Federal Communications Commission
Washington, D.C. 20554

In reply refer to: 1800E1-BL

Facility I.D. No. 19191

Released: March 2, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Broadcast Development Corporation
Licensee, Station KAME-TV
1600 Peachtree Road, N.W.
Atlanta, Georgia 30309

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of fifty thousand dollars ($50,000), pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

Background

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the amount 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. Accordingly, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. § 73.670, 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 against "program-length commercials." The Commission defined a "program-length commercial" as "a program associated with a product, in which commercials for that product are aired," and stated that the entire duration of any program-length commercial would be counted as commercial matter for the purpose of the children's television commercial limits. *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). The commercial limits became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On June 1, 1998, you filed a license renewal application (FCC Form 303-S) for station KAME-TV, Reno, Nevada (File No. BRCT-980601KH). In response to Section III, Question 5 of that application, you certified that, during the previous license term, station KAME-TV complied with the limits on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. However, in a letter dated September 23, 1998, you advised the Commission of your intent to file an amendment to station KAME-TV's renewal application concerning compliance with the commercial limits, and requested that no action be taken on the renewal application prior to receipt of the amendment. Subsequent letters filed on October 7, 1998, and December 10, 1998, notified the Commission that you were still attempting to sort through station KAME-TV's logs in order to prepare the amendment, which was eventually filed on January 4, 2000.

In the January 4, 2000 amendment, you advised the Commission that, though your initial certification of compliance with the commercial limits was accurate to the best of your knowledge at the time the renewal application was filed, station KAME-TV, in fact, had not fully complied with the commercial limits during its 1993 - 1998 term. You explained that station KAME-TV's programming and trafficking functions were handled by KTVU Partnership, the licensee of station KRXI(TV), Reno, Nevada, pursuant to a time brokerage agreement (TBA).[1] Also in your January 4, 2000 amendment, you claimed to have had difficulties in determining the exact number and duration of the commercial overages due to the significant volume of logs to be reviewed, the number of overages which occurred and the lack of complete network advertising records. You stated that legal counsel for KTVU Partnership discussed these difficulties and alternate methods of calculating and reporting station KRXI(TV)'s and station KAME-TV's violations with Commission staff. In that discussion, you proposed that KTVU Partnership would review a sample of the stations' logs and submit for each station a composite for the number of overages that occurred during the license term. Accordingly, in the January amendment, you described the results of the sampling method for the time period between December 1995 and October 1998. You also included an explanation setting forth the circumstances that led to the commercial overages, which were the same as those that led to the violations at KRXI(TV). To this end, you stated that station KRXI(TV)'s staff was delegated the day-to-day responsibility for station KAME-TV's programming and traffic functions. However, you contended that station KRXI(TV) was essentially a start-up operation[2] using new personnel and equipment, and is located in a small market,[3] where few people have previous broadcast experience,

[1] According to your statement, station KAME-TV has been programmed pursuant to a TBA since August 31, 1995, initially among Elcom of Reno, the station's licensee at the time, Ellis Communications, Inc. and Cox Reno, Inc. On October 28, 1996, Cox Reno, Inc. assigned the TBA to its affiliate, KTVU Partnership, the licensee of station KRXI(TV), Reno, Nevada. On May 9, 1997, you acquired station KAME-TV from Elcom of Reno, with the TBA remaining in place.

[2] In this regard, you stated that station KRXI(TV) commenced operation on December 3, 1995, and through May of 1997, was programmed by KTVU Partnership pursuant to a Management Agreement between Nevada Television Corporation (NTC), the licensee of the station at that time, and KTVU Partnership. On June 2, 1997, KTVU Partnership acquired ownership of station KRXI(TV) through an acquisition of NTC's stock. On April 30, 1998, NTC was merged into KTVU Partnership through a *pro forma* transaction, resulting in KTVU Partnership becoming the licensee of station KRXI(TV).

[3] Stations KAME-TV and KRXI(TV) are located in the Reno, Nevada Designated Market Area (DMA), ranked 111th in size.

and even fewer have experience working in a traffic department. Though KTVU Partnership trained its traffic department staff, it was your understanding that the effects of this training were handicapped by frequent employee turnover.

By letter dated June 9, 2000, the staff requested additional, detailed information for the time period between May 9, 1997 (the date that Broadcast Development Corporation acquired station KAME(TV)) and June 9, 2000.[4] For said time-frame, the staff requested that you provide, *inter alia*, a list of each segment of programming 5 minutes or more in duration designed for children 12 years old which contained commercial matter in excess of the limits, and for each programming segment so listed, the length of the segment and the amount of commercial matter contained in it. In an amendment dated July 31, 2000, you stated that during your ownership of the station, station KAME(TV) violated the children's television commercial limits on 301 occasions. Of these commercial overages, one was less than 30 seconds in duration, 72 were 30 seconds or longer but less than one minute in duration; 45 were one minute or longer but less than one and one-half minutes in duration; 94 were one and one-half minutes or longer but less than two minutes in duration; 72 were two minutes or longer but less than three minutes in duration; 16 were three minutes or longer but less than four minutes in duration; and one was four minutes or greater in duration.[5] You indicate that the above-listed overages for KAME(TV) occurred during the period between May 9, 1997 and September 23, 1998. During the period between September 23, 1998 (when station KAME(TV) advised the staff of the need to amend its license renewal application) and June 9, 2000, you indicate that station KAME(TV) has been in compliance with the children's programming commercial matter limits. You stated that on September 23, 1998, the station, in conjunction with station KRXI(TV), implemented remedial measures,[6] and as

[4] *See* Letter to Joseph A. Godles, Counsel for Broadcast Development Corporation, from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission (June 9, 2000).

[5] We note that in a related proceeding, KTVU Partnership, licensee of station KRXI(TV), Reno, Nevada, was issued a notice of apparent liability for forfeiture in the amount of thirty thousand dollars ($30,000) for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming. During KTVU Partnership's ownership, station KRXI(TV) recorded 207 overages. While KTVU Partnership provides the programming to and performs the trafficking functions for station KAME(TV), the programming which is provided to station KAME(TV) is different from the programming which is aired on station KRXI(TV). Station KAME(TV) is an UPN affiliate, and broadcasts UPN network programming, while station KRXI(TV) is a FOX affiliate, and broadcasts FOX network programming.

[6] In your January amendment, you set forth the following remedial measures which station KAME(TV) and station KRXI(TV) have established and taken to prevent overages from occurring in the future: (1) restricted the amount of commercial matter aired during children's programs to a maximum of 11 minutes per hour on weekdays and 9.5 minutes per hour on weekends; (2) authorized only the traffic manager to change the formatting of commercial time during children's programming and required that any changes be approved by traffic personnel at station KTVU(TV), Oakland, California, another KTVU Partnership station; (3) conducted a training session for station KRXI(TV)'s traffic, programming and master control departments concerning the children's television commercial limits; and (4) trained traffic personnel to code spots correctly to ensure that the computer traffic system promptly identifies overages in the future. Along with these measures, children's commercial schedules

result, station KAME(TV) has incurred no further overages.

Discussion

Station KAME(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 301 occasions constitutes a repeated violation of Section 73.670 of the Commission's Rules. Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for forfeiture in the amount of fifty thousand dollars ($50,000) for station KAME(TV)'s apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the following criteria: (1) the number of instances of commercial overages; (2) the length and nature 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.[7] These criteria are appropriate in analyzing violations of the commercial limits during children's programming since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability," as required under § 503(b)(2)(D) of the Communications Act.

We note that station KAME(TV) exceeded the children's television commercial limitations on 301 occasions, which constitutes an unusually high number of violations. Further, 228 of the violations were one minute or greater in duration, and 89 of those were two minutes or greater in duration. Overages of this number and nature mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990.[8] In addition, violations occurred at station KAME(TV) regularly and continually from May, 1997 for a period of ten months. When the Commission delayed the effective date of Section 73.670 of the Rules from October 1, 1991, until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance . . . ."[9] Based on the information filed with respect to the

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will be required to be manually reviewed three times a day for compliance with the Commission's Rules, thereby affording additional protection against future overages and enabling prompt corrective measures should an overage occur. Furthermore, to ensure that audits of children's programming continue to be conducted on a regular basis, you state that, during the upcoming license term, station KAME(TV) will file quarterly reports with the Commission regarding compliance with the commercial limits. Also beginning with the new license term, you pledge to increase station KAME(TV)'s core children's programming by one-third so that the station will air an average minimum of four hours of core programming per week.

[7] *See, e.g., Stainless Broadcasting Co. (WICZ-TV)*, 10 FCC Rcd 9961 (1995); *KXRM Partnership (KXRM-TV)*, 8 FCC Rcd 7890 (1993).

[8] *Children's Television Programming, supra*, 6 FCC Rcd at 2117-18.

[9] *Children's Television Programming*, 6 FCC Rcd at 5530 n.10.

renewal application for station KAME(TV), it is apparent that you failed to establish an effective program to ensure compliance with the commercial limits. Though you belatedly implemented policies and procedures designed to rectify station KAME(TV)'s deficient compliance and monitoring program, that does not relieve you of liability for the very high number of violations which occurred.[10] As for the reasons you give to explain the violations, they essentially amount to, or stem from, human error, which the Commission has repeatedly rejected as a basis for excusing or mitigating violations of the children's television commercial limits.[11] We see no reason to depart from that longstanding Commission precedent in this case.

Nor do we believe the forfeiture assessed here must be reduced or mitigated because KTVU Partnership and its staff at station KRXI(TV), not you, programmed station KAME-TV. It is a bedrock principal that licensees are ultimately responsible for compliance with the Communications Act and the Commission's Rules, regulations and policies.[12] Therefore, even though KTVU Partnership handled the day-to-day programming and traffic functions at station KAME-TV, you are ultimately responsible for the violations which occurred at your station. In this regard, it was your responsibility as licensee to ensure that an effective compliance plan had been implemented at station KAME-TV, *e.g.*, by conducting your own internal audit(s) to monitor the station's compliance with the commercial limits.

The other facts you cite, principally financial hardship and lack of monetary gain, also fail as mitigating circumstances in this case. With respect to financial hardship, we note that the Commission has previously considered a licensee's financial inability to pay as a basis for reducing a forfeiture, but has required the submission of supporting documentation.[13] Here, you do not claim financial inability to pay a forfeiture, but assert that station KAME-TV has operated, and continues to operate, at a loss. In any event, you provide no documentation in support of that assertion. For these reasons, your alleged operating losses afford no basis for us to mitigate the

[10] *See, e.g., WHP Television, L.P.*, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation (WTWS(TV))*, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc.*, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

[11] *See, e.g., LeSea Broadcasting Corp. (WHMB-TV)*, 13 FCC Rcd 2751 (1998); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (MMB 1995); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

[12] *See Vista Point Communications, Inc.*, 13 FCC Rcd 10540 (MMB 1998), *aff'd* 14 FCC Rcd 140 (MMB 1999); *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997*); J. Dominick Monahan*, 6 FCC Rcd 1867(1991).

[13] *Compare Delta Radio Corp.*, 12 FCC Rcd 22030 (CIB 1997) and *Benito Rish*, 10 FCC Rcd 2861 (1995) (licensees asserting inability to pay as a basis for reduction of forfeitures assessed against them submitted supporting documentation of financial hardship).

forfeiture for station KAME-TV's violations of the children's television commercial limits.[14] Finally, though you purportedly gained no monetary benefit from the overcommercialization at station KAME-TV, that does not mitigate the harm to children who have been exposed to commercial matter beyond the statutory limits, and we do not believe the Children's Television Act or Section 503(b)(2)(D) of the Communications Act empowers us to reduce the forfeiture on that basis.

Given all of these considerations, the violation of Section 73.670 of the Commission's Rules by station KAME-TV on 301 occasions warrants a forfeiture in the above-specified amount of $50,000. The duration and repeated nature of the overages are among the more serious the Commission has considered, and we believe the forfeiture assessed here is consistent with the forfeitures assessed in other, similar cases. For example, in *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986 (1995) (*UTV of San Francisco*), a $40,000 forfeiture was assessed for 218 violations, of which 72 were one minute or more in length. Similar to the facts in this case, the violations in *UTV of San Francisco* were attributed to inadvertence and misunderstanding of the Commission's Rules, and the licensee claimed that, upon discovering the overages, it made changes to station KBHK-TV's policies and procedures to prevent further violations. In *Paramount Stations of Houston, Inc.*, 9 FCC Rcd 140 (1993) (*Paramount)*, the licensee exceeded the children's television commercial limits on 132 occasions, of which 19 were one minute or more in length and 73 were program-length commercials. The forfeiture assessed in that case was $80,000. In this case, unlike in *Paramount*, there are no program-length commercial; however, the total number of commercial overages by KAME(TV) (301) and the number of commercial overages in excess of one minute (228) are substantially higher than in either *UTV of San Francisco* or *Paramount*. Accordingly, based on our examination of the facts in this case and the foregoing considerations, we conclude that an appropriate forfeiture for station KAME(TV)'s violations of the children's television commercial limits is in the amount of $50,000.

You are afforded a period of 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 include a detailed factual statement and such documentation and affidavits as may be pertinent . . . ." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, we find you qualified to remain a Commission licensee and conclude that grant of your application would serve the public interest, convenience and necessity. Therefore, the license renewal application of Broadcast Development Corporation, for station KAME(TV), Reno, Nevada, File No. BRCT-980601KH, IS HEREBY GRANTED, subject to the condition that, on December 31, 2006, or by such other date as the Commission may establish in the future under Section 309(j)(14)(A) and (B) of the Communications Act, the licensee shall surrender either its analog or its digital television channel for reallocation or reassignment pursuant to Commission regulations. The channel retained by the

[14] *See LeSea Broadcasting Corporation (KWHE(TV))*, 12 FCC Rcd 15977 (MMB 1997).

licensee will be used to broadcast digital television only after this date.

This letter was adopted by the Commission on February 13, 2001.

BY DIRECTION OF THE COMMISSION

Magalie Roman Salas
Secretary