

ORIGINAL

HARRY F. COLE
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
JOSEPH M. DI SCIPIO
PAUL J. FELDMAN
JEFFREY J. GEE
KEVIN M. GOLDBERG
FRANK R. JAZZO
M. SCOTT JOHNSON
MITCHELL LAZARUS
STEPHEN T. LOVELADY*
SUSAN A. MARSHALL
HARRY C. MARTIN
MICHELLE A. McCLURE*
MATTHEW H. McCORMICK*
FRANCISCO R. MONTERO
PATRICK A. MURCK
LEE G. PETRO*
RAYMOND J. QUIANZON
MICHAEL W. RICHARDS*
JAMES P. RILEY
DAVINA S. SASHKIN
PETER TANNENWALD*
KATHLEEN VICTORY
HOWARD M. WEISS
RONALD P. WHITWORTH

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400

FAX: (703) 812-0486

www.fhhlaw.com

May 28, 2009

RETIRED MEMBERS
RICHARD HILDRETH
GEORGE PETRUTSAS

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
ALAN C. CAMPBELL
DONALD J. EVANS
ROBERT M. GURSS*
RICHARD F. SWIFT*

WRITER'S DIRECT

(703) 812-0478
whitworth@fhhlaw.com

*NOT ADMITTED IN VIRGINIA

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: WEAX(FM), Facility ID No. 67795, Angola, IN
NAL/Acct. No. MB-200541410121
FRN: 0005273230
File No. BRED-20040323ASY**

Dear Ms. Dortch:

Transmitted herewith, on behalf of Trine University, formerly Tri-State University, are an original and four copies of its Application for Review of the *Forfeiture Order* issued by the Chief, Audio Division, Media Bureau, DA 09-930, released April 28, 2009.

Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,



Ronald P. Whitworth
Counsel for Trine University

Enclosures

cc: Mr. Peter H. Doyle (w/enc.)

FILED/ACCEPTED

MAY 28 2009

Federal Communications Commission
Office of the Secretary

RECEIVED

MAY 28 10:31 AM '09

Audio Division

FILED/ACCEPTED

MAY 28 2009

Federal Communications Commission
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	Facility ID No. 67795
Trine University)	NAL/Acct. No. MB-200541410121
Formerly Tri-State University)	FRN: 0005273230
)	
Licensee of Station WEAX(FM))	File No. BRED-20040323ASY
Angola, Indiana)	
)	
)	

To: The Commission

APPLICATION FOR REVIEW

Trine University, formerly Tri-State University (“TU” or the “University”), licensee of Noncommercial Educational Station WEAX(FM), Angola, Indiana (Facility ID No. 67795), by its attorneys, pursuant to Section 1.115 of the Commission’s Rules, herein requests review of the *Forfeiture Order* issued by the Media Bureau in the above-captioned matter.

TU seeks the rescission or alternatively, a substantial reduction in the forfeiture amount of seven thousand two hundred dollars (\$7,200), as assessed by the Bureau in its *Forfeiture Order*, DA 09-930, released April 28, 2009. The forfeiture was assessed as a result of TU’s violation of Section 73.3527 of the Commission’s rules. The forfeiture was reduced from the original amount of nine thousand dollars (\$9,000) due to TU’s history of compliance with the Rules. But the fine remains grossly disproportionate to forfeitures previously assessed to noncommercial educational stations in similar financial situations, and would result in the unintended effect of creating a further public harm. As provided herein, the assessment of a \$7,200 forfeiture would impose a devastating burden

on a college station operating on a shoestring budget, imposing a serious setback to its ability to serve the Angola community.

Question Presented

Was the forfeiture of seven thousand two hundred dollars (\$7,200) assessed by the Media Bureau grossly excessive in light of the nature of the violation, forfeitures assessed to similarly situated stations with similar limited resources, and the University's record for compliance with Commission rules?

Background

In filing its renewal application on March 23, 2004, TU reported that it had not properly maintained its public inspection file during the previous license term in that various issues/programs lists had either been lost or were never created in the first place. TU took immediate steps to prevent any future violations. As detailed in its letter to the Commission on March 22, 2006 ("2006 Letter"), TU has rededicated itself to maintaining full compliance with the Commission's rules and policies. Included in that process was the hiring of a new full-time Operations Manager whose duties include the timely preparation of the station's Quarterly Issues/Lists.

WEAX's public service improvements are not limited to the hiring of the Operations Manager. The station has been diligently preserving the funds necessary to modify the station's facilities by relocating the station's tower and increasing its antenna height to improve service to the Angola, IN community. An application to effectuate these planned changes (BPED-20090217AAA) is on file with the Commission.

Discussion

Section 503(b)(2)(D) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and any other such matters as justice may require when making a determination as to the applicability of forfeiture and the assessment of such amount. While electing in its *Forfeiture Policy Statement* to adopt predictable base forfeiture guidelines for violations of the Rules, the Commission explicitly reserved discretion to adjust, on a case-by-case basis, forfeiture amounts according to the factors under § 503(b), as well as discretion to depart altogether from the guidelines.¹

While TU appreciates that the Bureau has taken into account one of the factors specified in the Act -- history of prior offenses -- it respectfully requests that the full Commission now take into account the remainder of the statute, particularly in light of how the Commission has treated other stations in similar economic situations.

In its *Forfeiture Order*, the Commission references *Faith Christian Music Broadcast Ministries* in its discussion of the importance of issues/programs lists.² Ironically, that case illustrates the precise point that TU requests that the Commission consider in its review of the Bureau's action. In that case, the Commission reduced a forfeiture from \$3,000 to \$500 based on the licensee's gross revenues (the forfeiture amount represented approximately 1% of the licensee's gross revenues). This reduction was granted despite the licensee's assertion that "the public has no interest whatsoever in

¹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17101 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

² *Forfeiture Order* at 3.

the content of radio station issues and programs lists.” As detailed in the 2006 Letter, the Commission has routinely taken into account other factors such as a station’s noncommercial status and financial situation when reducing or canceling forfeitures in the past.³

Provided in the 2006 Letter was documentation illustrating the extremely limited budget that WEAX is operated under. If the *Faith Christian Music Broadcast Ministries* standard (1% of the licensee’s gross revenues) is applied to TU, its forfeiture should be approximately \$100. The detailed information provided in 2006 included full disclosure of the station’s finances, including its total budget, expenditures, and the percentage of the budget contributed by the university. An exhibit was provided breaking down precisely where the budget came from, and where money was spent in 2005 and 2006 (along with 2007 projections).⁴ Despite all of this hard data, the Bureau concluded that

this information was “an insufficient basis on which to assess (TU’s) inability to pay.”⁵

The inference seems to be that perhaps the finances of the University itself should have been included, as an additional source of income from which the station could pay the forfeiture. This is a completely inappropriate assumption for the Commission to make, as the ability for the station to pay the forfeiture should be based exclusively on the finances of the station itself. WEAX does not have the ability to access any additional resources from the University beyond the amount TU contributes to the station’s annual budget, which as documented in the 2006 Letter, is a very small percentage.

³ See 2006 Letter, attached as Exhibit 1, at 3.

⁴ *Id.* at Exhibit A.

⁵ *Forfeiture Order* at 3-4.


The assessment of a \$7,200 fine would represent more than 8% of the station's overall budget for 2005-06. The imposition of such a penalty would not only be significantly disproportionate to forfeitures assessed by the Commission in analogous situations, but would further harm the public despite the Commission's good intentions. Rather than punishing a past offense with a forfeiture that will result in greater harm to the public, the Commission has the opportunity to enable TU to continue pressing forward with its remedial efforts, station modification and other community efforts which will result in improved public service in its community.

Conclusion

In light of the foregoing, TU respectfully requests that the full Commission rescind, or alternatively, significantly reduce the forfeiture assessed by the Media Bureau under delegated authority in the above-captioned proceeding.

Respectfully submitted,

TRINE UNIVERSITY

By: 
Matthew H. McCormick
Ronald P. Whitworth
Its Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
(703) 812-0400

May 28, 2009

EXHIBIT 1

LAW OFFICES
REDDY, BEGLEY & MCCORMICK, LLP
SUITE 610
1156 15TH STREET, N.W.
WASHINGTON, D.C. 20005-1770

DENNIS F. BEGLEY
MATTHEW H. MCCORMICK

EDWARD B. REDDY
(1915-1990)

(202) 659-5700
FAX (202) 659-5711
rbm@rbmfcclaw.com

March 23, 2006

FILE COPY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED

MAR 23 2006

Federal Communications Commission
Office of Secretary

Re: Noncommercial Educational Station WEAX(FM), Angola, Indiana
Facility ID No. 67795
NAL Account No.: MB200541410121
FRN No. 0005-2732-30

Dear Ms. Dortch:

Tri-State University ("TSU" or the "University"), licensee of Noncommercial Educational Station WEAX(FM), Angola, Indiana (Facility ID No. 67795), herein responds to the Notice of Apparent Liability for Forfeiture ("NAL") set forth in a letter dated February 22, 2006, from the Chief of the Audio Division, Media Bureau. Through the February 22 letter the Commission granted the application for renewal of WEAX's license, but included an NAL in the amount of \$9,000 for violation of the FCC's Public Inspection File rule. The letter stated that the file contained only three Quarterly Issues/Programs Lists for the previous license term.

TSU herein respectfully requests that the NAL be rescinded or that the amount of the forfeiture be substantially reduced.

During the initial portion of the previous license term, WEAX was a student-operated station. From approximately February 1999 until August 2001, the station primarily simulcast the signal of Noncommercial Educational Station WBOI, Fort Wayne, Indiana (then known as WBNI-FM). In approximately August 2001, WEAX resumed originating primarily its own programming.

As noted in the renewal application, the University is committed to operate Station WEAX in full compliance with the Commission's rules and policies. The University has rededicated itself

Ms. Marlene H. Dortch, Secretary

Page 2

March 23, 2006

to the operation of the station and is in the process of fully integrating the station's operations into the University's curriculum and community outreach. Toward that objective, the University has hired a full-time Operations Manager, whose responsibilities include timely preparation of the station's Quarterly Issues/Programs Lists. The station's Operations Manager reports directly to the University's Vice President for Student and University Operations, Michael R. Bock.

The assessment of a \$9,000 forfeiture would be a severe blow to the University's plans to enhance the service provided by the station to the University and the community. A forfeiture in that amount would be more than 10% of the station's budget for Fiscal Year 2006-2007 and more than 200% of the income the station received from private donors and underwriting in 2005.

As verified in Mr. Bock's attached Declaration (Exhibit A hereto), the University heavily subsidizes the station's operations. In Fiscal Year 2004-2005, the cost of operating the station was \$72,205. Of that amount, all but \$4,401 came from the University. For Fiscal Year 2005-2006, the station's budget is \$88,258. Through the second quarter of that fiscal year, only \$3,900 came from outside sources.

A \$9,000 forfeiture would hamper to a significant degree the University's efforts to enhance the service the station provides to the University and the outside community. If it were required to pay the proposed forfeiture, the University would be forced to trim that amount out of an already tight budget for the station.

Such a forfeiture also would impede the University's efforts to upgrade the station's physical facilities. The University holds a construction permit to modify the station's facilities by relocating the station's tower and increasing its antenna height from 46 meters above average terrain to 67 meters. If the University had to divert \$9,000 to pay the proposed forfeiture, the upgrade project almost certainly would be delayed, if not cancelled.

TSU further notes that it has never previously been cited for violation of the Commission's rules. While the University acknowledges the importance of compliance with all Commission rules, it notes that the violation in question was fundamentally an administrative lapse that did not in any way endanger the public. Moreover, the University has taken steps to ensure compliance with the Public Inspection File rule.¹

¹ The Audio Division's February 22 letter states that the Public Inspection File for WEAX currently does not contain Quarterly/Issues Programs Lists for any of the quarters for the previous license term, except for the second quarter of 2003 and the second and third quarters of 2004. TSU wishes to clarify that while those are the only lists with respect to programming originated by WEAX, the file does contain Quarterly Issues/Programs lists with respect to issue-responsive

Given the severe adverse impact a \$9,000 forfeiture would have on the station's service, we urge the Commission to substantially reduce or cancel the forfeiture. While TSU has readily admitted that it failed to fully comply with the Issues/Programs Lists requirement,² the imposition of such a large forfeiture would be excessive for a noncommercial educational station such as WEAX. See, e.g., *Liberty University, Inc.*, 18 FCC Rcd 20,115 (Chief, Media Bureau, 2003) (although Public Inspection File was not complete throughout the license term, an NAL of only \$3,000 proposed); *Davidson College*, DA 05-2907 (Chief, Audio Division, November 4, 2005) (proposed forfeiture of \$9,000 for Public Inspection File violations by NCE licensee reduced to \$1,000); *National Cable Satellite Corp.*, 18 FCC Rcd 20,159 (Chief, Media Bureau, 2003) (Public Inspection File violations for an indiscernible amount of time during the license period results in NAL of \$3,000); *Isothermal Community College*, 16 FCC Rcd 21,360 (Chief, Enforcement Bureau, 2001) (absence of issues/programs lists and donors lists from Public Inspection File, even considered with other violations, nonetheless warrants only admonishment of noncommercial educational licensee, not a monetary forfeiture), *recon. dismissed*, 17 FCC Rcd. 22,666 (2002).

In determining the amount of a forfeiture, the Commission must gauge the licensee's ability to pay. The Commission previously has stated that a licensee's gross revenues are the best indication of its ability to pay a forfeiture. E.g., *Faith Christian Music Broadcast Ministries, Inc.*, DA 05-3088 (Chief, Media Bureau, December 1, 2005) (forfeiture reduced from \$3,000 to \$500, approximately 1% of licensee's gross revenues).

Here, if WEAX were to be assessed a forfeiture equal to 1% of its projected gross revenues for Fiscal Year 2006-2007, the amount would be \$100. See Exhibit A. If the Commission were to determine that the gross revenues of a noncommercial educational station is not the appropriate measure of the station's ability to pay a forfeiture, TSU suggests that an alternative measure would be the station's operating budget. WEAX's operating budget for the most recently completed fiscal

programming originating on Station WBOI, Fort Wayne, Indiana, and simultaneously rebroadcast on WEAX from approximately February 1999 until August 2001. Thus, the Public Inspection File does contain Quarterly Issues/Programs Lists for 14 quarters (*i.e.*, the end of the first quarter 1999 through the beginning of the third quarter 2001, during which WEAX rebroadcast WBOI), the second quarter of 2003 and the second and third quarters of 2004.

² TSU notes that the NAL, on its face, states that the forfeiture was for violation of Section 73.3526 of the Commission's Rules. Of course, that Rule is inapplicable to a noncommercial educational station.

DECLARATION
OF
MICHAEL R. BOCK

I, Michael R. Bock, do hereby declare and state under penalty of perjury:

I am Vice President for Student and University Operations of Tri-State University ("TSU"), which is the licensee of Noncommercial Educational Station WEAX(FM), Angola, Indiana.

I have reviewed TSU's response, drafted by TSU's communications counsel, Matthew H. McCormick, to the Commission's letter of February 22, 2006, in which it issued a Notice of Apparent Liability for Forfeiture ("NAL") with respect to WEAX's violation of the Public Inspection File Rule during the previous license term. The facts set forth in the response with respect to WEAX and TSU are, to the best of my knowledge and belief, true and correct.

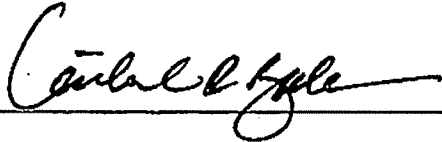
Attached to this Declaration is a printout setting forth TSU's income and expenditures with respect to WEAX for Fiscal Year 2004-2005 and for the first two quarters of Fiscal Year 2005-2006. The printout also includes the WEAX annual budgets for Fiscal Years 2005-2006 and 2006-2007. The total income received by WEAX during Fiscal Year 2004-2005 was \$4,401. TSU's total expenditures during that Fiscal Year with respect to the station were \$72,205.

WEAX's total income during the first two quarters of Fiscal Year 2005-2006 was \$3,900. TSU's total expenditures for those first two quarters were \$39,382. The total projected budget for Fiscal Year 2005-2006 is \$88,258.

The total projected budget for Fiscal Year 2006-2007 is \$83,775. The projected income for that Fiscal Year is \$10,000.

In closing, I wish to reiterate that the proposed forfeiture of \$9,000 would be a severe blow to WEAX, a noncommercial educational station with little revenue which is already heavily subsidized by TSU. Such a fine would hamper TSU's efforts to make the station an educational resource for its students and for the community at large.

Signed this 23rd day of March, 2006.



Michael R. Bock

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
6	WEAX														
7	1830														
8		ACCOUNT NAME	2005 Actual					2006			2007 Projected				
9			Actual												
10			Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total	Quarter 1	Quarter 2	Annual	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total
			Aug 31	Nov 30	Feb 28	May 31		Aug 31	Nov 30	Budget	Aug 31	Nov 30	Feb 28	May 31	
27		Other Income													
28		420600 Private Gift Income	-112	112	0	0	0	0	0	0	0	0	0	0	0
29		442425 Income/Radio Sponsorship	-700	-795	-1,002	-1,900	-4,401	-1,100	-2,800	10,000	2,500	2,500	2,500	2,500	10,000
83		Total Other Income	-812	-687	-1,002	-1,900	-4,401	-1,100	-2,800	10,000	2,500	2,500	2,500	2,500	10,000
84		Total Income	-812	-687	-1,002	-1,900	-4,401	-1,100	-2,800	10,000	2,500	2,500	2,500	2,500	10,000
85		Salaries													
87		510000 Salary/Administrative	3,923	4,578	1,377	0	9,878	120	17,860	32,500	8,369	9,369	8,369	8,369	33,478
91		510400 Salary/Support	2,040	2,535	8,095	14,365	27,035	8,295	-7,440	17,550	4,625	4,625	4,625	4,625	18,500
92		510500 Salary/Student	0	4,381	1,852	1,908	8,141	936	2,310	9,504	2,375	2,375	2,375	2,375	9,500
93		510600 Summer Contracts	1,696	0	0	0	1,696	0	0	996	0	0	0	0	0
95		Total Salaries	7,659	11,494	11,324	16,273	46,750	9,351	12,730	60,550	15,369	15,369	15,369	15,369	61,478
96		Benefits													
113		555200 Employee Relations	0	0	0	16	16	4	0	0	0	0	0	0	0
116															
117		Total Benefits	0	0	0	16	16	4	0	0	0	0	0	0	0
118		Facility Operations													
120		558000 Telephone	311	427	210	799	1,747	259	150	1,500	250	250	250	250	1,000
134		558320 Rep & Main/Equip	130	81	844	2,857	3,912	0	4,333	3,000	625	625	625	625	2,500
144															
145		Total Facility Operations	441	508	1,054	3,656	5,659	259	4,483	4,500	875	875	875	875	3,500
146		University Operations													
152		555300 Promotions	0	500	0	1,629	2,129	551	2,784	1,104	625	625	625	625	2,500
157		556800 Membership & Dues	0	0	55	3	95	0	95	396	25	25	25	25	100
158		557000 Legal & Accounting	0	880	2,538	888	4,286	215	98	3,204	500	500	500	500	2,000
161		557050 Professional Fees	0	0	50	0	50	100	0	996	125	125	125	125	500
163		558550 License Agreement	0	363	638	0	1,001	0	363	1,500	500	500	500	500	2,000
169															
170		Total University Operations	0	1,743	3,321	2,497	7,561	876	3,340	7,200	1,775	1,775	1,775	1,775	7,100
171		Information Sources													
188		552500 Purch/Software/License	0	269	1,119	0	1,388	3,890	0	2,004	125	125	125	125	500
197		556520 Programming Expenses	2,060	900	1,900	9051	5,765	300	1,320	7,896	1,700	1,700	1,700	1,700	6,800
198		556530 Engineering Expenses	338	0	0	1,840	2,178	0	0	996	625	625	625	625	2,500
199		556540 Music Purchases	96	96	769	56	1,057	96	56	0	0	0	0	0	0
200															
201		Total Information Sources	2,494	1,265	3,785	2,641	10,388	4,266	1,416	10,896	2,450	2,450	2,450	2,450	9,800
202		Administration													
217		556200 Office Supplies	0	0	147	10	157	19	5	504	25	25	25	25	100
218		556300 Small Equipment	24	33	1,188	248	1,493	2,723	290	3,504	250	250	250	250	1,000
220															
221		Total Administration	24	33	1,335	258	1,650	2,742	295	4,008	275	275	275	275	1,100
222		Communication													
224		555700 Postage & Shipping	0	0	13	7	20	10	59	204	50	50	50	50	200
225		555800 Copying & Printing	0	0	0	34	34	11	0	96	25	25	25	25	100
228															
229		Total Communication	0	0	13	41	54	21	59	300	75	75	75	75	300
230		Travel													
232		556700 Travel & Entertainment	0	0	127	0	127	0	0	804	125	125	125	125	500
233															
244		559900 Miscellaneous	0	0	0	0	0	0	0	0	0	0	0	0	0
292		559920 Budget Adjustment	0	0	0	0	0	0	0	0	0	0	0	0	0
293															
294		TOTAL SAL & OTHER EXP	\$10,618	\$15,043	\$20,962	\$25,582	\$72,205	\$17,539	\$22,323	\$88,258	\$20,944	\$20,944	\$20,944	\$20,944	\$83,776