

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

In the Matter of)
)
Penfold Communications, Inc.)
Licensee of Station KRTM(FM),)
Temecula, CA)
)
For a Forfeiture)
)
)

MEMORANDUM OPINION AND ORDER AND FORFEITURE ORDER

Adopted: November 24, 1998

Released: November 25, 1998

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau ("Bureau") has before it (1) a Notice of Apparent Liability ("NAL") released on August 15, 1997, 13 FCC Rcd 1947 (MMB 1997), issued to Penfold Communications, Inc. ("Penfold"), licensee of Station KRTM(FM), Temecula, CA; and (2) Penfold's September 15, 1997, response to the NAL.

2. The NAL assessed a \$6,000 forfeiture against Penfold for its repeated violation of Section 399B of the Communications Act of 1934, as amended (the "Act"), by broadcasting six impermissible announcements on October 27 and 28, 1993. Section 399B of the Act, as implemented by Section 73.503 of the Commission's Rules, prohibits public broadcast stations from broadcasting advertisements. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities. 47 U.S.C. § 399B. Although contributors of funds may receive on-air acknowledgements, the Commission has unequivocally stated that such acknowledgements may be made for identification purposes only and should not promote the contributor's products, services, or company. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. See Public Notice, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," 7 FCC Rcd 827 (1986). The Bureau found that the six announcements at issue were promotional in nature and were broadcast in exchange for consideration.

3. Penfold argues in its response that the forfeiture is not justified and asks that the NAL be "withdrawn." In support of its position, Penfold asserts that the announcements in question were either (1) not broadcast in return for consideration; or (2) did not contain promotional language. For ease of reference, a transcript of the announcements is attached hereto and the announcements are referred to by number as indicated in the transcript (#s 1-6).

4. With respect to announcement #1, promoting the Adobe Plaza, the Bureau stated in the NAL that it believed consideration was received in exchange for the broadcast because at the time the broadcast was aired Penfold had an agreement with Adobe Plaza, the shopping center where the station's studio was located, that it would promote the plaza and its businesses in exchange for reduced rent. In response to

KRTM(FM), Temecula, CA

October 27, 1993

1. Hi, Goldie here. After those three bears ran me off I found a cottage in the Adobe Plaza right here in Temecula. It's not too big, not too small, but just right. It's surrounded by over 15 businesses that make up the Adobe Plaza. Not too many, not too few, but just right. There's also space for more businesses. Information is available from Osbourn Properties at 694-9320. The Adobe Plaza, located on Jefferson Avenue, is the home of Peacock Uniforms, Gently Used Furniture, Adobe Chiropractic, National Communications, and the KRTM business office . . . just to name a few. Not too few, but just right.

2. (Ring sound effect.) Hello? Hey, Mark, this is Loxie. I've got some exciting news. What's up? I just found a furniture store located right here in Temecula with furniture that's been used . . . gently. Ah, what do you mean gently used? I mean like almost new. The store has filled up 8 times in 48 days with sofas, dinettes, chairs, tables, recliners, rockers, curios, beds, desks, china cabinets and more. Owners Rick and Jeannie Kearn take in all types of furniture on consignment. Consignment, huh? Where is this place? In the Adobe Plaza on Jefferson Avenue next to Tony's Spunky Steer and that local radio station KRTM or something. Oh, yeah, the programming of that station is underwritten by this announcement. Gently Used Furniture, 27625 Jefferson Avenue, 699-5044.

October 28, 1993

3. Temecula Valley's our location . . . Nissan of Temecula. Yeah, we've got cause for celebration. Nissan cars and trucks, we've got 'em all. Nissan of Temecula. In the Temecula Auto Mall . . . Nissan of Temecula. There's friendly faces all around . . . the only Nissan dealer in town. It's Nissan of Temecula. Nissan of Temecula is an underwriter of programming on KRTM.

4. Rancho Transmission, the oldest transmission center in Temecula, is an underwriter of programming on KRTM. Automatic transmission preventative maintenance schedule is every 20,000 miles Family owned and operated in the Temecula Valley. Rebuilt transmission work carries a one-year warranty or 24,000 miles. Rancho Transmission located on Via Montezuma in Temecula. The phone number is 676-6569.

