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

In the Matter of	)	
	)	
WFTV, Inc.	)	Facility I.D. No. 72076
Licensee of Station WFTV(TV)	)	NAL/Acct. No.: 1041420003
Orlando, Florida	)	FRN: 0001842848

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 26, 2010 **Released: May 27, 2010**

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")* issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),[1] we find that WFTV, Inc. [2] (the "Licensee"), licensee of Station WFTV(TV), Orlando, Florida (the "Station"), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children's programming.[3] Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of forty thousand dollars ($40,000).

II. BACKGROUND

2. In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394, 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 renewal applications 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, 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.[4]

3. Section 73.3526 of the Rules requires a commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations.[5] Pursuant to subsection 73.3526(e)(11)(ii), each commercial television broadcast station is required to place in its

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[1] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

[2] Subsequent to the filing of the WFTV license renewal application, the Commission granted the *pro forma* application (BALCT-20051123AIN) assigning the WFTV(TV) license from WFTV-TV Holdings, Inc. to WFTV, Inc.

[3] *See* 47 C.F.R. § 73.670.

[4] *Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

[5] *See* 47 C.F.R. § 73.3526.

public inspection file, on a quarterly basis, records sufficient to allow substantiation of the licensee's certification, in its renewal application, of its compliance with the children's television commercial limits imposed by Section 73.670 of the Rules. Further, pursuant to Section 73.673 of the Rules, licensees are required to provide to publishers of program guides, information identifying programming specifically designed to educate and inform children, including an indication of the age group for which the program is intended.[6]

4. On October 1, 2004, the Licensee filed its license renewal application (FCC Form 303-S) for Station WFTV(TV) (the "Application") (File No. BRCT-20041001AEV). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children's programming specified in Section 73.670 of the Rules. In Exhibit 25, the Licensee reported that the Station exceeded the children's television commercial limits on 154 occasions during the license term. Of these overages, 153 were 15 seconds in duration. The Licensee appeared to indicate that the remaining overage was two minutes and 45 seconds in duration, and indicated that this overage was caused by a technical failure.

5. With respect to the reasons for the 15-second overages, the Licensee attributed the overages to human error by the Station's staff in scheduling the ABC network children's programs to accommodate the Station's local news. The Licensee stated that pursuant to its review of the Station's programming after the departure of the employee handling the Station's children's programming responsibilities, it discovered an apparent misunderstanding by this former employee of the Commission's commercial limits requirements. The Licensee asserted that it took immediate steps to ensure the Station's future compliance with the children's television commercial limits. The Licensee also averred that the overages were not motivated by monetary benefit. According to the Licensee, the Station is committed to broadcast and non-broadcast efforts for children and has participated in programs and events dedicated to supporting families and children during the license term. The Licensee requested that in reviewing its admitted overages, the Commission consider the mitigating circumstances[7] and the Station's "record as a licensee with a demonstrated commitment to children and children's programming."

6. In Exhibit 25, the Licensee also stated that during preparation of the Application, it determined that due to a misunderstanding by the Station's staff during the last few quarters of the license term, the Station had not provided program guide publishers with information regarding the target child audience of its core programs. The Licensee also reported that it was unable to confirm that this information was provided to program guide publishers in previous years when the children's programming responsibilities were handled by former employees. The Licensee asserted that upon this discovery, the Station took immediate steps to ensure that the target age range would be provided to program guide publishers.

7. The Licensee indicated in Exhibit 17 that throughout the license term, it placed in the public inspection file certifications from the ABC television network confirming that all ABC television network children's programming was in compliance with the children's television commercial limits. Moreover, the Licensee stated that throughout the license term, the Station would routinely place in the public inspection file its own supplemental statements which listed the children's programs that it broadcast and described the Station's compliance with the commercial limits during these programs. However, the Station's staff discovered that for certain quarters, supplemental certifications had not been placed in the public file. The Licensee reported that the Station's staff also determined that it needed to further supplement other certifications in the public file. According to the Licensee, it subsequently

[6] *See* 47 C.F.R. § 73.673.

[7] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(b)(4).

prepared and placed supplemental certifications for these quarters in its public file. The Licensee stated, however, that it was unable to find information concerning the commercial matter aired during one program during the year 1999. Nonetheless, the Licensee asserted that the Station had documentation that it complied with the children's television commercial limits during this program in 1998 and that it is unaware of any reason why the amount of commercial matter in the program would have changed in 1999.

III. DISCUSSION

8. Station WFTV(TV)'s record of exceeding the children's television commercial limits on 153 occasions constitutes an apparent willful and repeated violation of Section 73.670.[8] The 153 instances in which the Station exceeded the children's television commercial limits represent a very high number of violations. Overages of this number 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.[9] The reasons cited for the violations, human error and what amounts to the lack of knowledge or misunderstanding of the children's television commercial limits by a former employee, do not mitigate or excuse them.[10] Furthermore, while the Licensee may have taken corrective actions to prevent subsequent violations of the children's television rules and policies, this does not relieve it of liability for the violations which have occurred.[11] Moreover, we do not believe that the licensee's "demonstrated commitment to children and children's programming" is a mitigating circumstance in this case.[12]

9. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, 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.[13] Section 312(f)(1) of the Act defines willful as "the conscious and

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[8] As discussed above, the Licensee attributed one conventional overage to a technical failure. In *Children's Television Programming,* the Commission specifically recognized that licensees may experience "occasional emergency scheduling change[s]," which would be taken into consideration in determining whether "extenuating circumstances" mitigated any resulting children's television commercial limits violations. 6 FCC Rcd at 2126 n.123. 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*.'" *Children's Television Programming (Recon.),* 6 FCC Rcd at 5096. Although this conventional overage did not involve a last-minute emergency scheduling change, we believe the technical failure which caused it constitutes an extenuating circumstance. Accordingly, this overage shall be considered *de minimis,* and shall not be considered in determining the sanction deemed appropriate for the other violations of the children's television commercial limits reported by the Licensee.

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

[10] *See, e.g., LeSea Broadcasting Corp. (WHKE(TV))*, Letter, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, Letter, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp. (WUTV(TV))*, Letter, 10 FCC Rcd 4957 (MMB 1995); *Ramar Communications, Inc. (KJTV(TV))*, Letter, 9 FCC Rcd 1831 (MMB 1994).

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

[12] *See WFTV-TV Holdings, Inc. (WRDQ(TV))*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 20178 (MB 2005).

[13] 47 U.S.C. § 503(b)(1)(B); s*ee also* 47 C.F.R. § 1.80(a)(1).

deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[14] 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,[15] and the Commission has so interpreted the term in the Section 503(b) context.[16] Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."[17]

10. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of $10,000 for public file violations, a base forfeiture amount of $8,000 for violation of Section 73.670, and a base forfeiture amount of $8,000 for violation of Section 73.673.[18] 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)(D) of the Act, including "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[19] In this case, we believe that an upward adjustment is warranted in light of the substantial number of commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of $40,000 for its apparent willful and repeated violation of Section 73.670.[20] This represents an increase over the forfeiture assessed for comparable violations in previous renewal cycles.[21] Given the numerous violations of the children's TV commercial limits in recent years, it appears that the forfeiture amounts assessed previously have not had a sufficient deterrent effect. Thus, where, as here, a case presents violations that are comparable to violations reported an earlier last renewal cycle, we are raising the forfeiture levels to strengthen the deterrent effect.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that WFTV-TV, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of forty thousand dollars ($40,000) for its apparent willful and repeated violation of Section 73.670 of the Commission's Rules.

12. 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,* WFTV-TV, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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[14] 47 U.S.C. § 312(f)(1).

[15] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[16] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[17] 47 U.S.C. § 312(f)(2).

[18] *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) *("Forfeiture Policy Statement"), recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

[19] 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement,* 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

[20] We think that an admonishment is appropriate for the licensee's failure to identify for publishers of program guides the age group for which its children's programming is targeted and its failure to maintain complete documentation in its public file regarding its compliance with the children's television commercial limits for all of its children's programs.

[21] *See Press Broadcasting Company, Inc.*, 12 FCC Rcd 15491 (1997).

13. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at 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, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If 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).

14. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

15. 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.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[22]

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WFTV-TV, Inc., 3993 Howard Hughes Parkway, Suite 250, Las Vegas, Nevada 89109, and to its counsel, Kevin F. Reed, Esquire, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[22] *See* 47 C.F.R. § 1.1914.