, e.g., Koplur Communications, 8 FCC Rcd 7884 (1993); Independent Communications, Inc., 8 FCC Rcd 7886 (1993); KXRM Partnership, 8 FCC Rcd 7890 (1993).

Act III NAL (WUHF(TV)), *supra* 10 FCC Rcd at 8799.

5. In its "Petition for Reconsideration and Reduction or Elimination of Forfeiture" ("Petition"), Act III states with regard to the two occasions when WUHF(TV) initiated its daily schedule by joining children's programs already in progress that

on one of these occasions, the station had an emergency transmitter shut down for equipment malfunction during its children's block and signed back on while children's programming was in progress. On the other occasion, a failure was experienced following routine scheduled repairs on station equipment delaying the station's ability to sign on the air.

Petition, at p.5.

6. In establishing rules and policies limiting the amount of commercial matter which may be aired during children's programming, the Commission specifically recognized that licensees may experience "occasional emergency scheduling change[s]", and stated that such emergency schedule changes would be taken into consideration in determining whether "extenuating circumstances" mitigated any resulting children's television commercial limit violations.³ On reconsideration, the Commission affirmed this policy, stating that "where the facts demonstrate that a slight overage is caused by a last-minute emergency scheduling change, we will consider such a lapse to be 'de minimis.'" (Footnote omitted.)⁴

³ Children's Television Programming, *supra* 6 FCC Rcd at 2126 n.123.

⁴ Children's Television Programming (Recon.), *supra* 6 FCC Rcd at 5096.

7. WUHF(TV)'s renewal application did not contain any description of or explanation concerning the circumstances surrounding either of the two incidents when WUHF(TV) joined children's programming in progress. However, from the information contained in Act III's Petition, it appears that the two incidents resulted from the kind of "last-minute emergency scheduling change[s]" which would be considered "extenuating circumstances" with regard to the resulting violations of the children's commercial limits. Therefore, in view of the extenuating circumstances described in Act III's Petition, the two overages which occurred when WUHF(TV) initiated its daily schedule by joining children's programs already in progress shall not be considered in determining the amount of any forfeiture (or the nature of any other sanction which may be appropriate) for the remainder of the children's television commercial overages reported in WUHF(TV)'s renewal application. See paragraph 12, infra.

8. Act III's Petition also quotes language from WUHF(TV)'s renewal application to the effect that two of the program-length commercials cited in Act III NAL (WUHF(TV)), supra, involved broadcasts of the program "Goof Troop" which included announcements for a fast-food restaurant which "promoted a contest in which a trip to Disney World was a prize" and which contained a "brief image" of the program's title character, "Goofy". Act III asserts that this commercial matter was inserted in the program by the advertiser and syndicator and transmitted to the station by satellite; and that WUHF(TV) had no warning that a commercial for a fast-food restaurant might contain material related to the program. Act III's Petition also cites another of the program-length commercial violations which involved "a shoe decorated with the Teenage Mutant Ninja Turtles" that was "displayed in a commercial for a shoe store" broadcast during the "Teenage Mutant Ninja Turtles" program. Act III asserts with regard to this incident that "WUHF[TV] could not have known that a shoe store commercial would contain such an image and the advertiser provided no warning that it in fact did contain cartoon character depictions."

9. Initially, we note that the Commission has repeatedly held that where a commercial announcement is primarily for a product otherwise unrelated to a program, but that announcement also includes references to 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.⁵ Further, broadcasts of children's television program-length commercials are not excused or mitigated by a licensee's assertion that the program-related commercial matter was inserted by the program's producer or distributor without the knowledge, participation or consent of the station.⁶ Finally, 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; where a commercial announcement

⁵ See, e.g., WSYT(TV), supra 10 FCC Rcd at 8905 (1995); Scripps Howard Bcstng 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).

⁶ See, e.g., Max Television of Syracuse, L.P. (WSYT(TV)), 10 FCC Rcd 8905 (1995); Mt. Mansfield Television, Inc. (WCAX-TV), 10 FCC Rcd 8797 (1995); Boston Celtics Broadcasting Limited Partnership (WFXT(TV)), 10 FCC Rcd 6686 (1995); Le Sea Broadcasting Corp. (WHKE(TV)), 10 FCC Rcd 4977 (1995).

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.⁷ Accordingly, Act III NAL (WUHF(TV)), *supra*, correctly treats the programs in question as program-length commercial violations.

10. In addition, Act III's Petition asserts that 11 of the overages occurred during the first quarter of 1992 when the commercial limits first became effective; that the station "reviewed the circumstances under which overages arose and established and refined its prevention procedures throughout the renewal term"; and that those procedures were "extremely effective" because "they reduced the occurrence of overages dramatically after the first quarter of 1992."

