

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

In the Matter of	)	
	)	
<b>WSKQ Licensing, Inc.</b>	)	File No.: EB-07-IH-8320
	)	FRN No.: 0004976882
Licensee of Station WSKQ-FM	)	NAL/Acct. No.: 201032080016
New York, New York	)	Facility ID No.: 61641
	)	
	)	

**FORFEITURE ORDER**

**Adopted: August 22, 2012**

**Released: August 22, 2012**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of sixteen thousand dollars (\$16,000) against WSKQ Licensing, Inc. (WSKQ), licensee of WSKQ-FM, New York, New York (Station), and a subsidiary of Spanish Broadcasting Systems, Inc. (SBS), for willfully and repeatedly violating Section 73.1206 of the Commission's rules by recording a telephone conversation for broadcast without prior notification to the called party.<sup>1</sup>

**II. BACKGROUND**

2. As discussed in more detail in the Notice of Apparent Liability for Forfeiture (*NAL*) in this case,<sup>2</sup> the Enforcement Bureau (Bureau) received a complaint (Complaint) alleging that, on August 23, 2007, WSKQ broadcast over the radio a prank call made by one of its employees to a member of the public. As described in the Complaint, the Station employee made a call to a woman—the call recipient—pretending to be an employee of a local hospital, and told her that her husband had been seriously injured in a motorcycle accident and that he later died at the hospital.<sup>3</sup> Further, according to the Complaint, the call recipient could be heard over the radio distraught when she received this information,<sup>4</sup> at which point the Station employee informed her that the call was a “joke.”<sup>5</sup>

<sup>1</sup> 47 C.F.R. § 73.1206.

<sup>2</sup> See *WSKQ Licensing, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 1287 (Enf. Bur. 2010) (*NAL*). A comprehensive recitation of the facts and history of this case can be found in the *NAL* and is incorporated herein by reference.

<sup>3</sup> See Complaint to Federal Communications Commission (Aug. 23, 2007) (on file in EB-07-IH-8320) (Complaint).

<sup>4</sup> See *id.* at 1.

<sup>5</sup> *Id.*

3. On September 25, 2008, the Bureau issued a letter of inquiry (LOI) to WSKQ inquiring into these allegations.<sup>6</sup> In its response, WSKQ stated that its parent company, SBS, contracted with a vendor, Rubin Ithier, who made the call and recorded the conversation for a prank call feature show.<sup>7</sup> The Licensee admitted that Ithier initiated the call that was broadcast by the Station, and that neither the Station nor Ithier informed the call recipient that the call was being recorded for later broadcast until after the call was recorded.<sup>8</sup> The Licensee further admitted that it broadcast the call more than once.<sup>9</sup> In view of the record evidence, including WSKQ's admissions, we issued on February 4, 2010, an *NAL* proposing a forfeiture in the amount of sixteen thousand dollars (\$16,000).<sup>10</sup>

4. On March 8, 2010, WSKQ filed a response to the *NAL*, urging cancellation of the forfeiture.<sup>11</sup> In support of its response, WSKQ contends, first, that it "has violated no rule" because the "plain language" of the telephone broadcast rule makes it applicable only to recordings made by a licensee and not, as here, to recordings made by its contractor and vendor.<sup>12</sup> WSKQ states that attributing the vendor's recording to the Licensee "improperly expands the rule beyond its plain language and intended application."<sup>13</sup> Second, WSKQ contends that the *NAL* did not fully consider the fact that the call recipient granted permission for the call to be aired, and argues that the call was, thus, consensual and did not "impinge on the call recipient's legitimate expectation of privacy."<sup>14</sup>

### III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act, as amended (Act),<sup>15</sup> Section 1.80 of the Commission's rules,<sup>16</sup> and the Commission's forfeiture guidelines set forth in the *Forfeiture Policy Statement*.<sup>17</sup> In assessing forfeitures,

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<sup>6</sup> See Letter from Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to WSKQ Licensing, Inc. (Sept. 25, 2008) (on file in EB-07-IH-8320).

<sup>7</sup> Letter from Bruce A. Eisen, Kaye Scholer, LLP, Counsel for WSKQ Licensing, Inc., to Marlene Dortch, Secretary, Federal Communications Commission (Oct. 27, 2008) (on file in EB-07-IH-8320) (LOI Response). The LOI Response included the declaration of Ramon Sierra a/k/a Ruben Ithier (Declaration) and an English translation of a transcript of the telephone call at issue (Translation of Transcript).

<sup>8</sup> See *id.* at 1–3, Declaration at 1, Translation of Transcript at 1–3. See also *NAL*, 25 FCC Rcd at 1287–89.

<sup>9</sup> See LOI Response at 4.

<sup>10</sup> See *NAL*, 25 FCC Rcd at 1292.

<sup>11</sup> See Response to Notice of Apparent Liability for Forfeiture, filed by Dennis P. Corbett, Nancy A. Ory, and F. Scott Pippin, Lerman Senter PLLC, Counsel to WSKQ Licensing, Inc. (Mar. 8, 2010) (on file in EB-07-IH-8320) (*NAL* Response). The Bureau and SBS subsequently entered into a tolling agreement on May 23, 2012, that tolled the statute of limitations period specified in Section 2462 of Title 28 of the United States Code, 28 U.S.C. § 2462, with respect to this case until November 21, 2012, to permit the parties to discuss potential settlement options, which discussions commenced on March 14, 2011, and ended on July 17, 2012.

<sup>12</sup> *NAL* Response at 2–5.

<sup>13</sup> *Id.* at 3–4.

<sup>14</sup> *Id.* at 3 (internal quotations omitted).

<sup>15</sup> 47 U.S.C. § 503(b).

<sup>16</sup> 47 C.F.R. § 1.80.

<sup>17</sup> See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

Section 503(b) of the Act requires that we 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 other such matters as justice may require.<sup>18</sup> We have considered WSKQ's response in light of these statutory factors, and find that neither cancellation nor reduction of the forfeiture is warranted for the reasons discussed below.

6. Section 73.1206 of the Commission's rules, also referred to as the telephone broadcast rule, requires that, *before* broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.<sup>19</sup> As explained in the *NAL*, Section 73.1206 reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy and to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.<sup>20</sup>

7. We disagree with WSKQ's contention that it did not violate the telephone broadcast rule. WSKQ asserts that it could not have violated the rule because the plain language of the rule describes prohibited conduct by "a licensee" specifically, and that because the conversation, in this case, was recorded by a vendor, who is not a licensee, the rule is inapplicable.<sup>21</sup> We find this line of argument to be meritless.<sup>22</sup> WSKQ offers no relevant legal precedent to support its narrow reading of the rule, nor provides any other authority that persuades us.<sup>23</sup> We have consistently held that licensees are responsible for the programming aired on their stations and for violations of Commission rules by employees *and*

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<sup>18</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>19</sup> 47 C.F.R. § 73.1206. The Commission will presume such awareness only when "the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations." *Id.*

<sup>20</sup> See *NAL*, 25 FCC Rcd at 1290–91 (citing authorities).

<sup>21</sup> See LOI Response at 2–6.

<sup>22</sup> We also find WSKQ's line of argument here to be disingenuous, particularly since it previously conceded to the propriety of our application of the rule in the same context we have here (i.e., a recording contracted to a vendor). In 2008, the Bureau proposed a forfeiture in the amount of sixteen thousand dollars (\$16,000) each against WSKQ and WXDJ for violating the telephone broadcast rule by contracting with the same independent vendor here (i.e., Rubin Ithier) to record so-called "caistes" without prior notice to the unsuspecting call recipients. See *WXDJ Licensing, Inc., et al.*, Notice of Apparent Liability, 23 FCC Rcd 14933 (Enf. Bur. 2008) (*WXDJ/WSKQ NAL*). WSKQ did not dispute the merits of the Bureau's findings therein, and paid the forfeiture; WXDJ, however, did not pay the forfeiture, but instead filed a response, urging for a reduction of the forfeiture, which was subsequently denied. See *WXDJ Licensing, Inc.*, Forfeiture Order, 25 FCC Rcd 3911 (Enf. Bur. 2010) (imposing \$16,000 forfeiture for violation of the telephone broadcast rule) (petition for reconsideration pending).

<sup>23</sup> WSKQ relies on criminal law precedent in support of its argument. See *NAL* Response at 4. Such reliance is misplaced and unpersuasive. The cited support stems from interpretation of criminal statutes, and is inapplicable here. Criminal statutes are generally subject to stricter scrutiny by the courts than are administrative rules and sanctions, which, if reasonable, receive deference from the courts. *Contrast Zaimi v. United States*, 476 F.2d 511 (D.C. Cir. 1973) (holding that "penal statutes are to be interpreted with exactitude") with *Northeast Hospital Corp. v. Sebelius, Secretary, U.S. Dept. of Health and Human Svcs.*, Memorandum Opinion, 699 F. Supp. 2d 81, 85–86 (D.D.C. 2010) ("[U]nder the APA, a court is to presume that the agency's action is valid and that [a]n agency's interpretation of a statute need not be the best or most natural one by grammatical or other standards[,] . . . [r]ather [it] need be only reasonable to warrant deference.") (internal quotations omitted).

independent contractors.<sup>24</sup> To hold otherwise would allow a licensee to circumvent the Commission's rules with impunity by simply having an agent perform, on its behalf, any acts that violate Commission rules.

8. Furthermore, in this case, it is undisputed that WSKQ's parent company, SBS, specifically contracted with a vendor to record various calls for WSKQ's prank call feature show, demonstrating a clear intent to broadcast the prank call.<sup>25</sup> WSKQ admits: "[T]he telephone call was initiated, as described, by Ramon Sierra, aka Ruben Ithier, the owner of a vendor with whom [SBS] contracted to create 'caistes,' which are calls made during WSKQ's 'El Vacilon' morning show . . . . WSKQ had a segment called 'Llamado cruel' ('cruel calls' or 'caistes') during the El Vacilon morning show."<sup>26</sup> It is further undisputed that the call recipient had not received prior notice that the call was being recorded for later broadcast.<sup>27</sup> Despite knowing the foregoing circumstances, WSKQ nevertheless agreed to air the call. As such, WSKQ's violation of the telephone broadcast rule was willful, and it cannot now claim innocence for the actions of a vendor with which it (or its parent company, SBS) specifically contracted to make these so called "cruel [prank] calls" to unsuspecting individuals.<sup>28</sup>

9. We also disagree with the Licensee's contention that the consent to broadcast the call, obtained after the recording concluded, insulates the Licensee from the rule's application.<sup>29</sup> The rule requires notice obtained *before* recording for broadcast commences, not consent obtained after the fact.<sup>30</sup> It is this initial notice that protects the privacy of the call recipient.<sup>31</sup>

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<sup>24</sup> See, e.g., *WXDJ/WSKQ NAL*, 23 FCC Rcd at 14937 ("We further find that the call's origination and recording by an independent contractor, rather than the Licensees themselves, does not exculpate WXDJ Licensing or WSKQ Licensing from liability."); *Proactive Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 9079, 9082 (Enf. Bur. 2008) ("[T]he Commission has consistently ruled that licensees are responsible for the selection and presentation of program material aired over their stations as well as for the acts and omissions of their employees.") (forfeiture paid); *Des Moines Independent Community School District*, Forfeiture Order, 24 FCC Rcd 3869, 3870-71 (Mass Med. Bur. 2009) ("[T]he Commission has long held that licensees are responsible for the acts and omissions of their employees and independent contractors, and has consistently refused to excuse licensees from forfeiture penalties where the actions of employees or independent contractors have resulted in violations."); see also *American General Media Corporation*, Letter, 14 FCC Rcd 6445 (Mass Med. Bur. 1999) (finding telephone broadcast rule violation and holding that, "although the . . . program was aired pursuant to a programming agreement and the air personalities were not employees of [the station], [the licensee] is responsible for any violations of the Commission's rules which occurred during that program").

<sup>25</sup> See *NAL*, 25 FCC Rcd at 1291; see also *NAL Response* at 1-2.

<sup>26</sup> *LOI Response* at 1-2.

<sup>27</sup> See *id.* at Translation of Transcript at 3-5.

<sup>28</sup> The Licensee should have been aware, as of the time of this conduct and as of the filing of its response to our *NAL*, that we have specifically rejected this argument in similar cases against another SBS station. See *WXDJ Licensing, Inc.*, 19 FCC Rcd 22445, 22446 (Enf. Bur. 2004); *WXDJ Licensing, Inc.*, 25 FCC Rcd 3911, 3912-14 (Enf. Bur. 2010).

<sup>29</sup> See *NAL Response* at 3; 47 C.F.R. § 73.1206. The Licensee points out (see *NAL Response* at notes 1, 7) imprecision in the *NAL*'s recitation of how certain factual events unfolded. Even if the events occurred as clarified by the Licensee, they are inconsequential to our decision and the resulting forfeiture.

<sup>30</sup> See 47 C.F.R. § 73.1206; see also *Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) (the Commission specifically considered and rejected amending the telephone broadcast rule to allow consent after the fact).

<sup>31</sup> See *supra* note 20; *Cumulus Licensing LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1667, 1670 (Enf. Bur. 2009) ("The Commission has held that the prior notification requirement ensures the protection of an (Footnote continued on next page...)

10. We have examined WSKQ's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that WSKQ willfully and repeatedly violated Section 73.1206 of the Commission's rules. We hereby affirm the *NAL* and impose a forfeiture in the amount of sixteen thousand dollars (\$16,000).

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>32</sup> Section 1.80 of the Commission's rules,<sup>33</sup> and authority delegated by Sections 0.111, 0.204, and 0.311 of the Commission's rules,<sup>34</sup> WSKQ Licensing, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of sixteen thousand dollars (\$16,000) for repeated and willful violation of Section 73.1206 of the Commission's rules.<sup>35</sup>

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules by the close of business on or before August 29, 2012.<sup>36</sup> If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.<sup>37</sup> WSKQ Licensing, Inc. shall send electronic notification of payment to Jeffrey Gee at Jeffrey.Gee@fcc.gov, Anjali Singh at Anjali.Singh@fcc.gov, and Judy Lancaster at Judy.Lancaster@fcc.gov on the date said payment is made.

13. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>38</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

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individual's 'right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station' live or by recording for delayed airing.") (forfeiture paid).

<sup>32</sup> 47 U.S.C. § 503(b).

<sup>33</sup> 47 C.F.R. § 1.80(f)(4).

<sup>34</sup> 47 C.F.R. §§ 0.111, 0.204, 0.311.

<sup>35</sup> 47 C.F.R. § 73.1206.

<sup>36</sup> 47 C.F.R. § 1.80.

<sup>37</sup> 47 U.S.C. § 504(a).

<sup>38</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

14. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>39</sup> If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

15. **IT IS FURTHER ORDERED** that a copy of this **FORFEITURE ORDER** shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to WSKQ at its address of record, and to its counsel of record, Dennis P. Corbett, Nancy A. Ory, and F. Scott Pippin, Lerman Senter PLLC, 2000 K Street, NW, Suite 600, Washington, D.C. 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison  
Chief, Enforcement Bureau  
Federal Communications Commission

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<sup>39</sup> 47 C.F.R. § 1.1914.