F.C.C. 70–512

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.124 (AM), 73.299 (FM) AND 73.678 (TV) OF THE COMMISSION'S RULES IN ORDER TO PROHIBIT CERTAIN FRAUDULENT BILLING PRACTICES	RM–1013

MEMORANDUM OPINION AND ORDER

(Adopted May 13, 1970)

BY THE COMMISSION:

1. The Commission has before it the petition for rulemaking (RM–1013) filed by the Star Stations of Indiana, Inc. (licensee of WIFE (AM) and WIFE–FM, Indianapolis, Ind.) on August 10, 1966. The petition proposes to amend sections 73.124 (AM), 73.299 (FM) and 73.678 (TV) of our rules in order to prohibit the issuance of "bills" by licensees which misrepresent "(*a*) the time or the day on which spot announcements were broadcast or (*b*) the number of announcements which were broadcast".[1] No pleadings have been filed in respect to the petition.

2. At the present time, the provisions of section 73.124 (which are identical in pertinent part to secs. 73.299 and 73.678) of our rules read as follows:

Fraudulent billing practices. No licensee of a standard broadcast station shall knowingly issue to any local, regional, or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature, content or quantity of such advertising. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

3. In sum, petitioner asserts that it is necessary to insert in the above rule a phrase which specifically bans the issuance of any "fraudulent

[1] The Commission adopted (Apr. 28, 1966, released May 4, 1966) an order in docket 16612, designating for hearing petitioner's applications for renewal for the licenses of WIFE(AM) and WIFE–FM. The renewal hearing was based, inter alia, on alleged fraudulent billing practices similar to those that the petitioner in the instant petition asserts are not covered but should be covered in the existing rules. In view of the identity of the questions presented in the renewal hearing and the instant petition our action on the instant petition has been delayed until this date so as to avoid any action in the rulemaking process which would prejudge the renewal hearing. On Sept. 17, 1969, the Commission adopted (released Oct. 3, 1969, F.C.C. 69–992) its final decision in docket 16612, which considered the problem of fraudulent billing practices by petitioner and gave petitioner a short term renewal of its licenses for WIFE(AM) and FM.

bill" by licensees which misrepresents the time or the date or the number of times that advertising was broadcast. While emphasizing its view that the existing rules do not cover such situations and that it would be unfair for the Commission under its present rules to take action against any licensee for any such misrepresentations (see footnote 1, above), it also asserts the public interest in prohibiting such fraudulent acts by licensees.

4. We agree with petitioner in respect to the strong public interest factors supporting the prohibition of misrepresentations by licensees in any and all billing practices. Any such misrepresentation certainly reflects adversely on the qualifications of a licensee and, to a degree, on the industry as a whole. The public interest, convenience and necessity clearly require reasonable ethical business practices in the industry—specifically on the part of individual broadcasters. It is within the Commission's authority, and is its responsibility, to take whatever action is appropriate to check these practices, which essentially amount to the use of broadcast facilities for fraudulent purposes. We took such action in this area in 1965, in adopting rules concerning "double billing" and other types of deceptive billing practices. See the "Report and Order" in docket 15396, F.C.C. 65–951, 1 F.C.C. 2d 1068, 6 R.R. 2d 1540, pars. 5–7.

5. Therefore, it is clear that the practices mentioned in the petition—which are some of the practices in which the hearing examiner and the Commission found that the WIFE stations had engaged—are now and should be prohibited, and licensees found to have engaged in them subjected to substantial sanctions. The only question raised by the present petition is whether the practices are covered by the present rule (adopted in October 1965, later than the occurrences at WIFE involved in the hearing), or whether an amendment of the fraudulent billing rules is required.

6. We conclude, initially, that the present language of the rule does cover these practices. As noted above, the rule states that no licensee shall knowingly issue any bill, etc., which "misrepresents the nature, content or quality of such advertising * * *". Certainly the time of day or the day of the week are core matters of importance in respect to the "nature" of an advertisement. In contracting with a licensee for commercial announcements, advertisers are paying for the size of audience they hope to reach, which is dependent, in large part, on the time of day or the day of the week their commercial copy is broadcast. Therefore the "nature" of the advertisement is clearly misrepresented if it is represented to be broadcast at a different time of the day or a different day of the week than actually presented. Moreover, the rule bans misrepresentations in respect to "quantity" of announcements. Considering the crucial importance which time of broadcast often has, the fact that X commercials were broadcast between 6 and 9 a.m., and Y commercials between midnight and 5 a.m., is just as much a part of "quantity" as is the fact that X plus Y commercials were broadcast during a particular week.

7. However, it is also true, as petitioner urges, that the rulemaking which led to the 1965 rules, the report and order adopting them and to a large extent the rules and examples themselves, read in terms of the specific, rather widespread practice which they were designed to

prevent, i.e., "double billing", in which, essentially, the station acts in collusion with a local advertiser, "billing" him a larger amount than that actually due or paid so that he can claim greater reimbursement from a cooperating manufacturer who is paying part of the cost of the local store's advertising. Therefore we believe it appropriate to add language to the rule to make completely clear its prohibition against outright false billing, the knowing rendition of any bill or other document which misrepresents the number of announcements run, their character, their length, or the date and time of their broadcast. While less common than double billing was prior to the 1965 decision, such practices, where they occur, are certainly no less fraudulent and contrary to the public interest, and we agree with petitioner that licensees should be specifically enjoined against them.[2]

8. Accordingly, we are adding to the fraudulent billing rule the following language, which is much the same as that suggested by petitioner:

* * * or which misrepresents the quantity of advertising broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast.

