

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

In the Matter of	)	
	)	Facility ID No. 58845
<b>San Jose State University</b>	)	NAL/Acct. No. MB-20051810125
	)	FRN: 0009748385
Licensee of Station KSJS(FM)	)	File No. BRED-20050822AAB
San Jose, California	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 13, 2011**

**Released: April 14, 2011**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. San Jose State University (“University”), licensee of Station KSJS(FM), San Jose, California (“Station”), filed a Petition for Reconsideration (“Petition”) of the Forfeiture Order<sup>1</sup> issued to the the University for its willful and repeated violation of Section 73.3527 of the Commission’s Rules (“Rules”)<sup>2</sup> by failing to properly maintain a public inspection file for the Station. In this Memorandum Opinion and Order, we grant reconsideration in part and reduce the forfeiture issued by the Media Bureau (“Bureau”) from nine thousand dollars (\$9,000) to eight thousand dollars (\$8,000).

**II. BACKGROUND**

2. On August 22, 2005, the University filed an application to renew the license of the Station. 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 or 73.3527 of the Rules has been placed in the station’s public inspection file at the appropriate times. The University indicated “No” to that certification, attaching an exhibit explaining that “[f]rom 2001 to the present ... no quarterly issues were placed in the file.” It stated that it would recreate these lists, place them in Station’s public file, and that it had taken steps to assure that the lists would be prepared and filed in a timely fashion in the future.

3. On December 20, 2005, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”)<sup>3</sup> in the amount of nine thousand dollars (\$9,000) to the University for willfully and repeatedly violating Section 73.3527 of the Rules, based on the fact that it was responsible for 16 issues/programs lists which were missing from the Station public inspection file during the license period.<sup>4</sup> In response, the University filed a Request for Reduction of Proposed Forfeiture (“Request”) on January 18, 2006, which was later denied in the Forfeiture Order. The University then filed the subject Petition.

<sup>1</sup> *San Jose State University*, Forfeiture Order, 24 FCC Rcd 14331 (MB 2009).

<sup>2</sup> 47 C.F.R. § 73.3527.

<sup>3</sup> *Letter to Frank R. Jazzo, Esq. from Peter H. Doyle*, reference 1800B3-SS (MB Dec. 20, 2005).

<sup>4</sup> The Commission granted the above-referenced license renewal application on December 20, 2005.

4. In its Petition, the University argues that: (1) the Forfeiture Order failed to explain how it distinguished the present case from those cited in the Request; (2) that its actions in failing to keep a complete public inspection file were not egregious; (3) the decision is at odds with a recent Video Division case in which a television station licensee was admonished for public file violations; (4) it is financially unable to pay the forfeiture amount; and (5) the University for the first time seeks a reduction of the forfeiture amount due to its past record of compliance with the Rules.

### III. DISCUSSION

5. The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.<sup>5</sup> The University has failed to meet this burden.

6. The University argues that the Forfeiture Order "provides no rational basis for the amount of the forfeiture proposed,"<sup>6</sup> and questions the Media Bureau's authority to disavow cases such as *Faith Christian*,<sup>7</sup> which was cited in its Request. We have the authority to disavow cases that are inconsistent with precedent.<sup>8</sup> As we explained in the Forfeiture Order, the \$3,000 forfeiture amount issued in *Faith Christian* was inconsistent with other contemporaneous cases involving similar public violations.<sup>9</sup> To the extent that the cases cited in the Forfeiture Order postdated the University's NAL, as the University maintains, we find that there are also cases preceding the University's NAL that support the \$9,000 forfeiture amount.<sup>10</sup>

7. The University also refers to a Video Division case to support its argument that a \$9,000 forfeiture amount is excessive.<sup>11</sup> However, *S&E Network, Inc.*, is inapposite because the violation at

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<sup>5</sup> See 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

<sup>6</sup> Petition at 1.

<sup>7</sup> *Faith Christian Music Broadcast Ministries, Inc.*, Forfeiture Order, 20 FCC Rcd 19051 (MB 2005) ("*Faith Christian*").

<sup>8</sup> See *Meredith/New Heritage Strategic Partners, LP*, Memorandum Opinion and Consolidated Order, 9 FCC Rcd 6841, ¶ 10 (1994); *Julia S. Zozaya*, Memorandum Opinion and Order, 6 FCC Rcd 4416, 4417 (1991).

<sup>9</sup> See, e.g., *South Atlanta Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8471 (MB 2006) (issuing \$10,000 forfeiture for nine missing issues/programs lists). See also *Saga Communications of Illinois, LLC*, Forfeiture Order, 24 FCC Rcd 2479 (MB 2009) (affirming \$9,000 forfeiture issued for eight missing issues/programs lists); *Manuel Huerta*, Forfeiture Order, 23 FCC Rcd 14647 (MB 2008) (same); *ROA Licenses, LLC*, Forfeiture Order, 23 FCC Rcd 11333 (MB 2008) (noting initial \$9,000 forfeiture issued for eight missing issues/programs lists, but reducing the forfeiture amount to \$7,200 based on licensee's history of compliance with the Rules); *Emerson College*, Memorandum Opinion and Order and Notice of Apparent Liability, 21 FCC Rcd 8488 (MB 2006) ("*Emerson College*") (\$10,000 forfeiture assessed for fifteen missing issues/programs lists).

<sup>10</sup> *Joseph C. Chautin (Station WGSO(AM))*, Notice of Apparent Liability, 19 FCC Rcd 11250 (MB 2004) (\$9,000 forfeiture issued for missing contour map and 10 issues/programs lists); *James P. Riley (Station KUOA(AM))*, Notice of Apparent Liability, 19 FCC Rcd 11242 (MB 2004) (\$9,000 forfeiture assessed for twenty-six missing issues/programs lists).

