

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

In re Application of)	
)	
UNIVERSITY OF MARYLAND,)	Facility I.D. No. 69802
EASTERN SHORE)	NAL/Acct. No. MB201241410004
)	
For Renewal of License for)	FRN: 0002133965
Station WESM(FM))	File No. BRED-20110531AMV
Princess Anne, Maryland)	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: May 14, 2012

Released: May 14, 2012

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau ("Bureau") has before it the application of the University of Maryland, Eastern Shore ("Licensee"), for renewal of its license for noncommercial educational ("NCE") FM Station WESM(FM), Princess Anne, Maryland ("Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL"),¹ we find that the Licensee apparently willfully and repeatedly violated Section 73.3527 of the Rules by failing to retain all required documentation in the WESM(FM) public inspection file.² Based upon our review of the record before us, we conclude that Licensee is apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000) and that the captioned license renewal application should be granted for a period of four (4) years instead of a full term of eight years.

II. BACKGROUND

2. Section 73.3527 of the Rules requires NCE broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information about the station at regular intervals throughout the license period.³ Among the materials required for inclusion in the file are the station's quarterly issues/programs lists, which must be retained until final Commission action on the station's next license renewal application.⁴

¹ This NAL is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended ("Act"), and Section 1.80 of the Commission's Rules ("Rules"). See 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80. The Bureau has delegated authority to issue the NAL under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

² See 47 C.F.R. § 73.3527.

³ Cf. *Letter to Kathleen N. Benfield*, 13 FCC Rcd 4102 (MMB 1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (MMB 1993)).

⁴ See 47 C.F.R. 73.3527(e)(8).

3. 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 73.3527 has been placed in the station's public inspection file at the appropriate times. Licensee answered "No" to that certification and attached an exhibit explaining that it could not certify that issues/programs lists were placed in the local public file at the appropriate times during the entire license period. Licensee also indicated that reconstruction has taken longer than expected "due to the large number of missing and/or incomplete quarters – 32 in all."⁵ Licensee states that it has implemented procedures to ensure that issues/programs lists are prepared and placed in the public file each quarter going forward.

III. DISCUSSION

4. *Proposed Forfeiture.* As Licensee has acknowledged, at the time of the filing of the Station's renewal application, and during the entire license term, the Station's public inspection file did not contain any of issues/programs lists required to be retained in the file by Section 73.3527 of the Rules. In this regard, where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.⁶

5. Under Section 503(b)(1)(B) of the Act, a person who is found 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.⁷ 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.⁸ 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,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."¹¹

6. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of Section 73.3527.¹² In determining the

⁵ Application at Exhibit 12. Licensee indicates that, while some reports were prepared after 2008, the reports lacked dates, so it is unclear if they were filed at the close of each calendar quarter; it is also unclear whether the reports were accurate because they did not specify the community issues the listed programs addressed. *Id.*

⁶ See *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)); *Surrey Front Range Limited Partnership*, Notice of Apparent Liability, 7 FCC Rcd 6361 (FOB 1992).

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

⁸ 47 U.S.C. § 312(f)(1).

⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹¹ 47 U.S.C. § 312(f)(2).

¹² See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

appropriate forfeiture amount, we may adjust the amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “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.”¹³

7. In this case, although Licensee admitted to violating Section 73.3527, it did so only in the context of the question contained in its license renewal application that compelled such disclosure. Moreover, the violations were extensive, occurring over the entire eight-year license period and involving 32 issues/programs lists. Additionally, although Licensee otherwise has a history of compliance with the Rules, a downward adjustment is not appropriate here considering the extensive violations that occurred.¹⁴ Considering the record as a whole, we believe that a \$10,000 forfeiture is appropriate for the Section 73.3527 violations in this case.¹⁵

8. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹⁶ That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹⁷ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”¹⁸

9. It is clear to us that Licensee’s conduct has fallen far short of the standard of compliance with the Act and the Rules that would warrant a routine license renewal. Licensee apparently failed to timely prepare and file a single issues/programs list over the entire license term, an eight-year period. The issues/programs lists are a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community.¹⁹ The Commission’s public information file rule also safeguards the public’s ability to assess the station’s service and to meaningfully participate in the station’s renewal process, and ensure the station’s accessibility to and nexus with its community, to serve and respond to community programming needs.²⁰ As such, the public information

¹³ 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

¹⁴ *See The Padner Group, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 27 FCC Rcd 576, 577-78 (MB 2012) (despite Licensee’s history of compliance with the Rules, downward adjustment of forfeiture not appropriate due to extensive public inspection file rule violations).

¹⁵ *See, e.g., Peak Communications, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 23 FCC Rcd 1660 (MB 2008) (\$10,000 forfeiture proposed for public file rule violation occurring over six years and involving 24 missing issues/programs lists).

¹⁶ 47 U.S.C. § 309(k).

¹⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ *See Formulation of Policies and Rules to Broadcast Renewal Applicants*, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6365 (1989).

²⁰ *See Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05 ¶ 39.

requirements are integral components of a licensee's obligation to serve the public interest and meet its community service obligations. Absent any issues/programs lists in the Station's public inspection file, we cannot determine that Licensee has met those obligations.

10. We believe that Licensee's violations of Section 73.3527 at the Station was a "serious" violation,²¹ as it denied both the public and the Commission any opportunity to review and comment on the Station's programming during the entire license term. The record here further indicates that Licensee's willful and repeated violations of Section 73.3527 at the Station, when considered together, constitutes a pattern of abuse over a period of years by Licensee at the Station.²² However, we find that Licensee's violations of the Act and the Rules do not rise to such a level that designation for evidentiary hearing on the issue of whether to deny renewal for the Station is warranted. Importantly, the record establishes that Licensee has established new procedures to ensure that issues/programs lists are prepared and placed in the Station's public files each quarter going forward.²³

11. Nevertheless, we believe that additional measures are necessary in order to ensure that the Station is operated in compliance with the Act and the Rules in the future. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant the renewal application by separate action upon the conclusion of this forfeiture proceeding, if there are no issues other than the apparent violation that would preclude grant of the application. The new license term will be limited to a period of four years.²⁴ This limited renewal period will afford the Commission an opportunity to review the Station's compliance with the Act and the Rules and to take whatever corrective actions, if any, that may be warranted at that time.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that the University of Maryland, Eastern Shore is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars (\$10,000) for its apparent willful and repeated violations of Section 73.3527 of the Commission's Rules.

²¹ See 47 U.S.C. § 309(k)(1)(b).

²² See 47 U.S.C. § 309(k)(1)(c).

²³ Application at Exhibit 12. Based on these recent efforts, we do not find that Licensee's operation of the Station "was conducted in an exceedingly careless, inept and negligent manner and that Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.* at 200.

²⁴ See, e.g., *Visionary Related Entertainment, LLC*, DA 12-167, 27 FCC Rcd 1392 (MB 2012) (one-year renewal granted based on Licensee's willful and repeated violations of the Commission's radiofrequency radiation exposure guidelines at two stations); *South Seas Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal granted, NAL issued, for willfully and repeatedly violating 47 C.F.R. § 73.1350 by engaging in operation of the station at an unauthorized site and willfully and repeatedly violating 47 C.F.R. § 73.1740 by leaving the station silent without the proper authorization); *Enid Public Radio Association*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 9138, 9144 (MB 2010) (six-year renewal granted, NAL issued, after finding a pattern of abuse where "the number, nature and extent" of the violations on the record, coupled with the licensee's apparent disregard for a prior admonition regarding those violations and refusal to address the allegations, indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules").

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, the University of Maryland, Eastern Shore SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the proposed 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). Licensee will also send electronic notification on the date said payment is made to Penelope.Dade@fcc.gov and Stephen.Svab@fcc.gov.


15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

16. 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.

17. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.²⁵

18. IT IS FURTHER ORDERED that copies of this Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to the University of Maryland, Eastern Shore, UMES Backbone Road, Princess Anne, MD 21853, and to Licensee's counsel, Steven C. Schaffer, Esq., Schwartz, Woods and Miller, 1233 20th St., N.W., Suite 610, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION


Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ See 47 C.F.R. § 1.1914.