9. It is also appropriate to add examples to the 1965 public notice entitled "Applicability of Fraudulent Billing Rule" (F.C.C. 65–952, 30 F.R. 13642, 1 F.C.C. 2d 1075), since, as mentioned above, the examples now largely deal with the "double billing" practice or variations of it. Accordingly, examples 9 and 10 are added to that public notice, as follows:

9. A licensee knowingly issues a bill or invoice to a local or national advertiser which shows broadcast of commercial announcements 1 minute in length, whereas in fact some of the announcements were only 30 seconds in length.

Interpretation: This is fraudulent billing, since it misrepresents the length of the commercials, a highly important element of the price charged for them.

10. A licensee knowingly issues a bill or invoice to a local or national advertiser which sets forth the time of day or date on which commercial announcements were broadcast, whereas in fact they were presented at a different time or on a different day, or were not broadcast at all.

Interpretation: This is fraudulent billing, since time of broadcast is often highly important in its value and the price charged for it. Charging for advertising not broadcast is clearly fraudulent.

10. *Form of the rule.* Recently, the Commission has begun an effort to simplify the structure of part 73 of our rules, that governing the broadcast services, by combining in one subpart those rules common to all or most of the broadcast services. This was done in connection with the new station identification rules adopted in December 1969, the text of which is set forth in section 73.1201, with brief cross references thereto in the rules specifically applying to each service. We are adopting the same technique here, and the fraudulent billing rule, as amended herein, is set forth in new section 73.1205, which is the appropriate section in the planned structure of the new subpart H. Present sections 73.124 (AM), 73.299 (FM), and 73.678 (TV) are amended herein to simply refer to the new section.

[2] We so held in the Star Stations of Indiana, Inc. decision mentioned in footnote 1, above, 19 F.C.C. 2d 991, 17 R.R. 2d 491 (1969), where the conduct involved occurred before adoption of the rule. See also *WBZB Broadcasting Service, Inc.*, 10 F.C.C. 2d 321, 11 R.R. 2d 254 (1967); *Robert D. and Martha M. Rapp*, 12 F.C.C. 2d 703, 13 R.R. 2d 32 (1968); *Lawrence Broadcasters, Inc.*, 14 F.C.C. 2d 384, 14 R.R. 2d 1 (1968); *Perry Radio*, 18 F.C.C. 2d 175, 16 R.R. 2d 525 (1969).

11. *Authority.* Authority for amendment of the fraudulent billing rules is contained in sections 4(i), 303(r), 307, 308, and 309 of the Communications Act of 1934, as amended. We are taking this rule-making action without the prior public proceedings contemplated as a general matter by section 553 of the Administrative Procedure Act. This is permissible and appropriate because, as noted above, the practices mentioned by petitioner are really included within the present language of the rule, forbidding misrepresentation as to the nature and quantity of advertising. The present action is merely interpretative, expressing the application of the rule in particular circumstances, and thus prior proceedings are not required, under section 553(b)(3)(A). In any event, prior proceedings may be dispensed with as unnecessary, under section 553(b)(3)(B). This is true because the conduct specifically proscribed by the new language is clearly fraudulent and contrary to the public interest, at least to the same degree as where the "double billing" practices to which our 1965 action and rules were primarily addressed. Action to prohibit such practices, by more specific language, is clearly warranted and appropriate.

12. In view of the foregoing, *It is ordered*, That: (*a*) effective June 26, 1970, sections 73.124, 73.299 and 73.678 of the Commission's rules *Are amended*, and new section 73.1205 *Is adopted*, as set forth in the appendix hereto.

(*b*) The public notice entitled "Applicability of Fraudulent Billing Rule", F.C.C. 65–952, 30 F.R. 13642, 1 F.C.C. 2d 1075, *Is superseded* by public notice (F.C.C. 70–513), which is the same as the earlier document except for new Examples 9 and 10 and the third paragraph in the preliminary text referring to them.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. The present text of sections 73.124, 73.299, 73.678 of the Commission's rules is deleted and these sections are amended, to read as follows:

§ 73.124 Fraudulent billing practices.
See § 73.1205, which is applicable to all standard broadcast stations.

§ 73.299 Fraudulent billing practices.
See § 73.1205, which is applicable to all FM broadcast stations.

§ 73.678 Fraudulent billing practices.
See § 73.1205, which is applicable to all television broadcast stations.

2. In Subpart H of Part 73, new Section 73.1205 is added, as follows:

§ 73.1205 Fraudulent billing practices.

No licensee of a standard, FM or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

NOTE.—Commission interpretations in connection with this rule may be found in a separate public notice issued May 18, 1970, entitled "Applicability of Fraudulent Billing Rule". (F.C.C. 70–513), 35 F.R. ——.)