<sup>11</sup> See *S&E Network, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 20 FCC Rcd 20282 (MB 2005) (issuing a \$3,000 forfeiture for Section 73.3526(e)(11)(iii) violations).

issue there was the licensee's failure to "publicize the existence and location of the Children's Television Programming Reports" as required by Section 73.3526(e)(11)(iii) of the Rules.<sup>12</sup>

8. The University further claims that its failure to comply with the public file rule was not an egregious action that merited a \$9,000 base forfeiture amount. We disagree. The forfeiture amount proposed was the base amount indicated in the Forfeiture Policy Statement and Section 1.80(b)(4) of the Rules for public file violations.<sup>13</sup> We believe the base amount is appropriate in the circumstances presented here.

9. The University again argues that the forfeiture should be reduced or cancelled because paying the forfeiture amount would cause it significant 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. The University provides a financial statement of revenues, expenses and changes in net assets in accordance with GAAP. The statement shows an operating loss of more than \$212 million for the fiscal year ending on June 30, 2008. Additionally, the University provides copies of two news articles from 2009 highlighting its recent financial hardships, as well as an undated newspaper article highlighting California's state budget woes.

10. Typically, the Commission uses gross revenue as the primary measuring stick by which it evaluates a licensee's ability to pay.<sup>14</sup> Other financial indicators may be considered, but operating losses alone do not mean a licensee cannot afford to pay.<sup>15</sup> In the past, we have cancelled forfeitures based on losses only in extreme cases.<sup>16</sup> In this case, the University submits a statement showing an admittedly high operating loss in 2008. Nonetheless, a financial statement reflecting only one year's worth of the University's finances does not provide adequate information to present the University's overall financial situation.<sup>17</sup> Further, the proposed forfeiture amount constitutes less than one percent of the University's total operating revenue of more than \$267 million dollars. As such, cancellation of the forfeiture based

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<sup>12</sup> *Id.*, 20 FCC Rcd at 20283.

<sup>13</sup> In the NAL, the proposed forfeiture was reduced from the \$10,000 base amount to \$9,000 because the violation was voluntarily reported. This is inconsistent with our case law, which holds that disclosures prompted by license renewal form questions are not voluntary disclosures. *See, e.g., WPW Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 13250, 13252 (MB 2010).

<sup>14</sup> *See CARE Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 1411, 1413 (MB 2010) (holding that a forfeiture constituting five percent of licensee's average gross revenue is not excessive); *PJB Communications of Virginia*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*") (similarly holding that a forfeiture of two percent of licensee's gross revenue is not excessive).

<sup>15</sup> *See PJB Communications* (concluding that a showing of expected losses is not enough to cancel a forfeiture); *see also Valley Air, LLC*, Letter, 24 FCC Rcd 5505, 5507 (MB 2009) ("*Valley Air*") (cancelling proposed forfeiture based on losses of \$345,000 as compared to \$235,000 in revenue over three years).

<sup>16</sup> *Valley Air*, 24 FCC Rcd at 5507 (cancelling NAL where cumulative net losses exceeded Station's revenues by fifty percent over the relevant three-year period).

<sup>17</sup> *See Gallatin Valley Witness, Inc.*, Forfeiture Order, 25 FCC Rcd 13358 (MB 2010) (rejecting licensee's financial hardship argument, finding that two nonconsecutive years worth of tax returns does not allow for an accurate assessment of its financial status); *College of the Holy Cross*, Forfeiture Order, 24 FCC Rcd 5508, 5510 (MB 2009) (finding that a one-page document setting forth station income and expenditures for one year, and no information regarding licensee's finances, was an insufficient basis on which to assess a licensee's ability to pay).

on a claim of financial hardship would be inappropriate. However, given the University's history of compliance with the Rules, we reduce the forfeiture amount to \$8,000.<sup>18</sup>

#### IV. CONCLUSION

11. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed by San Jose State University, on January 4, 2010, IS GRANTED IN PART AND DENIED IN PART.

12. IT IS ALSO ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,<sup>19</sup> that San Jose State University IS LIABLE FOR A MONETARY FORFEITURE in the amount of eight thousand dollars (\$8,000) for willfully and repeatedly violating Section 73.3527 of the Commission's Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Memorandum Opinion and Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>20</sup> 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/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at 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 by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If 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).<sup>21</sup> Licensee will also send electronic notification on the date said payment is made to Kelly.Donohue@fcc.gov and Jack.Komperda@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, Room 1-A625, 445 12th Street, S.W., Washington, DC 20554.<sup>22</sup>

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<sup>18</sup> See, e.g., *WLVV, Inc.*, Forfeiture Order, 24 FCC Rcd 7715, 7717 (MB 2009) (reducing forfeiture amount based on licensee's history of compliance); *Wayne State College*, Forfeiture Order, 24 FCC Rcd 2484, 2486 (MB 2009) (same); *Christian Center, Inc.*, Forfeiture Order, 24 FCC Rcd 1128, 1129 (MB 2009) (same); *John Brown University*, Forfeiture Order, 24 FCC Rcd 1536, 1537 (MB 2009) (same). See also 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Downward Adjustment Criteria.

<sup>19</sup> 47 C.F.R. § 73.3527.

<sup>20</sup> 47 U.S.C. § 504(a).

<sup>21</sup> See 47 C.F.R. § 1.1914.

<sup>22</sup> *Id.*

14. IT IS FURTHER ORDERED, that copies of this Memorandum Opinion and Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to: San Jose State University, One Washington Square, San Jose, CA 95192-0098, and to its counsel, Frank R. Jazzo, Esq., Fletcher, Heald and Hildreth, PLC, 1300 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau