

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the matter of)

Northern Broadcasting Company, Inc.)
Licensee of Station WNCE-CD)
Glens Falls, NY)

Facility ID No. 450
NAL/Acct. No. 20154
FRN: 0006053771

RECEIVED - FCC

AUG 20 2015

To: Chief, Video Division, Media Bureau

Federal Communications Commission
Bureau Office

RESPONSE TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

1. Introduction. This is the response to the above-captioned Notice of Liability for Forfeiture ("NAL") and is filed on behalf of Northern Broadcasting Company, Inc., licensee of WNCE-CD ("Licensee"). The Licensee requests that the forfeiture be cancelled because Licensee's compliance with Class A documentation requirements was previously considered by the Commission, and the Commission notified the Licensee that it was in compliance and the matter was closed. The NAL also erroneously holds the Licensee responsible for the omissions of a prior owner of the Station. Finally, payment of the forfeiture would cripple a very hard-working, locally owned and managed station and would seriously undermine fulfillment of the important goals of local programming, local ownership and management, and local community service that Congress intended and the Commission endorsed when Class A stations were created in the Community Broadcasters Protection Act of 1999.

2. Previous Consideration by the Commission. This is the *third* time that the Media Bureau ("Bureau") has come after WNCE-CD for Class A documentation requirements. There has to be a limit to how many times a Licensee can be called to account for the same actions, especially where the Licensee worked very hard to correct any omissions, and the Bureau made a *written finding* that the Licensee was "in compliance" and the matter was "closed."

3. The Bureau first wrote to WNCE-CD about Children's Television reports on March 28, 2011. Of the 13 late-filed reports listed in footnote 6 of the NAL, 11 were for periods prior to the 2011 letter. The Licensee responded on April 28, 2011 and supplemented that response on April 2, 2012, pursuant to a request by the Media Bureau ("Bureau") Staff. The Bureau took no further action.¹

4. A second compliance inquiry letter was sent to the Licensee on March 12, 2013, a letter similar to that sent to many other Class A stations. The licensee responded on April 22, 2013 (following timely-filed requests for extension of time). On April 30, 2013, the Bureau wrote to the Licensee stating that WNCE-CD "is now in compliance with the public file issues raised in the Letter. As a result, that inquiry is now closed." A copy of that letter ("Compliance Letter") was included as an attachment to the licensee's 2015 license renewal, File No. BRDTA-20150120AJE.

5. The NAL followed on July 21, 2015, raising Children's Reports issues going back to 2009 – all prior to the Bureau's March 12 and April 30, 2013 letters, with 11 out of 13 incidents relating to dates prior to the Bureau's letter of March 28, 2011. If the Licensee had entered into a Consent Decree instead of focusing its attention on compliance, the Commission would have been legally foreclosed from further considering pre-2013 Children's Reports further.² In effect, then, the NAL proposes to punish the Licensee because it was found to be in compliance instead of being found to be in violation. Regardless of whether or not the Constitutional criminal law concept of "double jeopardy" applies literally here, it is nevertheless fundamentally unjust to go after a Licensee three times for the same thing and to propose a forfeiture after the Licensee was

¹ While two reports mentioned at footnote 6 were due after the 2011 letter, one of those was filed only one day late.

² See, e.g., *Emmis Radio License, LLC*, 22 FCC Rcd 16637 (MB 2007), *recon. den.*, 24 FCC Rcd 369 (MB 2009), *rev. den.*, 29 FCC Rcd 2571 (2014); *Tama Broadcasting*, 24 FCC Rcd 1612 (MB 2009); and *Citicasters Licensee LP*, 22 FCC Rcd 19324 (MB 2007).

found in "compliance" and the inquiry was "closed." There has to be finality to Commission actions; indeed, a Commission Order becomes final 40 days after the latest of its release date, public notice of the action, or publication in the *Federal Register*.³ The Compliance Letter made a finding that became final long ago. If the Commission can re-open its former finding now, no licensee will be safe from continued prosecution for the same actions throughout an entire 8-year license term.

6. Responsibility for Prior Owner. WNCE-CD underwent a "long form" transfer of control under File No. BTCVA-20100729AEK, consummated on September 24, 2010. Under existing regulations and a consistent line of published decisions and notices, current owners are not responsible for actions of prior owners. While the Commission may be able to change its rules after proper notice and opportunity for comment, it may not do so retroactively and without notice to the public and an explanation of its reasons. As the Supreme Court has confirmed, "[an] agency may not... depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 47 CR 933 (2009).

7. The Commission has made it clear in its own rules that licensee responsibility for public file completeness runs only forward from consummation of a long-form assignment or transfer of control. Section 73.3526(d) is explicit:

(d) Responsibility in case of assignment or transfer. (1) In cases involving applications for consent to assignment of broadcast station construction permits or licenses, with respect to which public notice is required to be given under the provisions of § 73.3580 or § 73.3594, the file mentioned in paragraph (a) of this section shall be maintained by the assignor. If the assignment is consented to by the FCC and consummated, *the assignee shall maintain the file commencing with the date on which notice of the consummation of the assignment is filed with the FCC.* The assignee shall retain public file documents obtained from the assignor for the period required under these rules.

³ See 47 CFR § 1.108.

(2) In cases involving applications for consent to *transfer of control* of a permittee or licensee of a broadcast station, the file mentioned in paragraph (a) of this section shall be maintained by the permittee or licensee. *[emphasis added]*

8. While assignments and transfers are dealt with in separate sub-sections of the rule, and the language about the limited responsibility of a new owner appears in only the assignment sub-section, the Commission has previously publicly interpreted the concept of when responsibility of a new owner begins to apply to both assignments and transfers of control. In a public notice, *Media Bureau Announces Certain Revisions to Instructions to Form 303-S*, 18 FCC Rcd. 9896, DA 03-1437, released April 30, 2003, the Bureau stated that "if the station license was assigned or transferred during the subject license term pursuant to a 'long-form' application on FCC Form 314 or 315, the renewal applicant's certifications should cover only the period during which the renewal applicant held the station's license." This principle was affirmed in *Citadel Broadcasting Company*, 25 FCC Rcd. 15060, DA 10-2051 (MB, 2010), where the Bureau accepted the licensee's argument based on Section 73.3526(d) and on the cited public notice and limited a station's liability after a long-form transfer to post-consummation omissions.

9. In light of the well-established case law, formally published and not based on informal Staff oral advice, and which has not been changed by published formal rulings or public notices, the Licensee cannot be held responsible for filings due prior to September 24, 2010. Looking at events after that date, the Licensee is at most responsible for only four late filings, one of which was only a single day late,⁴ and a second of which was due only six days after consummation of the transfer of control.

10. Local Ownership and Local Service. WNCE-CD, both before and after the 2010 transfer of control, has been a locally owned and managed small business. It has struggled to fulfill

⁴ See fn. 6 of the NAL.

the ideals underlying the creation of Class A stations. The sole owners of the Licensee are Jesse H. Jackson, III, and Antoinette Jackson, who are husband and wife. They live in Glens Falls, New York, which is WNCE-CD's community of license.⁵ In his letter of March 30, 2012, to the Video Division, submitted on April 2, 2012, Mr. Jackson stated:

I'm asking you to go to looketvonline.com to see what I have accomplished with this station. Very few LPTV's have the dedication and sophistication we do. We are a "face" to the communities we serve.

Ms. Henry, because of the recession, this station lost close to \$300,000 in the last three years. It was the hardest time in my life. This year we will come within \$1,500 of breaking even. My staff is very dedicated and if you go to the website you will see we provide a "voice of record" for almost every issue that affects our viewers.

I also managed to go digital and get cable coverage. You have a lot of experience in this business so you know what I managed to accomplish with nothing more than sheer determination, support and a degree of talent.

If you do not take the time to consider these factors, we will be out of business.

11. The Licensee is not submitting tax returns in support of its inability to pay, because it cannot meet the test based on 7.7% of gross annual revenue that the Commission has used in the past. But that test is completely unrealistic, if not arbitrary and capricious, for a small business enterprise that struggles every day to make ends meet and has to comply with costly regulations, including personnel to staff a main studio, main studio space rent, presenting local and children's programming, and filing large amounts of paper work every three months, before the Licensee even begins to pay for local programming, news, and all the other things the community enjoys on the station.

12. The quality service provided by WNCE-CD is widely recognized by the community, as well as by government officials who serve the community. In 2012, when the

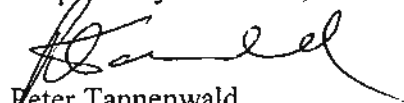
⁵ See Ownership Report, File No. BOR-20131218EZX. The Biennial Ownership Report that will be filed later this year will show that the other two 5% owners listed in the 2013 report have since withdrawn and will also show an updated address for Mr. and Mrs. Jackson.

Licensee responded to the Bureau's 2011 letter, Congressman Chris Gibson went to the time and trouble to write a detailed letter to the Bureau regarding the importance of WNCE-CD to the community and stating that "I think a situation in which WNCE's limited resources had to be diverted away from local programming and employment in an attempt to reconcile an unintentional paperwork lapse would be unfortunate." A copy of that letter is attached. The points made in the letter remain fully valid today.

13. Conclusion. This is a case where, if the Bureau does not cancel the NAL, it will be imposing a penalty for a paperwork violation, however important the paperwork may be, that will force diversion of funds from local programming and local job creation. It will be form over substance, since no one has questioned the station's actual ongoing provision of local and Children's programming. It will force a reduction of service to the public, which is the opposite of what the Commission was created to do and which it should always strive to do. The Bureau also cannot lawfully hold the Licensee today responsible for omissions that occurred prior to the 2010 long form transfer of control, nor can or should it re-open matters that it declared closed in writing in 2013.

14. Accordingly, Northern Broadcasting Company, Inc. requests that the proposed forfeiture be cancelled and that at most, the Licensee be admonished for post-2010 late filings.

Respectfully submitted,



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HOUSE ARMED SERVICES COMMITTEE

Subcommittee on Emerging Threats
and Capabilities

Subcommittee on Readiness



Congress of the United States
House of Representatives
Washington, DC 20515

June 7, 2012

HOUSE AGRICULTURE COMMITTEE

Subcommittee on Livestock, Dairy, and
Poultry

Subcommittee on General Farm
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<http://gibson.house.gov>

William T. Lake
Chief, Media Bureau
Federal Communications Commission
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Dear Mr. Lake:

Jesse Jackson, majority owner and manager of Station WNCE-CD, Glens Falls, New York, is a resident of the Congressional District that I represent. Mr. Jackson notified my office regarding a discovery by the Commission last year that WNCE neglected to file certain reports regarding its programming for children.

It is my understanding that WNCE is adequately providing all required programming, but failed to file necessary paperwork during a change in management. I understand the need for licensees to comply with FCC rules and to properly document their compliance with programming requirements. I also appreciate the need for the Commission to enforce these requirements. However, I think a situation in which WNCE's limited resources had to be diverted away from local programming and employment in an attempt to reconcile an unintentional paperwork lapse would be unfortunate.

During the past couple of years, WNCE has succeeded in getting carriage on Time-Warner's cable TV system and converting to digital operation at what I understand was significant and burdensome cost, especially for a small business in a small market. According to Mr. Jackson, the station is just breaking even for the first time and now can finally envision the possibility of surviving over the long term.

I personally know the management and staff of WNCE. WNCE is very valuable to my District and serves an important function in the local community. It has brought new local programming to Saratoga, Warren, and Washington Counties, including the communities of Glens Falls and Saratoga Springs. These counties lie in the shadow of the Albany-Schenectady-Troy Tri-Cities urban cluster and do not otherwise get the attention to their local needs as the Albany area stations do not have news bureaus in the three counties. I fear that reductions in WNCE's programming would negatively and significantly affect my constituents.

I ask that you take this information into consideration as you continue to review this matter. Please keep me updated of any developments on this case.

Sincerely,

Chris Gibson
Member of Congress

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