

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

In re Application of)	
)	
ICICLE BROADCASTING, INC.)	Facility I.D. No. 47072
)	NAL/Acct. No. MB-201441410014
For Renewal of License for)	FRN: 0000011254
Station KOHO-FM)	File No. BRH-20130930BKH
Leavenworth, Washington)	

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

Adopted: March 4, 2014

Released: March 5, 2014

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (“Bureau”) has before it the application of Icicle Broadcasting, Inc., (“Licensee”), for renewal of its license for Station KOHO-FM, Leavenworth, Washington (“Station”). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”),¹ we find that Licensee apparently willfully and repeatedly violated Section 73.3526 of the Rules by failing to retain all required documentation in the Station’s 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).

II. BACKGROUND

2. Section 73.3526 of the Rules requires a commercial broadcast licensee 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

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 73.3526 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:

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. § 73.3526.

³ Cf. *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division*, 13 FCC Rcd 4102 (MMB 1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, Memorandum Opinion and Order, 8 FCC Rcd 6400 (MMB 1993)).

⁴ See 47 C.F.R. § 73.3526(e)(12).

[L]icensee [has] reviewed the public inspection file and determined [as missing] . . . quarterly issues/programs reports during the 2006-2008 time period.

The 12 missing reports are in the process of being re-created based on available station records and documentation and will be placed in the station's public inspection file shortly.

The licensee takes seriously its obligations as a broadcast station licensee and sincerely regrets the laps with respect to these issues/programs lists. KOHO-FM had some significant changes in management beginning in 2006. The General Managers during this period of time are no longer with the station. The licensee has been unable to locate the missing quarterly reports that were not in the public file during this period of turnover. Issue-responsive programming was broadcast during this time period -- KOHO-FM, a true community radio station, regularly broadcasts news and public affairs programs and public service announcements that serve community needs and interests.

The licensee has adopted procedures to address this gap in record-keeping (e.g., electronic calendar reminders). In addition to internal communications, it has asked its FCC counsel to send it reminders when quarterly reports are due.⁵

On February 19, 2014, Licensee notified Commission staff via electronic correspondence that despite an "exhaustive search" it was ultimately unable to recreate the missing reports because the Station "lacked the ability to retrieve reliable records concerning the dates, times and duration of issue-responsive programs."⁶ Additionally, it reaffirmed that it had "adopted a variety of procedures to make sure that there will be no gap in [future] recording-keeping"⁷

III. DISCUSSION

4. *Proposed Forfeiture.* As Licensee has acknowledged, at the time of the filing of the Station's license renewal application, and during periods within the license term, the Station's public inspection file did not contain many of the items required to be retained in the file by Section 73.3526 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.⁸

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.⁹ 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.¹⁰ The legislative history to Section 312(f)(1) of the Act clarifies that this

⁵ Application, Exhibit 12.

⁶ E-mail from Elliott Salmon, Station General Manager (dated Feb. 17, 2014), to Erwin Krasnow (Licensee's counsel) forwarded to Commission staff on February 19, 2014.

⁷ *Id.*

⁸ 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).

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

¹⁰ 47 U.S.C. § 312(f)(1).

definition of willful applies to both Sections 312 and 503(b) of the Act,¹¹ and the Commission has so interpreted the term in the Section 503(b) context.¹² 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.”¹³

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 a violation of Section 73.3526.¹⁴ In determining the appropriate forfeiture amount, we may adjust the base 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.”¹⁵

7. In this case, although Licensee admitted to violating Section 73.3526, 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 a three-year period and involving 12 issues/programs lists. Additionally, a downward adjustment is not appropriate here considering the extensive violations that occurred. Considering the record as a whole, we believe that a \$10,000 forfeiture is appropriate for the Section 73.3526 violations in this case.¹⁶

8. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹⁷ 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.¹⁸ 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.”¹⁹

9. We find that Licensee’s apparent violations of Section 73.3526 of the Rules do not constitute “serious violations” warranting designation for evidentiary hearing. Moreover, we find no

¹¹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹² See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹³ 47 U.S.C. § 312(f)(2).

¹⁴ 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.

¹⁵ 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).

¹⁶ See, e.g., *Linfield College*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 12429 (MB 2009) (\$10,000 forfeiture proposed for twelve missing issues/programs lists); *Faith Baptist Church*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 9146 (MB 2007) (\$10,000 forfeiture proposed for violations of Section 73.3526 occurring over three years and involving 11 missing issues/programs lists).

¹⁷ 47 U.S.C. § 309(k).

¹⁸ 47 U.S.C. § 309(k)(1).

¹⁹ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

evidence of violations that, when considered together, evidence a pattern of abuse.²⁰ Further, we find that the Station served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violations that would preclude grant of the application.

IV. ORDERING CLAUSES

10. 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 Icicle Broadcasting, Inc., 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 73.3526 of the Commission's Rules.

11. 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, Icicle Broadcasting, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. 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 Kim.Varner@fcc.gov.

13. 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.

14. 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.

²⁰ For example, we do not find here that Licensee's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *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. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

15. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.²¹

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Icicle Broadcasting, Inc., P.O. Box 2675, Wenatchee, WA 98807, and to its counsel, Erwin G. Krasnow, Esq., Garvey Schubert Barer, 1000 Potomac Street N.W., Washington, DC 20007-3501.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²¹ See 47 C.F.R. § 1.1914.