

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

In the Matter of	)	
	)	
KWGN Inc.	)	Facility I.D. No. 35883
Licensee of Station KWGN-TV	)	NAL/Acct. No. 0741420050
Denver, Colorado	)	FRN: 0001615046

**NOTICE OF APPARENT  
LIABILITY FOR FORFEITURE**

**Adopted: August 1, 2007**

**Released: August 3, 2007**

By the Chief, Video Division, Media Bureau:

**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”),<sup>1</sup> by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,<sup>2</sup> we find that KWGN Inc. (the “Licensee”), licensee of Station KWGN-TV, Denver, Colorado (the “Station”), apparently willfully and repeatedly violated Sections 73.670 and 73.352(e)(11)(iii) of the Rules, by failing to comply with the limits on commercial matter in children’s programming, and by failing to publicize the existence and location of the Station’s Children’s Television Programming Reports, respectively.<sup>3</sup> 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 seventeen thousand, five hundred dollars (\$17,500).

**II. BACKGROUND**

2. In the Children’s Television Act of 1990, (the “CTA”),<sup>4</sup> 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. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a “program-length commercial”).<sup>5</sup>

<sup>1</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> See 47 C.F.R. § 0.283.

<sup>3</sup> See 47 C.F.R. §§ 73.670 and 73.3526(e)(11)(iii).

<sup>4</sup> Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394.

<sup>5</sup> *Children’s Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

3. Under the Commission's rules implementing the CTA, each television broadcast station licensee has an obligation, during its license term, to air programming that serves the educational and informational needs of children through both the licensee's overall programming and programming "specifically designed" to educate and inform children (core programming).<sup>6</sup> The Commission's rules require commercial licensees to provide information to the public about the shows they air to fulfill their obligation. Section 73.3526(e)(11)(iii) of the Rules requires each commercial television broadcast station to prepare and place in its public inspection file a Children's Television Programming Report for each calendar quarter reflecting, *inter alia*, the efforts it has made during the quarter to serve the educational needs of children. As set forth in Section 73.3526(e)(11)(iii), licensees are also required to file the reports with the Commission and to publicize for the public the existence and location of the reports.

4. On December 1, 2005, the Licensee filed its license renewal application (FCC Form 303-S) for Station KWGN-TV (the "Application") (File No. BRCT-20051201BRA). 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 19, the Licensee indicated that between December 23, 1998, and August 30, 2004, the Station violated the children's television commercial limits on 17 occasions. Of these overages, two were ten seconds in duration, five were 30 seconds in duration, two were 60 seconds in duration, one was 75 seconds in duration, and two were 90 seconds in duration. In addition, the Licensee acknowledged that four program-length commercial overages occurred when it aired a commercial for a movie featuring Jackie Chan during the children's program "Jackie Chan Adventures" on four occasions. The Licensee indicated that five of the conventional overages resulted from technical failures of the Station's automation or computer systems. Further, the Licensee attributed one conventional overage to an error that occurred in the programming supplied by the station's national television network, The WB Television Network. The Licensee reported that six conventional overages and four program-length commercials resulted from human error and/or inadvertence.

5. The remaining incident the Licensee reported occurred on September 24, 2002 when it aired a WB Television Network commercial for the Nintendo GameBoy E-Reader, during the "Pokemon" program. The Licensee asserted that the Station was not warned, and did not know until after broadcast, when the WB Television Network brought the matter to the Licensee's attention, that the commercial contained a "fleeting, obscured image" of a "Pokemon" game card. The Licensee stated that, the image, in which only the letters "MON" are visible for just over one second, does not depict any "Pokemon" character. According to the Licensee's description, the "Pokemon" card appears as the third of six cards arranged in the shape of a fan during the display and "Pokemon" is not mentioned in the audio of the commercial. The Licensee maintained that it had been its good faith judgment that the program-length commercial policy was inapplicable in this case because there is no likelihood that children would perceive any linkage between the "Pokemon" program and the GameBoy commercial. Further, the Licensee contended that the WB Television Network expressed its belief that the GameBoy commercial does not violate the Commission's rules or policies or the Children's Television Act's commercial time limits. Finally, the Licensee described corrective measures taken subsequently to prevent future violations.

6. In Exhibit 24, the Licensee indicated that in 1999, it failed to publicize the existence and location of the Station's Children's Television Programming Reports. The Licensee stated that this error occurred as a result of a change in management at the Station in the first quarter in 1999, and was not discovered until the fourth quarter of 1999. Immediately upon discovery of this omission, the Licensee asserted, it implemented procedures to ensure future compliance.

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<sup>6</sup> 47 C.F.R. § 73.671.

### III. DISCUSSION

7. Station KWGN-TV's record during the last license term of exceeding the Commission's commercial limits on 12 occasions, including five program-length commercials, constitutes an apparent willful and repeated violation of Section 73.670 of the Rules.<sup>7</sup> With respect to the Station's broadcast of the commercial for the Nintendo GameBoy E-Reader, although the Licensee contended that the "Pokemon" game card appeared for approximately one second during the commercial, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.<sup>8</sup> Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the GameBoy commercial and the "Pokemon" program regardless whether any "Pokemon" character is depicted given the image of a "Pokemon" game card contained in the commercial and the consequent likelihood that children may associate it with the program.

8. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.<sup>9</sup> Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children's television commercial limits, stating that the program-length commercial policy "directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter."<sup>10</sup>

9. The number and magnitude of overages at issue here 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.<sup>11</sup> Although the Licensee indicated that six conventional overages and four of the program-length commercials resulted from human error and/or inadvertence, this does not mitigate or excuse the violations. In this regard, the Commission has repeatedly rejected human error and

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<sup>7</sup> As discussed above, the Licensee attributed five conventional overages to technical failures. 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 the five conventional overages reported by the Licensee did not involve last-minute emergency scheduling changes, we believe the technical failures which caused them constitute extenuating circumstances. Accordingly, these overages 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.

<sup>8</sup> *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); see also *WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for "Spirit of Mickey" home video showing brief image of Donald Duck on cover of video aired during "Quack Pack" program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff'd*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program "Goof Troop").

<sup>9</sup> S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 24 (1989).

<sup>10</sup> *Children's Television Programming*, 6 FCC Rcd at 2118.

<sup>11</sup> *Children's Television Programming*, 6 FCC Rcd at 2117-18.

inadvertence as a basis for excusing violations of the children's television commercial limits.<sup>12</sup> Regarding the reasons given for one conventional overage and one program-length commercial, the fact that they resulted from errors which occurred in the programming supplied by the Station's television network or were inserted into the program by the Station's television network does not relieve it of responsibility for the violations. In this regard, the Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with our children's television rules and policies will not excuse or mitigate violations which do occur.<sup>13</sup> Furthermore, the Licensee's implementation of policies to prevent subsequent violations of the Commission's children's television rules and policies does not relieve the Licensee of liability for violations which have occurred.<sup>14</sup>

10. 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.<sup>15</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.<sup>16</sup> 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,<sup>17</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>18</sup> 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."<sup>19</sup>

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670 and a base forfeiture amount of \$10,000 for violation of Section 73.3526.<sup>20</sup> 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."<sup>21</sup>

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<sup>12</sup> See, e.g., *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp., supra*; *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

<sup>13</sup> See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995).

<sup>14</sup> See, e.g., *WHP Television, L.P. (WHP-TV)*, 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. (KEVN-TV)*, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

<sup>15</sup> 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

<sup>16</sup> 47 U.S.C. § 312(f)(1).

<sup>17</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>18</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>19</sup> 47 U.S.C. § 312(f)(2).

<sup>20</sup> 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.

<sup>21</sup> 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.

12. In this case, an upward adjustment is warranted in light of the number and nature of the commercial overages. Indeed, the Licensee reported five program-length commercials. In addition, the Licensee failed to publicize the existence and location of the Station's Children's Television Programming Reports during 1999. Considering the record as a whole, we believe that a \$17,500 proposed forfeiture is appropriate for the apparent willful and repeated violations of Sections 73.670 and Section 73.3526(e)(11)(iii).

#### IV. ORDERING CLAUSES

13. 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 KWGN Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seventeen thousand, five hundred dollars (\$17,500) for its apparent willful and repeated violations of Sections 73.670 and 73.3526(e)(11)(iii) of the Commission's Rules.

14. 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*, KWGN Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. 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 above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229.

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> 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.

17. 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.

18. 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.<sup>22</sup>

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<sup>22</sup> See 47 C.F.R. § 1.1914.

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KWGN Inc., 6160 South Wabash Way, Greenwood Village, Colorado 80111, and to its counsel, R. Clark Wadlow, Esquire, Sidley Austin Brown & Wood LLP, 1501 K Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau