



Federal Communications Commission
Washington, D.C. 20554

November 28, 2011

In Reply Refer to:
1800B3-JAN
NAL/Acct. No. MB-200741410016
FRN: 0010680106

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

James R. Cooke, Esq.
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Arlington, VA 22207

Re: Station WBZQ(AM), Huntington, IN
Larko Communications, Inc.
Facility ID No. 72788
File No. BR-20050419ACL

Dear Mr. Cooke:

We have before us a March 21, 2007, Response to Notice of Apparent Liability (“Response”) filed on behalf of Larko Communications, Inc. (“Larko”), licensee of Station WBZQ(AM), Huntington, Indiana (“Station”). The Response seeks cancellation of the January 31, 2007, Notice of Apparent Liability for Forfeiture (“NAL”)¹ in the amount of seven thousand dollars (\$7,000), issued by the Media Bureau (“Bureau”) to Larko for willfully violating Section 73.3539 of the Commission’s Rules (“Rules”) and willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (“Act”) for its failure to timely file a license renewal application (“Application”) and for unauthorized operation of the Station after its license had expired.² For the reasons set forth below, we cancel the monetary forfeiture.

Background. Section 73.3539(a) of the Rules requires that applications for renewal of license for broadcast stations must be filed “not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed.”³ An application for renewal of the Station’s license should have been filed by April 1, 2004. Larko filed a renewal application on April 1, 2004,⁴ but the Bureau dismissed the application due to a delinquent debt under the Commission’s “red light” program.⁵ Larko did not seek reconsideration of the red light dismissal or file another renewal application for the

¹ *Larko Communications, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 1581 (MB 2007).

² 47 C.F.R. § 73.3539; 47 U.S.C. § 301.

³ 47 C.F.R. § 73.3539.

⁴ File No. BR-20040401ASR.

⁵ See *Broadcast Actions*, Public Notice, Report No. 45913 (rel. Feb. 2, 2005). Under Section 1.1910 of the Rules, “Action will be withheld on applications . . . by any entity found to be delinquent in its debt to the Commission . . .,” and the application or request for authorization will be dismissed “if a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days” of notice of such delinquency. See 47 C.F.R. § 1.1910(b)(2) and (3). Larko indicates that it was aware of a delinquent regulatory fee but was advised by the Bureau to delay payment until it received a delinquency notice in order to ensure that the payment would be properly credited. Larko claims that it never received such a notice. Response at 1. In light of our action herein, this argument is moot.

Station, and the Station's license expired on August 1, 2004. Larko tendered the referenced renewal application⁶ on April 19, 2005, and also a request for special temporary authority ("STA")⁷ for WBZQ(AM) to continue Station operations pending consideration of the untimely renewal application on April 21, 2005. Both filings came more than eight months after the Station's license had expired. The Bureau granted that STA request on April 29, 2005.⁸ On January 31, 2007, the Bureau advised Larko of its apparent liability for a forfeiture of \$7,000 for failure to file a timely renewal application for the Station and for unauthorized operation of the Station after its license expired and granted the Station's late-filed renewal application.⁹ Larko filed the subject Response on March 21, 2007.¹⁰

In its Response, Larko states that cancellation or reduction of the forfeiture amount is warranted because its failure to file a timely renewal application was inadvertent, and payment of the proposed forfeiture will cause it financial hardship.

Discussion. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,¹¹ Section 1.80 of the Rules,¹² and the Commission's *Forfeiture Policy Statement*.¹³ 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.¹⁴

Larko first argues that its violations of the Act and the Rules were unintentional, stating that "[Larko] did not intend at any time to operate unlawfully."¹⁵ As the Commission has held, violations resulting from inadvertent error or failure to become familiar with the FCC's requirements are willful violations.¹⁶ In the context of a forfeiture action, "willful" does not require a finding that the rule

⁶ File No. BR-20050419ACL.

⁷ File No. BLSTA-20050421ABR.

⁸ *Letter to James R. Cooke, Esq.*, Reference 1800B3 (MB Apr. 29, 2005). By the terms of the STA grant letter, the authority expired on October 29, 2005. Larko timely filed for an extension of the STA on April 21, 2005, which was dismissed upon grant of the referenced renewal application.

⁹ *Larko Communications, Inc.*, 22 FCC Rcd at 1583-84.

¹⁰ The Response included partial tax returns for 2003, 2004, and 2005. Larko, at the request of the Bureau, also filed a Supplement ("Supplement A") on November 11, 2010, that includes compete tax returns for 2004, 2005, 2006, and 2007, and a second Supplement ("Supplement B") on October 6, 2011, that includes tax returns for 2008 and 2009. Additionally, Larko acknowledges that it filed the Response after the 30-day filing period prescribed by Section 1.80(f)(3) of the Rules. Response at 1; 47 C.F.R. § 1.80(f)(3). Because Bureau staff engaged in negotiations with Larko after receiving the untimely Response, the Bureau in essence waived the 30-day filing period and it would be fundamentally unfair to dismiss the Response on those procedural grounds.

¹¹ 47 U.S.C. § 503(b).

¹² 47 C.F.R. § 1.80.

¹³ *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).

¹⁴ 47 U.S.C. § 503(b)(2)(E).

¹⁵ Response at 1.

¹⁶ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*") (stating that "inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance"); *Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358, 358 (1986) (stating that "employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations").

violation was intentional. Rather, the term “willful” means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Rules.¹⁷ Accordingly, we reject this argument.

Larko next argues that the proposed \$7,000 forfeiture is excessive in light of its dire finances and would result in financial hardship.¹⁸ The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the party against which the forfeiture is proposed submits: (1) federal tax returns for the most recent three year period; (2) financial statements prepared according to generally accepted accounting principles; or (3) some other reliable and objective documentation that accurately reflected the party'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.¹⁹ “In general, a licensee's gross revenues provide the best indication of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators, such as net losses, may also be relevant.”²⁰ Further, the Bureau has, in the past, cancelled forfeitures where a licensee's losses are substantial in relation to revenues.²¹

In support of its request for cancellation of the forfeiture, Larko submits copies of its federal income tax returns for the years 2005-2009. During the most recent three-year period for which Larko has provided tax returns, Larko reported gross revenues of \$68,713, \$134,203, and \$87,098 in 2007, 2008, and 2009, respectively, for an average yearly gross revenue of \$96,671.33.²² The proposed \$7,000 forfeiture represents 7.2 percent of Larko's average gross revenue for 2007-2009. In considering claims of financial hardship, we have found a forfeiture amount of five percent of average gross revenue reasonable,²³ while the Enforcement Bureau has found that a forfeiture as high as 7.9 percent of average gross revenue was not excessive despite claims of financial hardship.²⁴ In the absence of extraordinary circumstances, we would reduce the forfeiture to \$4,800, which would represent approximately five percent of average gross revenue. We find such circumstances present here, however, as during the same three-year period, Larko reported losses of \$152,917, \$51,407, and \$25,213 for 2007, 2008, and 2009,

¹⁷ 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*, 6 FCC Rcd at 4387-88.

¹⁸ Response at 2.

¹⁹ *E.g. Drexel Univ.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 1386, 1387 (2011).

²⁰ *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992).

²¹ See, e.g., *J. Dominic Monahan, Esq.*, Letter, 25 FCC Rcd 16188, 16190 (MB 2010) (cancelling a forfeiture where a licensee's losses exceeded revenue by seventy percent over the most recent three-year period); *Henry A. Solomon, Esq.*, Letter, 24 FCC Rcd 5505, 5507 (MB 2009) (cancelling a proposed forfeiture where a licensee's losses exceeded revenue by fifty percent over the most recent three-year period).

²² See Supplement A, Exhibit 4 and Supplement B, Exhibits 1 and 2.

²³ See, e.g., *Grace Baptist Church*, Forfeiture Order, 25 FCC Rcd 7473 (MB 2010) (finding forfeiture representing approximately eleven percent of average gross revenue excessive and reducing to five percent); *CARE Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 1411 (MB 2010) (same).

²⁴ See *Coleman Enters., Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24389 (EB 2000), *recon. denied*, 16 FCC Rcd. 10023, 10025 (2001).

respectively.²⁵ Averaged across the three-year reporting period, Larko's losses exceed its revenue by nearly 80%.

We have examined Larko's Response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Larko willfully violated Section 73.3539 of the Rules and willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended. However, after reviewing Larko's claim and the supporting documentation, we believe that payment of the \$7,000 forfeiture, or any reduction thereof consistent with Commission precedent,²⁶ would pose a financial hardship in view of Larko's substantial documented losses. Accordingly, we cancel the proposed forfeiture.²⁷ Nevertheless, we find that it is appropriate to admonish Larko for its willful violation of Section 73.3539 of the Rules and willful and repeated violation of Section 301 of the Act.

Conclusion. In view of the foregoing, the Notice of Apparent Liability (NAL/Acct. No. MB200741410016) for violation of Sections 73.3539 of the Rules and 301 of the Act is hereby CANCELLED. Larko Communications, Inc. is instead hereby ADMONISHED for its willful violation of Section 73.3539 of the Rules and willful and repeated violation of Section 301 of the Act.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Larko Communications, Inc.

²⁵ See Supplement A, Exhibit 4 and Supplement B, Exhibits 1 and 2.

²⁶ See, e.g., *Grace Baptist Church*, *supra* note 23; *CARE Broadcasting, Inc.*, *supra* note 23.

²⁷ See, e.g., *Mr. Richard Marburger*, Letter, 24 FCC Rcd 13622, 13624 (MB 2009) (cancelling forfeiture because of licensee's inability to pay); *M. Scott Johnson, Esq.*, Letter, 24 FCC Rcd 11292, 11294 (MB 2009) (same); *Henry A. Solomon, Esq.*, Letter, 24 FCC Rcd 5505, 5507 (MB 2009) (same).