

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

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| In the Matter of |) | |
| |) | |
| KSBY Communications LLC |) | Facility I.D. No. 19654 |
| Licensee of Station KSBY(TV) |) | NAL/Acct. No.: 201441420045 |
| San Luis Obispo, California |) | FRN: 0023677487 |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 22, 2015

Released: January 22, 2015

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"),¹ we find that KSBY Communications LLC (the "Licensee"), licensee of Station KSBY(TV), San Luis Obispo, California (the "Station"), apparently willfully and/or repeatedly violated Section 73.3526(e)(11)(iii) of the Rules² by failing to file with the Commission in a timely manner its Children's Television Programming Reports (FCC Form 398) for eight quarters. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also find that the Licensee failed to comply with the limits on commercial matter in children's programming and we hereby admonish the Licensee for this violation of the Commission's rules.

II. BACKGROUND

2. Section 73.3526 of the Rules requires each commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations.³ As set forth in subsection 73.3526(e)(11)(iii), each commercial television licensee is required to prepare and place in its public inspection file a Children's Television Programming Report (FCC Form 398) for each calendar quarter reflecting, *inter alia*, the efforts that it made during that quarter to serve the educational and informational needs of children. That subsection also requires licensees to file reports with the Commission and place them in their public file by the tenth day of the succeeding calendar quarter, and to publicize the existence and location of the reports.⁴

3. In addition, in the Children's Television Act of 1990 ("CTA"), Pub. L. No. 101-437, 104

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

² 47 C.F.R. § 73.3526(e)(11)(iii).

³ 47 C.F.R. § 73.3526.

⁴ 47 C.F.R. § 73.3526(e)(11)(iii).

Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the amount of commercial matter that commercial television stations may air during children's programming, and to consider in its review of television license renewals 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, 47 C.F.R. § 73.670, 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.⁵ These commercial limitations became effective on January 1, 1992.⁶

4. In furtherance of the CTA's underlying purpose to protect children from excessive and inappropriate commercial messages, the Commission adopted the website address rules.⁷ The website address rules restrict the display of Internet web addresses during children's programming directed at children ages 12 and under.⁸ Specifically, Section 73.670(b) permits the display of Internet website addresses during program material or promotional material not counted as commercial time only if it meets the following four prong test: (1) the website offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) the website is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).⁹

5. On August 4, 2014, the Licensee filed its license renewal application (FCC Form 303-S) for the Station (the "application").¹⁰ The Licensee reported that it failed to file its Children's Television Programming Reports in a timely manner for multiple quarters.¹¹ Additionally, in response to Section IV, Question 5 of that application, the Licensee attached an exhibit which admitted that on October 12, 2013, the Station aired the URL address for the website "www.lazytown.com," which appeared during the

⁵ See *Policies and Rules Concerning Children's Television Programming*, MM Docket Nos. 90-570 and 83-670, Report and Order, 6 FCC Rcd 2111 (1991), *recon. granted in part*, Memorandum Opinion and Order, 6 FCC Rcd 5093 (1991).

⁶ See *Policies and Rules Concerning Children's Television Programming*, MM Docket Nos. 90-570 and 83-670, Order, 6 FCC Rcd 5529 (1991).

⁷ See *Children's Television Obligations of Digital Television Broadcasters*, MM Docket No 00-167, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, 22961-62, ¶¶ 50-52 (2004) ("*2004 Report and Order*"), *aff'd in part, amended in part*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065, 11077-78, ¶¶ 29-32 (2006) ("*2006 Order on Reconsideration*"); see also 47 C.F.R. § 73.670(b), (c), and (d).

⁸ See *2004 Report and Order*, 19 FCC Rcd at 22961, ¶ 50; 47 C.F.R. § 73.670, note 2.

⁹ See 47 C.F.R. § 73.670(b). In 2006, on reconsideration, the Commission retained the original text of Section 73.670(b) concluding that "the website address rule fairly balances the interest of broadcasters in exploring the potential uses of the Internet with our mandate to protect children from over-commercialization." The Commission went on to clarify that "broadcasters are free to display the addresses of website that do not comply with the [four-prong] test during allowable commercial time, as long as it is adequately separated from the program material." *2006 Order on Reconsideration*, 21 FCC Rcd at 11078, ¶ 32.

¹⁰ *Application for Renewal of Broadcast Station License*, File No. BRC DT-20140801ACW.

¹¹ *Id.* Exhibit 20.

closing credits of the NBC Network supplied children's program "LazyTown."¹² The program was supplied to the Station, through the NBC Network, by Sprout as part of the NBC Kids Saturday Morning E/I Block. The inclusion of the website address is described as being "inadvertently included" and "fleeting." The Licensee states that NBC Network is "working with Sprout to develop and implement additional procedures to minimize the possibility of a re-occurrence of this isolated incident."¹³

III. DISCUSSION

6. The Licensee's failure to file electronically the Station's Children's Television Programming Reports for eight quarters constitutes apparent willful and/or repeated violation of Section 73.3526(e)(11)(iii). In addition, the Licensee's display of a URL for a website during its children's programming constitutes a violation of Section 73.670(b) of the Commission's rules.

