

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

In the Matter of )
ACC Licensee, Inc. ) File No. EB-04-TC-100
Licensee of WJLA-TV ) Facility ID No. 1051
Washington, D.C. ) NAL/Acct. No. 200532170009
) FRN: 0007517576
Apparent Liability for Forfeiture )

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 25, 2005

Released: May 25, 2005

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"),<sup>1</sup> we find that ACC Licensee, Inc. ("ACC") apparently willfully or repeatedly violated section 713 of the Communications Act of 1934, as amended (the "Act"),<sup>2</sup> and section 79.2(b)(1)(i) of the Commission's rules.<sup>3</sup> ACC apparently violated the Act and the Commission's rules by failing, in a timely manner, to make accessible to persons with hearing disabilities emergency information that it provided aurally in its programming for WJLA-TV during a thunderstorm/tornado watch in the Washington, D.C. Metropolitan area on May 25, 2004. Based upon our review of the facts and circumstances, we find ACC apparently liable for a forfeiture in the amount of \$8,000.

II. BACKGROUND

2. Approximately one in ten Americans – 28 million – has some level of hearing loss; in the population of people over 65 years of age, that number increases to one in three.<sup>4</sup> As the median age of

<sup>1</sup>See 47 U.S.C. § 503(b)(4)(A). The Commission has authority under this section of the Act to assess a forfeiture penalty against a broadcast licensee if the Commission determines that the licensee has "willfully or repeatedly" failed to comply with the provisions of the Act or with any rule, regulation, or order issued by the Commission under the Act. For a violation to be willful, it need not be intentional. Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991).

<sup>2</sup>47 U.S.C. § 613.

<sup>3</sup>47 C.F.R. § 79.2(b)(1)(i).

<sup>4</sup>See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Report and Order, 18 FCC Rcd 16753, at para. 5 (2003) (HAC Report and Order); Erratum, WT Docket No. 01-309, 18 FCC Rcd 18047 (2003) (citations omitted).

the population continues to rise, the proportion of Americans with hearing loss will likely increase.<sup>5</sup> According to the American Speech-Language-Hearing Association, “[t]he number of Americans with a hearing loss has evidentially doubled during the past 30 years. Data gleaned from Federal surveys illustrate the following trend of prevalence [of hearing loss] for individuals aged three years or older: 13.2 million (1971), 14.2 million (1977), 20.3 million (1991), and 24.2 million (1993).”<sup>6</sup> Access to television information in an emergency is critical for all Americans, including this important and growing segment of our population.

### A. Requirements for Accessibility of Emergency Information

3. Congress recognized how important visual access to televised information is to individuals with hearing disabilities, and required the Commission, pursuant to section 713 of the Act,<sup>7</sup> to prescribe rules regarding Video Programming Accessibility. Pursuant to this direction, and out of a concern that critical emergency information be available to every television viewer, including persons with hearing disabilities, the Commission adopted section 79.2 of the rules.<sup>8</sup> Section 79.2(b)(1)(i) requires that video programming distributors providing emergency information in the audio portion of programming must provide persons with hearing disabilities with the same access to such information that distributors provide to listeners, either through a method of closed captioning or by using another method of visual presentation.<sup>9</sup>

4. The Commission’s rules do not require closed captioning,<sup>10</sup> but allow for other methods of visual presentation, including, but not limited to, open captioning, crawls, or scrolls.<sup>11</sup> The Commission stated that it was permitting these alternatives because it was concerned about the limited “real-time” captioning resources available and their current costs.<sup>12</sup> The Commission made clear, however, that regardless of the method of visual presentation used, video programming distributors must “use [a] method of visual presentation [that] ensure[s] the same accessibility [to emergency information] for persons with hearing disabilities as for any other viewer, as required by the rule.”<sup>13</sup> This could include already prepared signs or charts or handwritten information contained on a white board.<sup>14</sup> The Commission mandated equal accessibility because emergency information is of “equal or greater importance to persons with hearing

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<sup>5</sup>See *HAC Report and Order*, 18 FCC Rcd 16753, at para. 5..

<sup>6</sup>From: [http://www.asha.org/public/hearing/disorders/prevalence\\_adults.htm](http://www.asha.org/public/hearing/disorders/prevalence_adults.htm) (visited May 24, 2005) (citations omitted).

<sup>7</sup>47 U.S.C § 613.

<sup>8</sup>*Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, and Accessibility of Emergency Programming*, Second Report and Order, 15 FCC Rcd 6615, 6621-22, para. 12 (2000) (“*Second Report and Order*”).

<sup>9</sup>47 C.F.R. § 79.2(b)(1)(i).

<sup>10</sup>*Second Report and Order*, 15 FCC Rcd at 6620, para. 11.

