

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

In the Matter of)
Fox Television Stations, Inc.)
Licensee of WTTG (TV)) File No. EB-04-TC-104
Washington, D.C.) Facility ID No. 22207
Apparent Liability for Forfeiture) NAL/Acct. No. 200532170011
FRN: 0012916607

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"),¹ we find that Fox Television Stations, Inc. ("Fox") apparently willfully or repeatedly violated section 713 of the Communications Act of 1934, as amended (the "Act"),² and section 79.2(b)(1)(i) of the Commission's rules.³ Fox 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 WTTG 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 Fox apparently liable for a forfeiture in the amount of \$16,000.

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.⁴ As the median age of

¹See 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).

²47 U.S.C. § 613.

³47 C.F.R. § 79.2(b)(1)(i).

⁴See 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.⁵ 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).”⁶ 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,⁷ 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.⁸ 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.⁹

4. The Commission’s rules do not require closed captioning,¹⁰ but allow for other methods of visual presentation, including, but not limited to, open captioning, crawls, or scrolls.¹¹ 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.¹² 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.”¹³ This could include already prepared signs or charts or handwritten information contained on a white board.¹⁴ The Commission mandated equal accessibility because emergency information is of “equal or greater importance to persons with hearing

⁵See *HAC Report and Order*, 18 FCC Rcd 16753, at para. 5..

⁶From: http://www.asha.org/public/hearing/disorders/prevalence_adults.htm (visited May 24, 2005) (citations omitted).

⁷47 U.S.C § 613.

⁸*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*”).

⁹47 C.F.R. § 79.2(b)(1)(i).

¹⁰*Second Report and Order*, 15 FCC Rcd at 6620, para. 11.

¹¹*Id.* at 6618, para. 8.

¹²*Id.* at 6621, para. 11.

¹³*Id.* at 6623-24, para. 16.

¹⁴See 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.”¹⁵ 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,”¹⁶ 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.”¹⁷

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,”¹⁸ not merely the existence of an emergency.¹⁹ 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.*”²⁰ 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.”²¹ Since the adoption of the rules, the Commission has repeatedly reminded video programming distributors of their obligation to make emergency information accessible.²²

¹⁵*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 “emergency information,” the nature of the critical details described in section 79.2(a)(2) makes clear that timely visual presentation is required.

¹⁶47 C.F.R. § 79.2(a)(2).

¹⁷ *1976 Order*, 61 FCC2d 18, at para. 11.

¹⁸*Id.*

¹⁹*Second Report and Order*, 15 FCC Rcd at 6617, para. 5.

²⁰*Id.* (emphasis added).

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

²²*See, e.g.*, Public Notice, “Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing Disabilities,” DA 01-1930, 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 Disabilities,” DA 05-688, 20 FCC Rcd ____, 2005 WL 626867 (CGB March 17, 2005); Letter from Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, to Molly Pauker, Vice President, Corporate and Legal Affairs, Fox Television Stations, Inc., (April 22, 2004).

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 WTTG alleging that the station failed to make information on the thunderstorm/tornado watch accessible to persons with hearing disabilities that resulted in confusion about the severity and location of the emergency for those viewers. In the words of the complainant, “[Fox] cut into the screen during ‘American Idol’ for news about the weather. From this visual (with no captions), it look[ed] like the bad weather might be in Maryland. I was totally confused.”²³

7. The Enforcement Bureau (“Bureau”) subsequently launched an investigation into Fox’s broadcasts carried on WTTG on that date.²⁴ The Bureau sent a Letter of Inquiry to Fox, directing Fox to provide, among other things, videotapes of Fox’s May 25, 2004 coverage of the thunderstorm/tornado watch on WTTG. Fox filed a response that included the requested videotapes.²⁵

8. The Bureau has reviewed Fox’s tapes of WTTG’s programming and identified two instances where the station aurally provided emergency information regarding the way to take shelter in one’s home but failed to provide the visual presentation of that emergency information. The two instances are described below.

(a) At 6:20 p.m., Ms. Gwen Tolbart told viewers in the Frederick and Hagerstown, Maryland areas that they should take cover, go to the lowest level of their house, and stay close to the floor. Fox failed to provide closed captioning or any visual presentation of this emergency information on WTTG.

(b) At 6:45 p.m., Ms. Tolbart told viewers located in Lovettsville, Leesburg, and Lucketts, Virginia, to take cover, go to the lowest level of their house, and go to an interior room. Fox failed to provide closed captioning or any visual presentation of this emergency information on WTTG.

III. DISCUSSION

9. As an initial matter, we note that Fox 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 television broadcast station licensed by the Commission...”²⁶ As a broadcast licensee, Fox must comply with the Commission’s rules regarding the accessibility of emergency information to individuals with hearing disabilities.

10. We now turn to an analysis of the information broadcast by Fox over WTTG during the time period at issue. Fox interrupted its regular programming with coverage of the thunderstorm/tornado watch on several occasions. Fox’s meteorologist repeated emergency information many times, emphasizing the areas where the thunderstorm or tornado was located and was likely to cause damage or

²³Complaint 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.

²⁴Fox is the licensee of WTTG and is a video programming distributor as defined in our rules. 47 C.F.R. § 79.1(a)(2). Letter from Molly Pauker, Vice President, Corporate and Legal Affairs, Fox Television Stations, Inc., to Peter G. Wolfe, Senior Attorney, FCC (June 29, 2004) (“Response”).

²⁵Letter from Colleen K. Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, to Fox Television Stations, Inc. (June 7, 2004) (“Letter of Inquiry”).

²⁶47 C.F.R. § 79.1(a)(2).

loss of life, warned viewers to take shelter in their homes, and provided instructions for safe sheltering. While Fox visually presented some information during this period, mostly concerning the location of the severe weather, it appears that in several instances Fox did not make critical information available to persons with hearing disabilities.

11. The record shows that, in two separate instances from approximately 6:20 p.m. to 6:45 p.m., Fox aurally provided critical emergency information to viewers at specific locations on the way to take shelter in one's home, but failed to provide any visual presentation of this information.²⁷ The information in question concerning 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."²⁸ Indeed, the Commission offered this category of information as an example of critical details covered by the rule.²⁹ In addition, the Commission offered tornadoes and warnings and watches of impending changes in weather as examples of covered emergencies.³⁰ Fox did not, however, provide visual presentation of the shelter instructions after they were aurally provided. We note that, because of the rapid movement of a tornado and the quickly changing weather patterns associated with this type of weather event, it is vital that basic emergency information be provided visually and in a timely manner. The failure to present emergency information visually in this instance could have resulted in serious bodily harm or loss of life for persons with hearing disabilities. Accordingly, based on the facts and circumstances present here, we find Fox liable for two apparent violations of section 79.2(b)(1)(i).

12. Fox provides evidence that its failure to provide closed captioning was caused by the unavailability of its contract closed captioning service.³¹ As stated above, however, and as described in more detail below, section 79.2(b)(1)(i) mandates only that Fox provide visual access to emergency information by *some* means, not that Fox provide such visual access by closed captioning. Therefore, even without the assistance of its contract captioner, Fox could have complied with the rule by utilizing crawls, graphics, or some other method of visual presentation. Indeed, Fox displayed a chart showing shelter tips at 5:53 p.m., but it failed to provide that chart after shelter tips were aurally provided later during its programming. Therefore, viewers with hearing disabilities who were not watching at 5:53 p.m. were not made aware of shelter tips when they were communicated aurally at other times. Fox's evidence does not, therefore, alter our conclusion.

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.³² In exercising such authority, we are

²⁷See *supra* para. 8.

²⁸*Id.* 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).

²⁹Note to 47 C.F.R. § 79.2(a)(2).

³⁰47 C.F.R. § 79.2(a)(2).

³¹Response at 7, Exhibit 1.

³²Specifically, 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

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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."³³ Based on our review of the record, we conclude that Fox 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).³⁴ 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. Fox provided aural emergency information without providing visual presentation on several occasions, resulting in two apparent violations of the rule. Accordingly, we propose a forfeiture of \$16,000 for the two apparent violations here. Fox 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.³⁵

V. CONCLUSIONS AND ORDERING CLAUSES

15. We have determined that Fox Television Stations, 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 \$16,000.

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 Fox Television Stations, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$16,000 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, Fox Television Stations, 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.³⁶

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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).

³³See 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).

³⁴See 47 C.F.R. § 1.80(b)(4).

³⁵See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

³⁶If Fox chooses to respond, it should mail its response to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W. Room-4C224, Washington, D.C. 20554. Fox must include the file number listed above. It should also send an electronic

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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. 20554.³⁷

21. IT IS FURTHER ORDERED that copies of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Molly Pauker, Vice President, Corporate and Legal Affairs, Fox Television Stations, Inc, 5151 Wisconsin Avenue, N.W., Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Acting Chief, Enforcement Bureau

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copy of its response to Mark Stone, Deputy Chief, Telecommunications Consumers Division, at mark.stone@fcc.gov and Peter Wolfe, Senior Attorney, Telecommunications Consumers Division, at peter.wolfe@fcc.gov.

³⁷47 C.F.R. § 1.1914.