5. This weekend the sound track of the Valley 88.9 FM The Mix will broadcast live from the grand opening of the all new furnished Plan 1 Model Home at Costain Classics, at Silverhawk right off Winchester in Temecula. Costain Classics has three furnished models to view with up to five bedrooms. The live remote broadcast begins at 11 a.m. and continues until 3 in the afternoon, with best costume prizes, pumpkins and giveaways. For directions, the phone number is 698-4100. This Halloween eve, Saturday, October 30th, from 11 to 3. A live remote broadcast from Costain Classics at Silverhawk, from the station that loves it live, 88.9 FM The Mix.

6. Bah, humbug. Hey, dude, why the downer Scrooge-like attitude? Que pasa? Ba, ha, humbug. I find it rather discouraging unable to come up with a dining establishment which would offer both diversity and delicious delicacies all in one eating experience. Baja's, dude, in the Target Center. With fish tacos, burritos, tostados, combo plates and shrimp tacos and burritos. It's like Mondays are mad, Tuesdays are terrific, and Wednesday--Wednesdays, dude, are wild! Hmm . . . Baja's. Why does that sound familiar? In the Target Center. Baja's is an underwriter of KRTM programming. The phone number is 699-6311.

the NAL, Penfold supplied a statement from Adobe Plaza stating that it now receives rent in cash from KRTM and that the announcement in question was not part of the original rent agreement. In view of this statement, it appears that the Adobe Plaza announcement was not broadcast in return for consideration and, accordingly, does not violate Section 399B of the Act.

5. As to announcement #2, regarding Gently Used Furniture, the Bureau found that it appeared either consideration was received from Gently Used Furniture in return for the broadcast or that the broadcast was made as part of Penfold's arrangement with Adobe Plaza. Either way, the Bureau concluded that the broadcast violated Section 399B of the Act. Although Penfold objects in general to the Bureau's finding on this issue, it does not dispute the Bureau's conclusion or provide any evidence to persuade us otherwise. Moreover, Penfold does not challenge the Bureau's finding that announcement #2 is promotional in nature.

6. Penfold also objects to the Bureau's finding that consideration was received in exchange for the broadcast of announcement #6 about Baja's. The Bureau concluded that despite Penfold's assertions that no consideration was received for the broadcast of the particular announcement in question, the station received consideration from airing such announcement because Baja's is a station contributor. Specifically, the Bureau held that the tenor of the announcement, together with the financial support Penfold received from Baja's, leads to a conclusion that consideration was received in connection with the airing of the announcement extolling the "delicious" and "terrific" offerings of the restaurant. Penfold again asserts that it did not receive consideration for the airing of the particular announcement in question. However, Penfold's argument misses the point of the Bureau's ruling. Regardless of whether or not consideration was directly received in return for the airing of this particular announcement, based on the facts before us, it appears that consideration was at least indirectly received since Baja's is a station contributor and the announcement is clearly promotional in nature. See Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 86 FCC 2d 141, 148 (1981) ("Second Report and Order") (consideration is broadly construed and includes general contributions to licensees).

7. There is no debate with respect to announcements #3 and #4 as to whether or not consideration was received. Rather, Penfold challenges the Bureau's finding that those announcements were promotional. With respect to announcement #3, Nissan of Temecula, the Bureau found that the term "friendly faces all around" impermissibly promoted the auto dealer's staff. Penfold argues that it believed the phrase "friendly faces" refers to people in the community and that although the Commission may interpret the phrase differently, that does not change the fact that the licensee did not believe the announcement promoted the dealer's staff. Although we continue to believe that a listener would think the phrase refers to the sales staff, we acknowledge that Penfold may have reasonably believed otherwise. In determining whether a licensee violated Section 399B of the Act we look to whether or not the station, in good faith, believed that the announcement was non-promotional. Xavier University, 5 FCC Rcd 4920 4921 (1990). Accordingly, we find that no sanction should be imposed for the broadcast of announcement #3.

8. With respect to announcement #4, regarding Rancho Transmission, the Bureau concluded that the announcement was promotional in nature because it promoted the underwriter as "the oldest transmission service in Temecula," and advertised that the underwriter's "work carries a one-year warranty." Specifically, the Bureau held that "oldest," in the context of this announcement, is a comparative term and that the "warranty" advertised constitutes prohibited price information and an inducement to buy. Penfold argues that both terms are factual statements and are much less promotional than advertisements its counsel had recently heard on the radio. We are not persuaded by either argument. Whether or not something is factual is irrelevant to a determination of whether it is promotional. For example, the fact that an underwriter is having a clearance sale is a fact which, although accurate, still

constitutes a prohibited inducement to visit the establishment. The term "oldest," as compared with giving the year a business was established, implies that the underwriter has been in business longer than any of its competitors.¹ In addition, the broadcast of information about a warranty, even if true, provides an inducement to frequent the underwriter's establishment. We may have been persuaded otherwise if the warranty were a separate product that could be purchased, but in this case it appears to have been included with the purchase, providing an added incentive to a buyer.²

9. Finally, Penfold objects to the Bureau's finding regarding announcement #5, a remote broadcast at the Silverhawk real estate development. Live remote broadcasts are permissible under Section 399B. Second Report and Order, 86 FCC 2d at 153. Moreover, as long as the programming is based on the licensee's public interest judgement rather than an exchange of consideration, an announcement identifying the origination point of the broadcast would raise no question. *Id.* In this case, there was consideration received in return for hosting the remote at Silverhawk. However, even if we were willing to concede, *arguendo*, that the decision to have a remote at Silverhawk was based Penfold's public interest judgement rather than consideration received, the announcement in question did more than merely identify the origination point of the broadcast. Specifically, the announcement contained information about a grand opening at Silverhawk and details about the models that would be available for viewing. It then went on to provide information as to the specific time of the remote and the station events that would be available. Penfold is correct that the announcement did not "urge" listeners to purchase property at the real estate development, but it did identify the products of the owner of the remote location and provide incentives for listeners to visit that location.³ Moreover, although Penfold argues that the products were identified in a nonpromotional way, we disagree.⁴ The announcement constituted a prohibited "call to action" to attend the "grand opening" of the Silverhawk development where "all new" model homes were available for viewing. Accordingly, we reject Penfold's arguments regarding this announcement and reaffirm our previous finding that the broadcast of announcement #5 regarding the Silverhawk remote violated our rules and the Act.

10. A \$6,000 forfeiture was assessed in the NAL for the broadcast of the six announcements in question during a two day period, October 27 and 28, 1993. In assessing this forfeiture, the Bureau took into consideration the repeated nature of the violation, the carelessness with which Penfold responded to

¹ Cf. Xavier University, 5 FCC Rcd 4920 (1990) (the fact that a company has been in business for over 75 years describes the experience the business has to offer in a non-qualitative way).

² The fact that Penfold's counsel heard more promotional language broadcast on other noncommercial stations is not dispositive. The material counsel heard may or may not have been in compliance with the Act and our rules, depending on the circumstances surrounding the broadcast, and the matter may or may not have been brought to the Commission's attention.

³ Thus, contrary to Penfold's assertions, we find it appropriate to rely on Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, FCC, to James L. Zix, General Manager, Station WLAB(FM) (July 8, 1992).

⁴ Penfold asserts that it is permissible for announcements regarding remote broadcasts to contain information about the products and services of the owner of the remote location so long as such information is not promotional. In support of its position, Penfold cites Letter to Mr. Bob Rosenthal (KUNV), dated November 20, 1991. We find that case to be noncontrolling here both because the information broadcast about the Silverhawk real estate development was promotional and because, unlike in KUNV, consideration was received in return for the broadcast of the remote at Silverhawk.

the Bureau's first letter of inquiry, and Penfold's history of past rule violations. Having reviewed Penfold's response to the NAL, we reaffirm our findings of violation with respect to four of the announcements in question (#s 2, 4, 5, and 6), but reverse our findings regarding announcements #1 and #3 for the reasons set forth herein. The broadcast of four announcements in a two day period that violate Section 399B of the Act and Section 73.503 of the Commission's Rules supports a \$6,000 forfeiture. Nonetheless, in view of our findings herein and our conclusion that announcements #1 and #3 are permissible, we will reduce the forfeiture to \$4,000.

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), that Penfold Communications, Inc. FORFEIT to the United States the sum of Four Thousand Dollars (\$4,000) for the repeated violations of Section 399B of the Communications Act of 1934, as amended, 47 U.S.C. § 399B, and Section 73.503 of the Commission's Rules, 47 C.F.R. § 73.503, as described above. Penfold Communications, Inc. may take any of the steps outlined in the attachment to this letter regarding payment of the forfeiture pursuant to Section 1.80 of the Commission's Rules.

12. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested, a copy of this Memorandum Opinion and Order and Forfeiture Order to Penfold Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION


Roy J. Stewart
Chief, Mass Media Bureau