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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

FILED/ACCEPTED

MAY 31 2012

Federal Communications Commission  
Office of the Secretary

In re Application of )  
 )  
**TOCCOA FALLS COLLEGE** )  
 )  
For Renewal of License for )  
Station WTXR(FM) )  
Toccoa Falls, Georgia )

Facility I.D. No. 77327  
NAL/Acct. No. MB201241410025  
FRN: 0006338750  
File No. BRED-20111201FOP

To: Office of the Secretary  
Attention: Chief, Audio Division  
Media Bureau

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REGISTRATION SERVICES DIVISION

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

Toccoa Falls College (“the College”) licensee of WTXR(FM), Toccoa Falls, Georgia, by its counsel, and pursuant to Section 503 of the Communications Act of 1934, as amended (the “Act”) and Section 1.80 of the Rules, respectfully responds to the Audio Division’s (the “Division”) *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, DA 12-695, released May 2, 2012 (herein “NAL”), which found that the College “willfully and repeatedly” violated Section 73.3527 of the Rules by failing to retain all required documentation in the WTXR(FM) public inspection file, and as a result concluded that the College is apparently liable for a forfeiture of \$10,000. Putting aside, for the moment, the Division’s excessively harsh and severe action in attempting to assess a forfeiture of \$10,000 for a minor mistake at a student-run

educational facility, the College does not believe a forfeiture penalty is appropriate, and, in support, the College shows the following:<sup>1</sup>

### **Preliminary Statement**

The NAL should be vacated because (a) there is an insufficient basis to establish a “willful or repeated” violation of the Rule; (b) the Commission’s policy of assessing forfeitures for voluntarily reported violations is not in the public interest; (c) the action is at variance with cases drawing an admonition or lower amount of penalty instead of a \$10,000 forfeiture for the apparent violation; (d) the forfeiture, for a minor mistake, is greater than forfeitures assessed for truly serious violations; and (e) the Division should be lenient in the sanction imposed on student-run stations.

Moreover, the Division should immediately grant, without further delay or condition, the captioned application for renewal of license. Withholding action is a violation of Section 504(c) of the Act.

Section III, Item 3 of FCC Form 303-S requires the licensee to certify whether the documentation required by Section 73.3527, has been placed in the station’s public inspection file at the appropriate times. The College answered “No” to that certification, explaining:

In preparing this application, the licensee reviewed the public inspection file for WTXR. The public file is up-to-date, with the exception of the issues/programs lists. The issues/programs section does not contain any lists from the period of license issue date (March 30, 2006) [fn omitted] through June 2012 (and the licensee has been unable to recreate them). For the period July 1, 2010, through September 30, 2011, issues/programs lists were placed in the public file . . . . WTXR is a student-operated station and record-keeping was not as meticulous as it is for the other stations [licensee operates]. When it was discovered that the issues/programs lists were not being maintained, the licensee began maintaining

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<sup>1</sup> A response to the NAL is due by June 1, 2012, so this response is timely filed.

the lists. The failure to maintain the issues/programs lists was completely inadvertent.

The College respectfully argues that the omissions merit not a forfeiture, but, at most, an admonition. This request is supported by controlling case precedent.

### **Argument**

*Insufficient Basis for a “Willful or Repeated” Violation.* The College does not assert that the issues/programs lists were in the file; they were not. However, the College respectfully requests the Audio Division to find that the facts set out in the NAL do not provide sufficient basis of a “willful or repeated” violation. Under the circumstances, no forfeiture should have been assessed. Section 503(b) of the Act authorizes the Commission to assess forfeitures only against those who have “**willfully or repeatedly** failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission...” The College’s conduct was not willful. If the College had known that the issues/programs lists were not in the WTXR file, the College would have promptly corrected the situation. This is supported by the fact that the four other full-power noncommercial educational radio stations licensed to the College had complete public inspection files. The College certified to this fact and the licenses of the stations were routinely renewed.<sup>2</sup> The distinction between the four regularly-renewed stations and WTXR is that the four stations operate with a professional paid staff and provide a regular non-commercial educational service to their listeners. By contrast, WTXR is a teaching tool. Students run the station subject to the overall supervision and control of the College faculty and administrators. Unfortunately, in this case, the students did not

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<sup>2</sup> Noncommercial educational stations WEPC, Belton, South Carolina; WPFJ(AM), Franklin, North Carolina; WRAF(FM), Toccoa Falls, Georgia; and WTFH(FM), Helen, Georgia.

carry out the policies of the College in maintaining the issues/programs lists in the public file. The omission was inadvertent; not willful.

“Willful” means “the conscious and deliberate commission or omission of [a prohibited] act, irrespective of any intent to violate the Act or Commission rules.” (See Section 312(f) of the Communications Act, as amended.) In *Vernon Broadcasting, Inc. (WYGO, Corbin, KY)*, 60 RR 2d 1275, 1277, the Commission canceled a forfeiture for violation of Section 73.49(a)(8) of the Rules (inadequate fencing around the tower) because “there was no indication that the licensee was aware of the broken fence before the FOB [Field Operations Bureau] inspection or that it had failed to monitor the condition of the antenna site [material in brackets inserted].” Here, the College was unaware that the issues/programs lists were missing from the WTXR public file until it was preparing the license renewal application. In *Vernon Broadcasting*, the licensee had inspected the fence and found it intact, but an official Commission inspection revealed the damage. It should be noted that the Commission affirmed liability for an unintentional public file violation, but the licensee claimed it misinterpreted the Commission’s rules. That is not the case here. The College maintained the public files at its other stations. The omission at WTXR was an honest mistake. Because the students who would have been responsible for the maintenance of documents in the file were no longer at the College, it was not possible to reconstruct the lists in any meaningful way. Under no reasonable interpretation of the facts or the law can the College’s conduct be found to be “conscious and deliberate.”

The College also believes that, notwithstanding FCC precedent to the contrary,<sup>3</sup> the conduct does not meet the “repeated” test required by the statute. The NAL repeats the Commission’s traditional definition that “a continuing violation is “repeated” if it lasts more than one day. That may be true for some violations, such as operating over power, but it is the College’s position that the violation of which the College is charged happened on December 1, 2011, the day it reported the missing lists in the renewal application. In the next renewal cycle, should the College fail to maintain its public file for WTXR, a more plausible case would be made out for sanctions under the “repeated violation” theory. However, the College argues that the information in the NAL is not sufficient under the clear meaning of the statute to support a finding that the violation was “willful or repeated” as required to support a forfeiture under Section 503 of the Communications Act.

***The Policy of Assessing Forfeitures for Discrepancies Reported in Renewal Applications Should Be Changed.*** There is an important public interest dimension to this proceeding. Form 303-S requires the applicant to certify that it has placed documentation required by Section 73.3527 of the rules in the public file at the appropriate times. If the purpose of a sanction is to encourage licensees to keep their public files up to date, a licensee who discovers that a document is missing from the file and owns up to it should not be penalized by imposition of a forfeiture penalty. The anticipation of a significant monetary forfeiture may encourage less scrupulous broadcasters not to report missing public file documents and hope they will get away with it, especially when the penalty will be in five figures. Such licensees may reason that only in the case where the

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<sup>3</sup>*Southern California Broadcasting Co.*, 6 FCC Rcd at 4387 (1991). To the knowledge of the College, a federal Court has never ruled on the Commission’s interpretation of what is “repeated” conduct.

Commission's agents inspect a station or a third party brings the discrepancies to the Commission's attention after an affirmative certification will the licensee be taking any real risk by falsely certifying to the Commission.<sup>4</sup> Some licensees may just take that chance. Notwithstanding the Commission's usual position that a licensee is bound to answer questions on a form truthfully, and thus the disclosure is not "voluntary," an honest licensee such as the College who "comes clean" with the Commission, reports the discrepancy and pledges to do better in the future, should be praised, not penalized. The result of the Audio Division's abandonment of this policy would be that broadcasters would, at renewal time, inventory their files, report discrepancies, bring their files up to date (thus serving the public's interest) and have no fear of a forfeiture or a renewal hearing.

***Precedent Is Inconsistent for Similar Conduct.*** In *Letter to John Garziglia, Esquire, and John S. Neely, Esquire*, 20 FCC Rcd 12105 (2005), the Audio Division admonished the licensee of WKVE(FM), Semora, NC, for violation of Section 73.3526 of the Rules. In that case, missing from the public inspection file was the required copy of "The Public and Broadcasting" procedural manual. See also *Emmis Television License Corp.*, 19 FCC Rcd 22851 (EB 2004), where a station that failed to place in the public file letters from the public was admonished for violation of the public inspection file. In both these cases, the matters were brought to the Commission's attention by third parties. In the College's case, the matters were candidly admitted to in the renewal application.

***The Forfeiture Here Is also More than Triple the Amount Previously Imposed for Similar Apparent Violations.*** The forfeiture of \$10,000 for public file violations at a

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<sup>4</sup> *San Francisco Unified School District*, 19 FCC Rcd 13326 (2004).

student-run station cannot be harmonized with prior cases where an admonition or lesser amount forfeiture was imposed for violation of the same rule under *Melody Music v. FCC*, 345 F. 2d 730 ( D. C. Cir. 1965) that requires the Commission to treat similar violations of its rules similarly. In *Saga Communications of Illinois, LLC*, 26 FCC Rcd 5954 (2011) (*Review Pending*), the Audio Division assessed a forfeiture of \$3,000 for missing issues/programs lists. Moreover, in the *Saga Communications* case,<sup>5</sup> the Audio Division renewed the related application for renewal. In recent months, as discussed *infra*, this policy has changed without notice to the public.

***A Student-Run Station Should Be Afforded Lenience in Sanctions.*** Student-run stations, like WTXR, serve an important public interest need. Institutions of higher learning, like the College, use them as part of their mission to educate their student body. Here, the Division should rescind the forfeiture, not only because WTXR is student-run, but also in view of the excessively harsh and severe penalty exacted for missing issues/programs lists, which, experience teaches, are rarely, if ever, reviewed by the public and contain scant information. In contrast, a forfeiture of \$7,000 was assessed against a university for much more serious violations. Student-run station WSBU failed to file a timely renewal application and continued operations for more than four years after its license had expired before filing a renewal application and request for special temporary authority. There, the licensee argued that the failure to file a timely renewal application for the station was unintentional and resulted from staff turnover at the student-run station. *St. Bonaventure University*, 26 FCC Rcd 13355 (2011). The Division was unpersuaded.

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<sup>5</sup> *Notice of Apparent Liability* released June 23, 2005.

The College is well-aware that the Commission's policy has been to reject arguments that student-run stations should not be held to the same standards as commercial broadcasters. The College does not reject the notion that its student-run station should be required to comply with all FCC rules and policies. It is the degree of sanction that is problematic. An admonition would serve the Commission's purpose better than a forfeiture. In *Centreville City Schools Board of Education*, 25 FCC Rcd 3855 (2010), the Division reduced a \$7,000 forfeiture to \$500 because the station was a student-run Class D station. There, like WSBU, the licensee failed timely to file a license renewal application and operated without authorization for four months. While WTXR is not a Class D station, the principle is the same.

**The NAL Violates Section Title 47 USC §504--  
It Is Being Used to the Prejudice of the WTXR Renewal Application**

As noted, *supra*, the NAL includes a new component which violates Section 504 of the Act and apparently, without justification, seeks to exert undue leverage over the College in an effort to abrogate the rights of the College to contest the NAL. At NAL (¶ 8-9), the Division found that the College's "apparent violations of Section 73.3527 of the Rules do not constitute 'serious violations' warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse [fn omitted]. Further, we find that the Station served the public interest, convenience, and necessity during the subject license term." Having made those findings, pursuant to Section 308(k) of the Act, the Division is compelled to grant the application.

But that is not what the Audio Division did. It did not grant the renewal, as it did in the *Saga Communications* case. It, instead, stated that: "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 violation that would preclude grant of the application [emphasis added.].” In essence, the application for renewal of license for WTXR is being held hostage pending the payment of the forfeiture. Section 504 (c) of the Act is explicit: “In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.” Here, the Audio Division has made an affirmative finding that the license of WTXR should be renewed. By adding the *proviso* that the renewal application will be granted “upon the conclusion of this forfeiture proceeding,” the fact of issuance of a NAL is being used “to the prejudice” of the College since the forfeiture has not been paid and a court of competent jurisdiction has not finally ordered payment of the forfeiture.

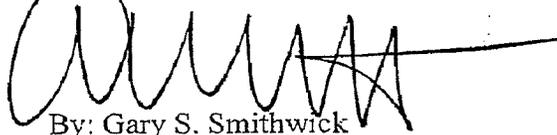
### **Conclusion**

Section 503(b)(2)E 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, any history of prior offenses, ability to pay, and such other matters as justice may require. Imposing a \$10,000 forfeiture against the licensee of a student-run noncommercial educational station for failing to maintain issues/programs lists that no member of the public will probably ever review violates this mandate as it ignores the degree of gravity of the violation and ignores the requirements of justice. In

light of the foregoing, The College respectfully requests the Audio Division to vacate the NAL, terminate this proceeding, and immediately grant the pending renewal application.

Respectfully submitted,

**TOSCOA FALLS COLLEGE**

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', with a long horizontal line extending to the right.

By: Gary S. Smithwick  
Its Counsel

**Smithwick & Belendiuk, P.C.**  
5028 Wisconsin Avenue, N.W.  
Suite 301  
Washington, DC 20016  
202-363-4560

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