

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

In the Matter of)	
)	
INDEPENDENCE PUBLIC MEDIA OF PHILADELPHIA, INC.)	EB-06-IH-5046
)	Facility ID No. 28480
)	NAL/Account No. 2009320830025
Licensee of Noncommercial Educational Television Station WYBE(TV), Philadelphia, Pennsylvania)	FRN No. 0008411837

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 10, 2009

Released: February 10, 2009

By the Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Independence Public Media of Philadelphia, Inc. (“Independence”), licensee of noncommercial educational television Station WYBE(TV), Philadelphia, Pennsylvania, willfully and repeatedly broadcast prohibited advertisements in apparent violation of Section 399B of the Communications Act of 1934, as amended (the “Act”),¹ and Section 73.503(d) of the Commission's rules.² Based upon our review of the facts and circumstances of this case, we conclude that Independence is apparently liable for a monetary forfeiture in the amount of two thousand five hundred dollars (\$2,500).

II. BACKGROUND

2. This case arises from a complaint made to the Commission on October 18, 2006, alleging that noncommercial educational television Station WYBE(TV) broadcast prohibited underwriting announcements on October 15, 2006.³ The complainant provided a transcript and program log relating to the program material at issue. Thereafter, the Enforcement Bureau (“Bureau”) inquired of the licensee concerning the allegations contained in the complaint.⁴ Independence responded to the *LOI* on October 10, 2007.⁵

¹ See 47 U.S.C. § 399B (a).

² See 47 C.F.R. § 73.503(d).

³ See anonymous email complaint sent to the Federal Communications Commission, Media Bureau, dated October 18, 2006 (“*Complaint*”).

⁴ See Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Independence Public Media of Pennsylvania, Inc., dated August 24, 2007 (“*LOI*”).

⁵ See Letter from Naomi D. Travers, Esq., to Marlene Dortch, Federal Communications Commission, dated October 10, 2007, and filed on behalf of Independence (“*Response*”).

III. DISCUSSION

3. Under Section 503(b)(1) of the Act, 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.⁶ 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.⁷ 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,⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁰ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹¹ In order to impose such a penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.¹² The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.¹³ As described in greater detail below, we conclude under this procedure that Independence is apparently liable for a forfeiture in the amount of two thousand five hundred dollars (\$2,500) for its apparent willful and repeated violations of the Commission’s underwriting rules.

A. Independence Has Willfully and Repeatedly Broadcast Advertisements in Apparent Violation of Section 399B of the Act and Section 73.503 of the Commission’s Rules

4. Advertisements are defined by the Act as program material broadcast “in exchange for any remuneration” and intended to “promote any service, facility, or product” of for-profit entities.¹⁴ The pertinent statute specifically provides that noncommercial educational stations may not broadcast advertisements.¹⁵ Although contributors of funds to such stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors’ products, services, or businesses.¹⁶ Specifically, such announcements may not contain comparative or qualitative

⁶ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

⁷ 47 U.S.C. § 312(f)(1).

⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁰ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

¹¹ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

¹² See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹³ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

¹⁴ See 47 U.S.C. § 399b(a).

¹⁵ See *id.*

¹⁶ See Public Notice, *In the Matter of the Commission Policy Concerning the Noncommercial Nature of*

descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.¹⁷ At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, the Commission expects that licensees exercise reasonable, “good faith” judgment in this area, and affords some latitude to the judgments of licensees who do so.¹⁸

5. At issue here are four underwriting announcements that Station WYBE(TV) broadcast on October 15 and 22, 2006, during the Asian Variety Show.¹⁹ Independence acknowledges that it received remuneration for airing messages contained in the show’s broadcasts on behalf of the station’s underwriters, all of whom are for-profit entities.²⁰ Independence claims that it does not maintain copies of programs that air on WYBE(TV), and, therefore, cannot confirm whether or when they aired, or their content.²¹ However, relying on an account given by the producer of the Asian Variety Show, Independence indicates that announcements identified by the Bureau were included in an episode of the show, and that it is likely that announcements appeared in additional episodes of the Asian Variety Show that aired “during the three to four week period immediately preceding or following October 15, 2006.”²² Independence believes, however, that the complained-of program, Asian Variety Show, aired on October 15, 2006, and was rebroadcast at 12:30 a.m. on October 22, 2006.²³ Independence further notes that the show’s producer could not confirm the accuracy of the transcript provided by the complainant.²⁴

Educational Broadcasting Stations (1986), reprinted in 7 FCC Rcd 827 (1992) (“Public Notice”).

¹⁷ See *id.*

¹⁸ See *Xavier University*, Letter of Admonition, issued November 14, 1989 (Mass Med. Bur.), *recons. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (“*Xavier*”).

¹⁹ See *Complaint*; see also *Response* at 2.

²⁰ See *Response* at 3. Independence explains that, while it does not have a direct relationship with the underwriters whose announcements air on the Asian Variety Show, it offers airtime to international program suppliers and, in exchange receives a fee to air programs that contain embedded announcements. See *Minority Television Project, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15646, 15649 (Enf. Bur. 2002), Forfeiture Order, 18 FCC Rcd 26611 (2003), *pet. for rev. den’d*, Order on Review, 19 FCC Rcd 25116 (2004), *aff’d*, Memorandum Opinion and Order, 20 FCC Rcd 16923 (2005) (forfeiture paid) (collectively “*Minority TV*”); see also *In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Memorandum Opinion and Order, 90 FCC 2d 895, 911 (1982), *recons.*, 97 FCC 2d 255 (1984) (“*Policy Statement*”); *Window to the World Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 20239, 20241 n.2 (Enf. Bur. 1997), Forfeiture Order, 15 FCC Rcd 10025 (Enf. Bur. 2000) (“*WTTW*”) (finding that consideration for purposes of Section 399B of the Act, may consist of the program material itself).

²¹ See *Response* at 1-3.

²² See *id.*

²³ See *id.*

²⁴ See *id.*

6. The Commission has long held that a licensee may not avoid liability for a rule violation by claiming ignorance as to what was broadcast over its station.²⁵ In similar instances, where the licensee can neither independently recall nor affirm or deny allegations concerning the content of what was broadcast on its station, the Commission has relied upon, and found credible, transcripts and other supporting information provided by complainants.²⁶ In this case, although the producer of the Asian Variety Show could not verify the content of the announcements, it appears to confirm that the identified announcements were included in the October 15, 2006, episode, which was apparently rebroadcast, and that the announcements appeared in additional episodes.²⁷ These admissions, which are consistent with the claims made by the complainant, lend credence to the complaint.²⁸

7. After careful review of the record in this case, we find that the four announcements set forth in the attached transcript were made on behalf of for-profit entities and apparently exceed the bounds of what is permissible under Section 399B of the Act and the Commission's pertinent rules and policies, notwithstanding the "good faith" discretion afforded licensees under *Xavier*. We conclude that they appear to constitute prohibited advertisements because they invite or urge business patronage, distinguish favorably the respective underwriters from their competitors by stating or implying that they offer superior service, products or price, and describe their underwriters through comparative and qualitative references.²⁹

8. Specifically, the announcements on behalf of Tilda Basmati Rice, Tajonline.com, Citibank and Classic Conservatories impermissibly promote their respective underwriters' services or products through the use of comparative and qualitative terms such as "something really special,"³⁰ "at a special price,"³¹ "the world's most loved,"³² "most trusted,"³³ "most anticipated,"³⁴ "exclusive,"³⁵ "luxurious,"³⁶ "inviting"³⁷ and "timeless."³⁸ In addition, the Classic

²⁵ See *Proactive Communications, Inc. (KQQB-FM)*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 9079, 9082 (Enf. Bur., Investigations & Hearings Div., 2008); see also *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, Memorandum Opinion and Order, 17 FCC Rcd 9892, 9895 (2002) (citing *Community Broadcasters, Inc. (WGHN(AM)/ WGHN-FM)*, Memorandum Opinion and Order, 55 FCC 2d 28, 35 (1975)) ("*Infinity*").

²⁶ See *Infinity*, 17 FCC Rcd at 9895.

²⁷ See *Response* at 1-3.

²⁸ See *Complaint* at 1-3.

²⁹ See generally *Public Notice* (clarifying the Commission's position on prohibited announcements).

³⁰ See Attachment at "Tilda Basmati Rice" announcement ("something really special for the festive season").

³¹ See *id.* ("at a special price").

³² See *id.* ("[e]njoy the world's most loved basmati").

³³ See Attachment at Tajonline.com announcement ("[m]ost trusted NRI gifting website").

³⁴ See Attachment at Citibank announcement ("the most anticipated movie of the year").

³⁵ See *id.* ("an exclusive offer from Citibank").

³⁶ See Attachment at Classic Conservatories announcement ("[a]dd luxurious, year round, and inviting living space to your home that will also prove to be a great investment").

³⁷ See *id.* ("inviting living space").

³⁸ See *id.* ("timeless beauty").

Conservatories announcement seeks to distinguish favorably its underwriter by referring to design awards it has received, and other distinctions that it possesses.³⁹ The Tilda Basmati Rice, Citibank and Classic Conservatories announcements also improperly refer to pricing information⁴⁰ and services that the underwriters provide free of charge.⁴¹ Finally, the announcements or included video captions on behalf of Citibank and Classic Conservatories contain explicit calls to action.⁴² The foregoing references appear to exceed the licensee's discretion under *Xavier* because each, in the context presented, refers either to specific qualities or attributes of the respective underwriters that are not necessarily possessed by competitors, or otherwise contain prohibited price information or other language of inducement.

