

Federal Communications Commission  
Washington, D.C. 20554

April 21, 1998

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**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Eagle Communications, Inc.  
Licensee, KCFW-TV  
340 West Main Street  
Missoula, MT 59802

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of eight thousand dollars (\$8,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 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 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. Accordingly, 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 on weekends and 12 minutes on weekdays. *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On December 1, 1997, you filed an application for renewal of license (FCC Form 303-S) for station KCFW-TV, Kalispell, Montana (File No. BRCT-971201KH). In response to Section III, Question 4 of that application, you certify that during the previous license term KCFW-TV failed to comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 4 to that application, you indicate that between April 4, 1993, and August 28, 1993, KCFW-TV violated the children's television commercial limits on 26 occasions. Of these 26 overages, five were two minutes and 30 seconds in duration, five were two minutes in duration, eight were between one minute and one minute and 45 seconds in duration, seven were between 30 and 55 seconds in duration and one was 15 seconds in duration. You attribute these overages to the failure of KCFW-TV's staff "to realize

that the format programmed into the traffic computer did not conform to the Commission's commercial limits. . . ." However, you maintain that steps were immediately taken to reduce the likelihood that similar errors would occur in the future. For example, the traffic manager reprogrammed the formats of all children's programs to ensure that they conform to the Commission's commercial limits and a manual check system was implemented. In addition, you assert that periodic meetings are held with traffic and master control personnel to reinforce the station's policy and procedures for compliance.

KCFW-TV's record during the last license term of exceeding the Commission's commercial limits on children's television programming on 26 occasions constitutes a repeated violation of Section 73.670 of the Commission's Rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Eagle Communications, Inc. is hereby advised of its apparent liability for forfeiture in the amount of eight thousand dollars (\$8,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length and nature of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability," as required under §503(b)(2)(D) of the Communications Act.<sup>1</sup>

As discussed above, KCFW-TV exceeded the children's television commercial limits on 26 occasions. This is a significant number of violations. In addition, although one overage was 15 seconds in duration, seven overages were between 30 and 55 seconds and a majority of the overages were of even longer duration. Specifically, eight overages were one minute to one minute and 45 seconds long and 10 overages were two minutes to two minutes and 30 seconds long. Overage of this number and magnitude 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. *Children's Television Programming, supra*, 6 FCC Rcd at 2117-18.

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<sup>1</sup> In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), stating that the guidelines for assessing forfeitures established therein must be subject to public comment to comply with the Administrative Procedure Act. In accordance with the court's decision, the Commission released *Forfeiture Guidelines - Notice of Proposed Rulemaking in CI Docket No. 95-6*, 10 FCC Rcd 2945 (1995). After receiving and considering comments from the public in that proceeding, the Commission adopted *Forfeiture Guidelines - Report and Order in CI Docket No. 95-6*, 12 FCC Rcd 17087 (1997) (*Forfeiture Guidelines*). *Forfeiture Guidelines* became effective on October 14, 1997. 62 Fed. Reg. 43474 (August 14, 1997). However, with regard to (i) all cases pending when *Forfeiture Guidelines* was adopted, and (ii) all cases involving "violations arising from facts that occurred before the effective date of th[at] order," forfeiture amounts are to be assessed "under the case-by-case approach in effect when the violation occurred," in conformity with the standards set out in Section 503 of the Communications Act. *Id.* at ¶49.

Furthermore, the violations occurred regularly over a five-month period. When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance . . . ." *Children's Television Programming, supra*, 6 FCC Rcd at 5530 n.10. The only reason cited by KCFW-TV for the commercial overages appears to amount to inadvertence and/or human error, neither of which mitigates or excuses such violations. In fact, the Commission has repeatedly rejected inadvertence and human error as a basis for excusing violations of the children's television commercial limits. See, e.g., *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10987 (1995); *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (1995); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995); *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (1994). Although corrective actions may have been taken to prevent subsequent violations of the Commission's children's television rules and policies, this does not relieve KCFW-TV of liability for violations which have occurred. See, e.g., *WHP Television, L.P.*, 10 FCC Rcd 4979, 4980 (1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, 9 FCC Rcd 2545, 2546 (1994); *R&R Media Corporation (WTWS(TV))*, 9 FCC Rcd 1715, 1716 (1994); *KEVN, Inc.*, 8 FCC Rcd 5077, 5078 (1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

Consideration of all of these factors warrants a forfeiture in the above-specified amount of \$8,000. In a similar case, *Quincy Jones Broadcasting, Inc. (WNOL-TV)*, 12 FCC Rcd 10391 (1997), we assessed a forfeiture of \$8,000 for 38 commercial limit violations, three of which were 30 seconds in duration and 35 of which were 15 seconds in duration. The 38 violations occurred over a period of 11 months, and were attributed to inadvertence, human error and misunderstanding concerning the proration of the commercial limits to an island of children's programming. We also assessed an \$8,000 forfeiture in *LWWI Broadcasting, Inc. (WANE-TV)*, 12 FCC Rcd 10511 (1997), for 40 commercial limit violations consisting of a one minute and 34-second overage, one 34-second overage, five 30-second overages and 33 overages less than 30 seconds in duration, which occurred over a two-year period as a result of human error. Compared to *Quincy Jones* and *LWWI Broadcasting*, KCFW-TV had fewer total violations, but a significantly larger number of overages one minute or longer in duration. Specifically, none of the overages in *Quincy Jones* exceeded 30 seconds in duration, only one overage in *LWWI Broadcasting* was over one minute in duration and most of the overages in both cases were less than 30 seconds. In contrast, the majority of overages in the instant case were at least one minute, and as much as two minutes and 30 seconds, in duration. We also note that KCFW-TV's violations occurred over a five-month period, as compared to the longer periods involved in *Quincy Jones* and *LWWI Broadcasting*. However, the period of time over which the overages occurred is only one of the five criteria we consider in assessing the forfeiture amount. For these reasons, we find the violations here, on balance, to be comparable to those in *Quincy Jones* and *LWWI Broadcasting*. Therefore, we conclude that a comparable forfeiture is appropriate.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture.

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Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, we find you qualified to remain a Commission licensee and conclude that grant of your application would serve the public interest, convenience and necessity. Therefore, the license renewal application of Eagle Communications, Inc. for station KCFW-TV, Kalispell, Montana, File No. BRCT-971201KH, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart  
Chief, Mass Media Bureau