Federal Communications Commission
Washington, D.C. 205543

May 13, 2009

DA 09-1058
In Reply Refer to:
1800B3-KAD
NAL/Acct No.: MB200641410080
FRN: 00049872
Released: May 13, 2009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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Washington, D.C. 20007-3501

In re: KCSY(FM) (formerly KVLR(FM)), Twisp, Washington
Valley Air, LLC (former licensee)
Facility ID: 41319
File No. BRH-20050926AGO

Dear Mr. Solomon:

The Chief, Audio Division, has before him the October 25, 2006, letter,[1] filed on behalf of Valley Air, LLC ("Valley Air"), former licensee of Station KCSY(FM) (formerly KVLR(FM)), Twisp, Washington ("Station").[2] The Request seeks cancellation of the September 27, 2006, Notice of Apparent Liability for a Forfeiture ("NAL")[3] in the amount of four thousand dollars ($4,000) for violations of Section 73.3526 of the Commission's Rules (the "Rules")[4] regarding Valley Air's failure to maintain the Station's public inspection file. By this action, we cancel the NAL and admonish Valley Air for violating Section 73.3526 of the Rules.

Background. On September 26, 2005, Valley Air filed the above-referenced application to renew the license of the Station ("Application"). Section III, Item 3, of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 of the Rules has been placed in the station's public inspection file at the appropriate times. Valley Air indicated "No" to that certification, indicating that the issues/programs lists for the 4th quarter of 2003, the

[1] Petition for Reconsideration and Request for Cancellation of Forfeiture, filed by Valley Air, LLC, on Oct. 25, 2006 ("Request").

[2] Valley Air, LLC, assigned the Station to Resort Radio, LLC, in 2006. *See* File No. BALH-20060809ABI (granted Sept. 28, 2006). The assignment was consummated on November 15, 2006.

[3] *Valley Air, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10638 (MB 2006).

[4] 47 C.F.R. § 73.3526.

first three quarters of 2004, and the first three quarters of 2005, had not been timely placed in the Station's public file due to the fact that the Station's general manager "fell behind" in their preparation. Valley Air further stated that, upon discovery of these deficiencies, it recreated the missing issues/programs lists and placed them in the file. On September 27, 2006, the staff advised Valley Air of its apparent liability for a forfeiture of $4,000 for willfully and repeatedly violating Section 73.3526 of the Rules, based on the fact that, by its admission, seven issues/programs lists were missing from the Station's public inspection file between 2003 and 2005.[5] In response, Valley Air filed the subject Request.

In its Request, Valley Air asserts that payment of the proposed forfeiture will cause it financial hardship, and claims that this reason warrants a cancellation of the assessed forfeiture.[6]

Discussion. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,[7] Section 1.80 of the Rules,[8] and the Commission's *Forfeiture Policy Statement*.[9] In assessing forfeitures, Section 503(b)(2)(E) 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 such other matters as justice may require.[10]

Valley Air contends that payment of the proposed forfeiture would cause it financial hardship. The Commission will not consider reducing or canceling a forfeiture in response to inability to pay unless the licensee 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 reflect the licensee'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.[11] In general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.[12] However, in some cases, other financial indicators, such as net losses, may also be relevant.[13]

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[5] The Commission granted the above-referenced license renewal application on September 27, 2006.

[6] Valley Air further claims that cancellation of the forfeiture is warranted because of Valley Air's history of compliance with the Rules. However, because we cancel the forfeiture on other grounds, we need not address the merits of this argument.

[7] 47 U.S.C. § 503(b).

[8] 47 C.F.R. § 1.80.

[9] *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), *recon. denied*, 15 FCC Rcd 303 (1999).

[10] 47 U.S.C. § 503(b)(2)(E).

[11] *See Discussion Radio, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 7433, 7441(2004).

[12] *PJB Communications of Virginia, Inc.,* Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*") (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues). *See also Hoosier Broadcasting Corporation,* Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641 (EB 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6741 (CCB 1992) (forfeiture not deemed excessive where it represented approximately 3.9 percent of the violator's gross revenues).

[13] *PJB Communications,* 7 FCC Rcd at 2089.

In support of its request for cancellation of the forfeiture, Valley Air submits copies of its 2003, 2004 and 2005 federal income tax returns, specifying gross revenues in the amounts of $75,167, $90,106, and $69,330, respectively. While the forfeiture amount proposed here is not excessive in view of precedent, we find Valley Air's financial situation unique in that, during the same three year period, it experienced cumulative net losses exceeding $345,000 during this timeframe. As such, its losses exceeded its revenue by nearly fifty percent from 2003 through 2005.

We have considered Valley Air's response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Valley Air willfully[14] and repeatedly[15] violated Section 73.3526 of the Rules. However, we believe that payment of the $4,000 forfeiture, or any reduction thereof, would pose a financial hardship in view of Valley Air's documented net losses.[16] Accordingly, we cancel the proposed forfeiture. Nevertheless, we find that it is appropriate to admonish Valley Air for its willful and repeated violation of Section 73.3526 of the Rules.

Conclusion. In view of the foregoing, the $4,000 Notice of Apparent Liability (NAL/Acct. No. MB200641410080) for violations of the public inspection file rule is HEREBY CANCELLED. Valley Air, LLC is instead hereby ADMONISHED for its violations of 47 C.F.R. § 73.3526.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Valley Air, LLC

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[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. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. *see Southern California Broadcasting Co.,* Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied,* 7 FCC Rcd 3454 (1992) ("*Southern California*").

[15] Section 312(f)(1) of the Act defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

[16] *See, e.g., Todd Steiner, Esq*., Letter, 23 FCC Rcd 13935 (MB 2008) (forfeiture cancelled based on licensee's claim of financial hardship); *Fayette County Broadcasting*, Memorandum Opinion and Order, 19 FCC Rcd 8921 (EB 2004) (same).