7. 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 and/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.¹⁴ 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.¹⁵ 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,¹⁶ and the Commission has so interpreted the term in the Section 503(b) context.¹⁷ 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."¹⁸

8. The Commission's *Forfeiture Policy Statement* and Section 1.80(b) of the Rules establish a base forfeiture amount of \$3,000 for failure to file a required form.¹⁹ 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."²⁰

9. In this case, the Licensee failed to file its Children's Television Programming Reports in a timely manner for eight quarters, ranging from one day late to seven months late. Based on our review of

¹² *Id.* at Exhibit 22.

¹³ *Id.*

¹⁴ 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(1).

¹⁵ 47 U.S.C. § 312(f)(1).

¹⁶ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁷ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁸ 47 U.S.C. § 312(f)(2).

¹⁹ *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), note to paragraph (b)(8), Section I.

²⁰ 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)(8); and note to paragraph (b)(8), Section II.

the facts and circumstances here, we find that the Licensee is liable for a forfeiture in the amount of \$3,000 for its apparent willful and repeated violations of Section 73.3526 (e)(11)(iii) of the Rules.

10. With respect to the Licensee's display of commercial matter during children's programming, even though the website address www.lazytown.com was displayed for only a short duration (estimated at less than one-half of one second) and was confined to a small portion of the screen (less than two percent of the picture height), the display of a website address during program material that does not comply with the four-prong test is still a violation of Section 73.670(b). No evidence has been provided demonstrating that the website complies with the four-prong test set forth in Section 73.670(b) and upon prior examination of the website we concluded it does not comply. In particular, the website does not meet the fourth prong of the test because, as recently as July 2, 2014, the top of the homepage of the website contained content of a commercial nature in the form of a link labeled "shop."²¹ Furthermore, while the website address was only displayed during the closing credits, the Commission has specifically stated that closing credits are considered to be part of the television programming material and are subject to the website address rule.²²

11. We note that while the commercial matter may have been inserted into the program by the Station's television network or program supplier (e.g., NBC Network or Sprout), this does not relieve the Station of responsibility for the violations. In this regard, the Commission has consistently held that 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.²³ Although corrective actions have been taken to prevent future violations, this does not relieve the Station from liability for violations that have already occurred.²⁴

12. We consider any violation of our rules limiting the amount of commercial matter in children's programming to be significant, however, the violation described in your license renewal application appears to have been an isolated occurrence. While we do not rule out more severe sanctions for a similar violation of this nature in the future, we have determined that an admonition is appropriate at this time. Therefore, based upon the facts and circumstances before us, we admonish the Station for its violation of Section 73.670(b) of the Commission's rules. We remind the Licensee that the Commission expects all commercial television licensees to comply with the limits on commercial matter, including the display of website addresses, during children's programming.

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 KSBY Communications LLC, licensee of Station KSBY(TV), San Luis Obispo, California, is hereby **NOTIFIED** of its **APPARENT**

²¹ See, e.g., *Orlando Hearst Television, Inc.* Admonishment Letter, 29 FCC Rcd 9634 (Vid. Div. 2014); *COMCORP of Texas License Corp.*, Admonishment Letter, 29 FCC Rcd 9692 (Vid. Div. 2014). When viewed on January 6, 2015, the website at URL "www.lazytown.com" no longer contained a "shop" link or any content other than a description of the show and links to a Lazytown Facebook page and YouTube channel.

²² *2006 Order on Reconsideration*, 21 FCC Rcd at 11080, ¶ 36.

²³ See, e.g., *WTTX, Inc.*, Admonishment Letter, 22 FCC Rcd 11968 (Vid. Div. 2007); *Max Television of Syracuse, L.P.*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 8905 (MMB 1995).

²⁴ See *International Broadcasting Corp.*, Memorandum Opinion and Order, 19 FCC 2d 793, 794 (1969) (permitting mitigation as an excuse based upon corrective action following a violation would "tend to encourage remedial rather than preventive action").

LIABILITY FOR FORFEITURE in the amount of three thousand dollars (\$3,000) for its apparent willful and repeated violations of Section 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*, KSBY Communications LLC, **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 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).

16. 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: Pamela Gallant, Associate Division Chief, Video Division, Media Bureau, Room 2-A622, 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.²⁵

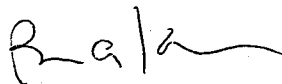
18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁶

²⁵ See *San Jose State Univ.*, 26 F.C.C. Rcd 5908 (2011) (noting that "[t]ypically, the Commission uses gross revenue as the primary measuring stick by which it evaluates a licensee's ability to pay. Other financial indicators may be considered....").

²⁶ 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 KSBY Communications LLC, 1772 Calle Joaquin, San Luis Obispo, CA 93405, and to its counsel, Christina H. Burrow, Cooley LLP, 1299 Pennsylvania Ave., NW, Suite 700, Washington, DC 20004.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'B. A. Kreisman', with a stylized flourish at the end.

Barbara A. Kreisman
Chief, Video Division
Media Bureau