B. Proposed Forfeiture

9. Section 503(b) of the Act and Section 1.80(a) of the Commission's rules both state that any person who willfully or repeatedly fails to comply with the provisions of the Act, the rules or Commission orders shall be liable for a forfeiture penalty.⁴³ The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$2,000 for violation of the enhanced underwriting requirements.⁴⁴ The *Forfeiture Policy Statement* also provides that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(E) of the Act, such as "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."⁴⁵

10. In this case, it appears that, on October 15 and 22, 2006, Independence willfully and repeatedly broadcast four separate advertisements in violation of Section 399B of the Act and Section 73.503(d) of the Commission's rules. Based on all the circumstances, the period of time over which the prohibited announcements were aired, the number of announcements at issue, and after examining forfeiture actions in other recent underwriting cases, we believe that a forfeiture of two thousand five hundred dollars (\$2,500) is appropriate. Accordingly, applying the *Forfeiture Policy Statement* and the statutory factors to this case, we conclude that Independence is apparently liable for a forfeiture in the amount of two thousand five hundred dollars (\$2,500) for willfully and repeatedly violating the Commission's underwriting rules.

³⁹ See *id.* ("precision crafted using the latest technological advancements to timeless beauty By the proud British craftsmen who were also the winners of many coveted international design awards.").

⁴⁰ See Attachment at Tilda Basmati Rice announcement, which includes a text block on the image of a rice bag with the following price information: "\$11.45 – 15 lbs".

⁴¹ See Attachment at Citibank announcement ("[o]pen an account today and get a complimentary Don DVD"); see also Attachment at Classic Conservatories announcement ("to make an appointment for a free, in-home, no obligation design consultation").

⁴² See Attachment at Citibank announcement ("For more information call Sanjay [telephone number]; Classic Conservatories announcement ("Please call [telephone number]").

⁴³ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

⁴⁴ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b).

⁴⁵ 47 U.S.C. § 503(b)(2)(E). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 ¶ 27.

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's rules, Independence Public Media of Philadelphia, Inc., licensee of noncommercial educational television Station WYBE(TV), Philadelphia, Pennsylvania, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of two thousand five hundred dollars (\$2,500) for willfully and repeatedly broadcasting advertisements in violation of Section 399B of the Act, 47 U.S.C. § 399b and Section 73.503 of the Commission's rules, 47 C.F.R. § 73.503, on October 15 and 22, 2006.

12. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Independence **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, 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[s] by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When 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). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Independence will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov.

14. The response, if any, shall be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W, Room 4-C330, Washington DC 20554 and **SHALL INCLUDE** the NAL/Acct. No. referenced above. To the extent practicable, the response, if any, shall also be sent by electronic mail to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov.

15. 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.

16. **IT IS ALSO ORDERED** that the complaint **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the instant complaint proceeding **IS HEREBY TERMINATED**.⁴⁶

17. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Independence Public Media of Philadelphia, Inc., c/o Naomi S. Travers, Esq. and Howard Liberman, Esq., Drinker Biddle & Reath, LLP, 1500 K Street, N.W., Suite 1100, Washington, DC 20005-1209, and by electronic mail to the Complainant.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

⁴⁶ For purposes of the forfeiture proceeding initiated by this *NAL*, Independence shall be the only party to this proceeding.

ATTACHMENT

Set forth below is the text of underwriting announcements allegedly aired by noncommercial educational television Station WYBE(TV), Philadelphia, Pennsylvania, on October 15 and 22, 2006:

1. *Tilda Basmati Rice*

Audio Voiceover: Looks like you found something really special for the festive season and at a special price. Must be Tilda. Tilda Pure Basmati – Enjoy the world’s most loved basmati.

Video Text caption: \$11.45 – 15 lbs.

2. *Tajonline.com*

Video Text Caption: Most trusted NRI gifting website.

3. *“Don” / Citibank DVD Giveaway*

Audio Voiceover: Watch the most anticipated movie of the year with an exclusive offer from Citibank Rupee Checking Account. Open an account today and get a complimentary *Don* DVD.

Video Text caption: For more information call Sanjay 718-XXX-XXXX.

4. *Classic Conservatories*

Audio Voiceover: Great investment. Share the sunlight. Add luxurious, year round, and inviting living space to your home that will also prove to be a great investment. Classic Conservatories are precision crafted using the latest technological advancements to timeless beauty. By the proud British craftsmen who were also the winners of many coveted international design awards. 1-888-XXX-XXXX to make an appointment for a free, in-home, no obligation design consultation.

Video Text caption: Please call 1-888-XXX-XXXX.