<sup>11</sup>*Id.* at 6618, para. 8.

<sup>12</sup>*Id.* at 6621, para. 11.

<sup>13</sup>*Id.* at 6623-24, para. 16.

<sup>14</sup>See generally, *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, Report and Order, Docket No. 20659, 61 FCC2d 18 (1976) (*1976 Order*), at paras. 9, 11 and Appendix B (relating to prior visual presentation requirements and noting potential use of slides and hand printed messages).

disabilities, and television plays a critical role in its dissemination.”<sup>15</sup> Further, it is clear from the Commission’s definition of emergency information, *i.e.*, information about a “current” emergency that provides critical details concerning “how to respond to the emergency,”<sup>16</sup> that the Commission required video programming distributors to display emergency information in a timely manner so that viewers can respond to a current emergency before becoming endangered. The Commission long ago recognized the importance of timeliness of providing emergency information, noting that “if visual notification is delayed, it should not be unreasonably delayed so that a hearing impaired person would not have time to take reasonable and constructive precautions with regard to the emergency.”<sup>17</sup>

5. The Commission defined emergency information in section 79.2 as “information, about a current emergency, that is intended to further the protection of life, health, safety, and property, *i.e.*, critical details regarding the emergency and how to respond to the emergency,”<sup>18</sup> not merely the existence of an emergency.<sup>19</sup> The rule provides the following non-exhaustive list of examples of the types of emergencies covered: “*tornadoes*, hurricanes, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and *warnings and watches of impending changes in weather*.”<sup>20</sup> The Commission further stated that critical details included, among other things, “specific details regarding the areas that will be affected by the emergency, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or *the way to take shelter in one’s home*, instructions on how to secure personal property, road closures, and how to obtain relief assistance.”<sup>21</sup> Since the adoption of the rules, the Commission repeatedly reminded video programming distributors of their obligation to make emergency information accessible.<sup>22</sup>

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<sup>15</sup>*Id.* at 6619-20, paras. 9, 10 (citing examples of the importance of timely visual emergency information including an inaccessible tornado warning that caused delay in evacuation of children and an inaccessible water contamination warning that caused persons with hearing disabilities to needlessly incur health risks of which they were not initially aware). In attempting to determine the scope of this rule, the Commission expressed concern that the disabilities community have available “sufficient information” with the “same immediacy” as other viewers. *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, and Accessibility of Emergency Programming*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 5627, 5631 (1998). In addition to the plain meaning of the phrase “emergency information,” the nature of the critical details described in section 79.2(a)(2) makes clear that timely visual presentation is required.

<sup>16</sup>47 C.F.R. § 79.2(a)(2).

<sup>17</sup> *1976 Order*, 61 FCC2d 18, at para. 11.

<sup>18</sup>*Id.*

<sup>19</sup>*Second Report and Order*, 15 FCC Rcd at 6617, para. 5.

<sup>20</sup>*Id.* (emphasis added)

<sup>21</sup>Note to 47 C.F.R. § 79.2(a)(2) (emphasis added).

<sup>22</sup>*See, e.g.*, Public Notice, “Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities,” 16 FCC Rcd 15348 (2001); Public Notice, “Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities,” 17 FCC Rcd 14614 (2002); Public Notice, “Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities,” 18 FCC Rcd 14670 (2003); Public Notice, “Reminder to Video Programming Distributors of Obligations to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities,” 19 FCC Rcd 9882 (May 24, 2004); Public Notice, “Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities,” DA 05-688, 20 FCC Rcd \_\_\_\_,

(continued....)

## B. The Investigation

6. On May 25, 2004, the Washington, D.C. Metropolitan area was subject to a severe thunderstorm/tornado watch. The Commission received a consumer complaint against WJLA-TV alleging that the station failed to make information concerning the thunderstorm/tornado watch accessible to persons with hearing disabilities. According to the complaint, this failure created confusion about the severity and location of the emergency for those viewers. In the words of the complainant, "I saw street maps with some kind of color coding and a computer cursor moving around the screen, but had no idea what the cursor was singling out or what the code was for the different colors."<sup>23</sup>

7. The Enforcement Bureau ("Bureau") subsequently launched an investigation into ACC's broadcasts carried on WJLA-TV on that date.<sup>24</sup> The Bureau sent a Letter of Inquiry to ACC, directing ACC to provide, among other things, videotapes of ACC's May 25, 2004 coverage of the thunderstorm/tornado watch on WJLA-TV.<sup>25</sup> ACC filed a response that included the requested videotapes.<sup>26</sup> ACC also filed a supplemental response.<sup>27</sup>

8. The Bureau has reviewed ACC's tapes of WJLA-TV's programming and identified at least one instance where the station aurally provided emergency information regarding the way to take shelter in one's home but substantially delayed the visual presentation of that emergency information. Specifically, at approximately 6:50 p.m., meteorologist Doug Hill told viewers located between Leesburg and Lucketts in Virginia to take cover in their homes, go to the basement or an interior room, and cover themselves with blankets and quilts.<sup>28</sup> ACC did not provide closed captioning or any other visual presentation of this shelter-in-place emergency information on WJLA-TV until approximately 9:22 p.m., over two and a half hours later.

## III. DISCUSSION

9. As an initial matter, we note that ACC is a "video programming distributor" subject to section 79.2 of the Commission's rules. Section 79.1(a)(2) defines a video programming distributor as "[a]ny

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2005 WL 626867 (Mar. 17, 2005). *See also* Letter from Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, to Fred Ryan, President and General Manager, WJLA-TV (Apr. 22, 2004).

<sup>23</sup>Complaint filed by Cheryl A. Heppner, Executive Director, Northern Virginia Resource Center for Deaf and Hard of Hearing Persons ("NVRC") (filed May 28, 2004) ("NVRC Complaint"). NVRC is located in Fairfax, Virginia, a suburb of Washington, D.C.

<sup>24</sup>ACC is a subsidiary of Allbritton Communications Company and licensee of WJLA-TV and is a video programming distributor as defined in our rules. FCC Form 323; 47 C.F.R. § 79.2(b)(1)(i). As a video programming distributor, ACC is obligated to provide to persons with hearing disabilities the same access to emergency information that it provides to listeners of its programming. 47 C.F.R. § 79.2(b)(1)(i).

<sup>25</sup>Letter from Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, to ACC Licensee, Inc. (June 7, 2004) ("Letter of Inquiry").

<sup>26</sup>Letter from Jerald N. Fritz, Sr. Vice President, Legal and Strategic Affairs, to Peter G. Wolfe, Senior Attorney, FCC (June 28, 2004) ("Response").

<sup>27</sup>Letter from Jerald N. Fritz, Sr. Vice President, Legal and Strategic Affairs, to Peter G. Wolfe, Senior Attorney, FCC (July 12, 2004).

<sup>28</sup>WJLA-TV did not provide the times of the broadcasts on all parts of the tapes. Therefore, these times are approximate based upon (1) the starting times WJLA-TV provided on the tapes themselves and (2) the starting point for particular news segments as set forth in WJLA-TV's Response, Item #1.

television broadcast station licensed by the Commission....”<sup>29</sup> As a broadcast licensee, ACC must comply with the Commission’s rules regarding the accessibility of emergency information to persons with hearing disabilities.

10. We now turn to an analysis of the information broadcast by ACC over WJLA-TV during the time period at issue. ACC interrupted its regular programming with coverage of the thunderstorm/tornado watch on several occasions. ACC’s meteorologist repeated emergency information many times, emphasizing the areas where the thunderstorm or tornado was located and was likely to cause damage or loss of life, warning viewers to take shelter in their homes, and providing instructions for safe sheltering. However, as described in the NVRC a consumer complaint, most of the visual information ACC provided, such as weather maps, did not reveal the danger of a tornado to persons with hearing disabilities, much less how they should take shelter in response to the threat.<sup>30</sup> Thus, while ACC visually presented some information during this period, mostly concerning the location of the worst weather, it appears that in at least one instance ACC did not make critical information available to persons with hearing disabilities.

11. The record shows that, at 6:50 p.m., ACC aurally provided critical emergency information to viewers in specific locations on the way to take shelter in one’s home, but provided visual presentation of this information only after a substantial delay of over two and a half hours.<sup>31</sup> The information in question concerning the need to and the way to take shelter in one’s home falls squarely within the Commission’s definition of “emergency information” because it is “[i]nformation, about a current emergency, that is intended to further the protection of life, health, safety, and property, i.e., critical details regarding the emergency and how to respond to the emergency.”<sup>32</sup> Indeed, the Commission offered this category of information as an example of critical details covered by the rule.<sup>33</sup> In addition, the Commission offered tornadoes and warnings and watches of impending changes in weather as examples of covered emergencies.<sup>34</sup> We note that ACC used crawls to convey emergency information during regular programming on May 25, 2004 and it could have easily used the same format to visually present the shelter tips at issue here. In addition, ACC’s own evidence indicates that it provided charts showing shelter tips several times during a previous tornado emergency on July 10, 2003,<sup>35</sup> and could have shown those same or similar charts on May 25, 2004.

12. ACC did not, however, provide these shelter instructions in either a crawl or a sign at the time it broadcast the instructions aurally. Instead, ACC waited over two and a half hours to display the instructions visually. Providing emergency information visually more than two and a half hours after the same information has been provided aurally is tantamount to not providing the information at all. Providing visual information after this lengthy delay is of no use to individuals with hearing disabilities. Accordingly, based on the facts and circumstances present here, we find ACC liable for an apparent violation of section 79.2(b)(1)(i).

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<sup>29</sup>47 C.F.R. § 79.1(a)(2).

<sup>30</sup>See NVRC Complaint.

<sup>31</sup>See *supra* para. 8.

<sup>32</sup>47 C.F.R. § 79.2(a)(2). In addition, the information here was primarily intended for the audience in the geographic area where the emergency was occurring. 47 C.F.R. § 79.2(b)(2).

<sup>33</sup>Note to 47 C.F.R. § 79.2(a)(2).

<sup>34</sup>47 C.F.R. § 79.2(a)(2).

<sup>35</sup>Response, Exhibit 5.

#### IV. FORFEITURE AMOUNT

13. For the time period at issue in this case, section 503(b)(2)(A) of the Communications Act authorized the Commission to assess a forfeiture of up to \$27,500 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act.<sup>36</sup> In exercising such authority, we are required to take into account "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."<sup>37</sup> Based on our review of the record, we conclude that ACC is apparently liable for the willful or repeated violation of our rules.

14. The Commission's forfeiture guidelines do not currently establish a base forfeiture amount for violations of section 79.2(b)(1)(i). Enforcement of the emergency accessibility rules is important, as lives may depend on compliance. We find that \$8,000, the base forfeiture amount for violations of rules relating to distress and safety frequencies and for failure to install and operate Emergency Alert System ("EAS") equipment, is analogous and warranted for apparent violations of section 79.2(b)(1)(i).<sup>38</sup> The purpose of the EAS and safety frequencies rules is to warn persons of emergencies, and the purpose of section 79.2(b)(1)(i) is the same. ACC provided aural emergency information without providing visual presentation for approximately two and one half hours, resulting in one apparent violation of the rule. Accordingly, we propose a forfeiture of \$8,000 for the apparent violation here. ACC will have the opportunity to submit further evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.<sup>39</sup>

#### V. CONCLUSIONS AND ORDERING CLAUSES

15. We have determined that ACC Licensee, Inc. has apparently willfully or repeatedly violated section 713 of the Act and section 79.2(b)(1)(i) of the Commission's rules by failing to make emergency information that it provided to hearing people accessible to persons with hearing disabilities, resulting in a proposed forfeiture of \$8,000.

16. Accordingly, IT IS ORDERED, pursuant to section 503(b) of Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that ACC Licensee, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$8,000

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<sup>36</sup>Specifically, section 503(b)(2)(A) provides for forfeitures up to \$25,000 for each violation or a maximum of \$250,000 for each continuing violation by (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate or similar instrument. 47 U.S.C. § 503(b)(2)(A). The Commission amended its rules by adding a new subsection to its monetary forfeiture provisions that incorporates by reference the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996 (DCIA), Pub L. No. 104-134, § 31001, 110 Stat. 1321 (1996). Thus, the maximum statutory forfeiture per violation pursuant to section 503(b)(2)(A) increased from \$25,000 to \$27,500. *See Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd. 18,221 (2000). We note that the Commission recently increased the per violation amount again to \$32,500. *See Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 2004 WL 1366972, FCC 04-139 (rel. June 18, 2004); 69 FR 47788 (establishing an effective date of September 7, 2004).

<sup>37</sup>See 47 U.S.C. § 503(b)(2)(D); *see also The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17,087 (1997); *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>38</sup>See 47 C.F.R. § 1.80(b)(4).

<sup>39</sup>See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

for willful or repeated violations of section 713 of the Act, 47 U.S.C. § 613, and section 79.2(b)(1)(i) of the Commission's rules, 47 C.F.R. § 79.2(b)(1)(i), as described in the paragraphs above.

17. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, ACC Licensee, Inc. SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.<sup>40</sup>

18. Payment of the 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 above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

19. The Bureau will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner'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.

20. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>41</sup>

21. IT IS FURTHER ORDERED that copies of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Jerald N. Fritz, Senior Vice President, Legal and Strategic Affairs, Allbritton Communications Company, 1100 Wilson Boulevard, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith  
Acting Chief, Enforcement Bureau

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<sup>40</sup>If ACC chooses to respond, it should mail its response to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W. Room-4C224, Washington, D.C. 20554. ACC must include the file number listed above. It should also send an electronic copy of its response to Mark Stone, Deputy Chief, Telecommunications Consumers Division, at [mark.stone@fcc.gov](mailto:mark.stone@fcc.gov) and Peter Wolfe, Senior Attorney, Telecommunications Consumers Division, at [peter.wolfe@fcc.gov](mailto:peter.wolfe@fcc.gov).

<sup>41</sup>47 C.F.R. § 1.1914.