11. Act III's Petition is correct, to the extent that 11 of the commercial overages in fact did occur during the first quarter of 1992 when the commercial limits first became effective. In this regard, WUHF(TV)'s renewal application stated that when overages occurred subsequent to the first quarter of 1992, procedures were modified and/or responsible personnel were "reprimanded and instructed on the station's policies for compliance." However, it is apparent that such modified procedures, reprimands and/or additional instructions to station personnel were ineffective because, as stated in Act III NAL (WUHF(TV)), *supra*, additional violations continued to occur throughout the remainder of the license term. Further, not only were there commercial overages or violations in every quarter of the license term subsequent to the effective date of the children's television limits, but the number of overages increased during the last two quarters of the term: while there was only one conventional overage in the second quarter of 1993, there were nine conventional overages and three program-length commercials in the third quarter of 1993; and three conventional overages and one program-length commercial in the fourth quarter of 1993.⁸ The only reason proffered for the vast majority of those overages was (and is) inadvertence and/or human error. The Commission has consistently rejected inadvertence and/or human error as an excuse for violations of the children's television commercial limits.⁹ Finally, even if WUHF(TV) had established an effective program for future compliance with the children's television commercial limits towards the end of the license term, the Commission has repeatedly held that the fact that a licensee may have instituted a plan to eliminate future overages does not relieve that licensee of liability for prior violations.¹⁰ Accordingly, the assertion in Act

⁷ UTV of San Francisco, Inc. (KBHK-TV), 10 FCC Rcd 10986, 10988 (1995).

⁸ As stated above, WUHF(TV)'s renewal application was filed on February 1, 1994, one month into the first quarter of 1994.

⁹ See, e.g., KBHK-TV, *supra* 10 FCC Rcd at 10987 & Note 1; Le Sea Broadcasting Corp. (WHKE(TV)), 10 FCC Rcd 4977, 4978 (1995); Buffalo Management Enterprises Corp. (WIVB-TV), 10 FCC Rcd 4959, 4960 (1995); Gannett Massachusetts Broadcasting, Inc. (WLVI-TV), 9 FCC Rcd 1555 (1994); Ramar Communications, Inc. (KJTV(TV)), 9 FCC Rcd 1831 (1994).

¹⁰ International Broadcasting Corp., 19 FCC 2d 793, 794 (1969). See also, e.g., KBHK-TV, *supra* 10 FCC Rcd at 10988; WCAX-TV, *supra* 10 FCC Rcd at 8798; WHP Television, L.P., 10 FCC Rcd 4979, 4980 (1995); WHKE(TV), *supra* 10 FCC Rcd at 4978; WIVB-TV, *supra* 10 FCC Rcd at 4960; Mountain States Broadcasting, Inc.

III's Petition that WUHF(TV)'s compliance procedures were "extremely effective" because "they reduced the occurrence of overages dramatically after the first quarter of 1992" does not justify or necessitate reduction or remission of the forfeiture assessed in Act III NAL (WUHF(TV)), supra.

12. Act III also argues that cases cited in Act III NAL (WUHF(TV)), supra, (i.e., Koplar Communications, 8 FCC Rcd 7884 (1993); Independent Communications, Inc., 8 FCC Rcd 7886 (1993); and KXRM Partnership, 8 FCC Rcd 7890 (1993)) do not support a forfeiture of \$15,000. However, those cases involved substantially different numbers of violations, no program-length commercials, and substantially different forfeiture amounts (respectively, a \$30,000 forfeiture for 197 overages; a \$27,500 forfeiture for 121 overages; and a \$25,000 forfeiture for 87 overages). Those cases were not cited in support of the forfeiture *amount* in Act III NAL (WUHF(TV)), supra. As indicated by the language quoted in paragraph 4, supra, those cases were clearly and specifically cited as precedent for the *criteria* applied to determine the amount of the forfeiture, not the forfeiture amount itself. The forfeiture amount assessed in Act III NAL (WUHF(TV)), supra, for 37 commercial overages, including 6 program-length commercials, is consistent with forfeitures imposed in roughly similar cases. In Max Television of Syracuse, L.P. (WSYT(TV)), 10 FCC Rcd 8905 (1995), a forfeiture of \$20,000 was assessed for a total of 29 violations, 18 of which were program-length commercials; in Paramount Stations Group of Kerrville, Inc. (KRRT(TV)), 8 FCC Rcd 7064 (1993), a forfeiture of \$15,000 was assessed for a total of 25 violations, eight of which were program-length commercials; and in WWOR-TV, Inc. (WWOR-TV), a forfeiture of \$12,500 was assessed for a total of 39 violations, 1 of which was a program-length commercial. Further, even after subtracting the two conventional overages caused by emergency scheduling changes discussed on paragraph 7, supra, WUHF(TV)'s revised total of 35 commercial overages, including 6 program-length commercials, is still a high number of violations which would merit a forfeiture of \$15,000. Accordingly, Act III's arguments concerning the amount of the forfeiture do not justify or necessitate reduction or remission of the assessed forfeiture amount specified in Act III NAL (WUHF(TV)), supra.

13. In view of the foregoing discussion, the arguments contained in the "Petition for Reconsideration and Reduction or Elimination of Forfeiture" assessed in Act III Broadcasting License Corporation (WUHF(TV)), 10 FCC Rcd 8799 (1995), do not necessitate or justify reduction or remission of the specified forfeiture. Accordingly, IT IS ORDERED THAT that "Petition for Reconsideration and Reduction or Elimination of Forfeiture" IS DENIED. IT IS FURTHER ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), Act III Broadcasting License Corporation FORFEIT to the United States the sum of fifteen thousand dollars (\$15,000) for repeated violations of Section 73.670 of the Commission's Rules, 47 C.F.R. §73.670. Payment of the forfeiture may be made

(KMSB-TV), 9 FCC Rcd 2545, 2546 (1994); R&R Media Corporation (WTWS(TV)), 9 FCC Rcd 1715, 1716 (1994); KEVN, Inc. (KEVN-TV and KIVV-TV), 8 FCC Rcd 5077, 5078 (1993).

by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. With regard to this forfeiture proceeding, Act III Broadcasting License Corporation may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau