

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

In the Matter of

Liability of WPNT, Inc.

Licensee of Station KHTK(FM)
Florissant, Missouri

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1993;

Released: March 15, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), issued on August 10, 1992, for twenty-five hundred dollars (\$2,500) against WPNT, Inc. ("WPNT") licensee of Station KHTK(FM),¹ Florissant, Missouri; and, (2) a response to the Notice of Apparent Liability filed September 8, 1992, requesting rescission of the forfeiture.

2. The Notice of Apparent Liability was assessed for repeated violations of 18 U.S.C. Section 1343 of the United States Code. The Commission determined that Station KHTK(FM) had repeatedly aired a fraudulent solicitation for funds to replace its tower when insurance funds were going to be used for that purpose. The facts are set forth in full detail in the Notice of Apparent Liability and will not be repeated here.

3. In addition to reiterating arguments already addressed in the Notice of Apparent Liability, WPNT argued that the three cases cited in the Notice of Apparent Liability do not support the Commission's position, which is that success of the scheme is irrelevant to whether a violation was committed. See *United States v. Lemire*, 729 F.2d 1327, 1341 (D.C. Cir. 1983); *United States v. Hopkins*, 716 F.2d 739 (10th Cir. 1982), *rev'd in part and remanded for new trial*, 744 F.2d 716 (10th Cir. 1984) (*en banc*); *United States v. Bagdasian*, 291 F.2d 163 (1961). Instead, the licensee contended that the cases cited support its position that defendants must benefit from the scheme before being found guilty of committing a wire fraud violation. Second, it argued that the Commission violated the First Amendment because it found a wire fraud violation without requiring extrinsic evidence to prove intent.

4. We reject WPNT's contentions. It is irrelevant that defendants benefitted in the cited cases because success of the scheme is not required to prove a wire fraud violation. In *United States v. Bagdasian*, 291 F.2d 163, 164 (1961), the Fourth Circuit Court of Appeals specifically rejected the

argument that an indictment was defective because it did not allege that the defendant converted money to his own use and stated that "this is not an essential part of the crime of devising a fraudulent scheme. . . ." In *United States v. Lemire*, 729 F.2d at 1341 (D.C. Cir. 1983) the court, citing *United States v. Schaeffer*, 599 F.2d 678 (5th Cir. 1979), stated that "success of scheme was not required." In *United States v. Hopkins*, 716 F.2d at 746 n.10 (10th Cir. 1982) *rev'd in part and remanded for new trial*, 744 F.2d 716 (10th Cir. 1984) (*en banc*), the court stated that the "actual defrauding of a particular victim is not crucial to a successful prosecution". Thus, the fact that WPNT donated the money to charity, instead of using it for its own purposes, is immaterial in determining whether there has been a violation.

5. Finally, we reject WPNT's contention that the Commission violated the First Amendment because it issued a forfeiture for wire fraud based on the announcement without requiring extrinsic evidence that the station intended to defraud or harm its listeners. WPNT advocates that a Section 1343 violation requires extrinsic evidence because such evidence is required in proving a news distortion or a hoax violation. See *e.g.*, *Hunger in America*, 20 FCC 2d 143 (1969); *The Selling of the Pentagon*, 30 FCC 2d 150 (1971); *Broadcast Hoaxes*, 7 FCC Rcd 4106 (1992). But, the present situation involves a wire fraud violation, which does not require extrinsic evidence. Furthermore, the wire fraud cases cited as authority in WPNT's response do not apply this type of First Amendment analysis. Moreover, our conclusion that WPNT violated Section 1343 is not based on the announcement alone. As explained in the Notice of Apparent Liability, we considered the totality of circumstances before we found that WPNT had committed a Section 1343 violation. We considered WPNT's decision to air the announcement twelve days in a row, four times per day, and that WPNT failed to inform listeners that the announcement was a joke, despite the announcement's lack of reference or words indicating it was a joke even, apparently, once it began receiving listeners' donations.

6. We have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) and conclude that the amount of forfeiture assessed against WPNT in this proceeding is justified.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that WPNT, Inc., licensee of KHTK(FM), Florissant, Missouri, FORFEIT to the United States the sum of twenty five hundred dollars (\$2,500) for its willful violation of 18 U.S.C. Section 1343 of the United States Code. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

¹ While we are aware that the licensee has changed the radio station's call sign to KXOK(FM), we are referring to the station

as KHTK(FM) for consistency with the record compiled in this case.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau