

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

In re Application of)	
)	
PECONIC PUBLIC BROADCASTING)	Facility ID No. 38340
)	NAL/Acct. No. MB-201541410015
For Renewal of License for)	FRN: 0020296422
Station WPPB(FM))	File No. BRED-20140203ARX
Southampton, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 2016

Released: June 23, 2016

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us the Petition for Reconsideration (Petition) filed on April 4, 2016, by Peconic Public Broadcasting (Peconic), licensee of noncommercial educational (NCE) Station WPPB(FM), Southampton, New York (Station). It seeks reconsideration of the Media Bureau, Audio Division (Bureau) *Forfeiture Order*¹ assessing a \$10,000 fine for willfully and repeatedly violating Section 73.3527 of the FCC's rules (Rules) by failing to properly maintain a public file for the Station.² For the reasons discussed below, we dismiss the Petition in part and otherwise deny it.

II. BACKGROUND

2. On February 3, 2014, Peconic filed the above-captioned license renewal application for the Station (Application), in which it stated that the Station's public file was missing 13 quarterly issues-programs lists dating back to December of 2010.³ On March 11, 2015, the Bureau issued the *Notice of Apparent Liability* to Peconic for its violations of Section 73.3527.⁴ On April 10, 2015, Peconic filed a Response to the *NAL* (Response),⁵ seeking rescission or reduction of the fine, arguing that: (1) the Commission should apply the "hard look" waiver standard to the circumstances surrounding the violations;⁶ (2) the violations were "entirely inadvertent and in no way purposeful or willful";⁷ and (3) Peconic's previous clean record and other factors such as the "local nature of the broadcast service

¹ *Peconic Pub. Broad.*, Forfeiture Order, 31 FCC Rcd 1904, 1905, para. 4 (MB Mar. 7, 2016) (*Forfeiture Order*).

² 47 CFR § 73.3527.

³ Application at Section III, Question 3.

⁴ *Peconic Pub. Broad.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 2205, 2208, para. 10 (MB 2015) (*NAL*).

⁵ Peconic titled the Response "Petition for Reconsideration," but the *NAL* invited a response, and the Bureau treated it as such.

⁶ Response at 2 citing *KSCT-TV v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983) (*KSCT-TV*).

⁷ *Id.*

provided, and the value of the service provided to the community,” should mitigate the forfeiture amount.⁸

3. On March 7, 2016 the Bureau issued the *Forfeiture Order* rejecting those arguments, finding that: (1) Section 503 of the Communications Act of 1934, as amended (the Act) and Section 1.80 of the Commission’s Rules (Rules), not a “hard look” waiver standard, are controlling for the purpose of assessing forfeiture reduction requests;⁹ (2) the violations were willful, as “willful” is defined by the Act, because Peconic’s failure to maintain a public inspection file was a “conscious and deliberate” omission;¹⁰ and (3) a downward adjustment of the forfeiture amount based on Peconic’s history of compliance with the Rules was not appropriate due to the extensive violations that occurred.¹¹ The Bureau also rejected Peconic’s financial hardship claim because it failed, despite repeated staff requests, to provide required supporting documentation.¹²

4. In the Petition, Peconic argues that the *Forfeiture Order* failed to sufficiently consider relevant financial factors that would require the Commission to reduce the forfeiture amount. It argues that: (1) reliance on “gross revenues” as the best determinant of a licensee’s inability to pay fails to consider the disparate impact those factors have on small public broadcasters; (2) the *William Penn University*¹³ policy applied to NCE stations staffed entirely by student volunteers should also apply to “stand alone non-profit organizations”¹⁴ such as Peconic; (3) Peconic cannot be faulted for failing to document its claim of financial hardship because the Commission was required to take official administrative notice of Peconic’s publicly available revenue information¹⁵; and (4) by including the language “such other matters as justice may require,” along with the enumerated factors of consideration listed in Section 1.80(b)(8) of the Rules,¹⁶ Congress intended the Commission to also consider fairness, equity, and public interest policies when determining whether to reduce the amount of a forfeiture.

III. DISCUSSION

5. Reconsideration will be granted only when the petitioner shows either a material error in the original order, or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.¹⁷

6. The Petition includes three arguments that were not previously presented: (1) that financial factors disparately affecting small broadcasters must be considered in determining ability to pay,¹⁸ (2) that Peconic should be treated the same as a student-run NCE station, and (3) that the

⁸ *Id.* at 3.

⁹ *Forfeiture Order*, 31 FCC Rcd at 1905, para. 4.

¹⁰ *Id.* at 1906, para. 6.

¹¹ *Id.* at 1906, para. 7.

¹² *Id.* at 1903, para. 5.

¹³ *William Penn Univ.*, Policy Statement and Order, 28 FCC Rcd 6932, 6939, para. 14 (MB 2013) (*William Penn*).

¹⁴ Petition at 2.

¹⁵ *See id.* at 3.

¹⁶ 47 CFR § 1.80(b)(8) (factors considered in determining the amount of the forfeiture penalty).

¹⁷ 47 CFR § 1.106(c) (referencing 47 CFR § 1.106(b)(2)).

¹⁸ Peconic states that “basing forfeitures on gross revenues has a disparate impact on small public broadcasters such as PPB” because “such broadcasters frequently operate without significant reserves or access to adequate credit resources.” Petition at 2. Peconic, however, never claims that it was actually unable to pay the forfeiture or actually lacks reserves and access to credit. Peconic’s argument also mischaracterizes the *Forfeiture Order*’s reliance on *PJB Communications*, incorrectly alleging the case was cited “to support [the Commission’s] adoption of a strict

Commission was required to take official administrative notice of Peconic's revenue information. Peconic has not provided evidence of changed circumstances, or facts or arguments that could not have previously been known by the exercise of ordinary diligence. All of these arguments could have been raised in the Response. Accordingly, we will dismiss the Petition to the extent that it relies on these arguments.¹⁹

7. Furthermore, we disagree with Peconic's proposal to extend the *William Penn* mitigation policy for first-time-offending NCE stations that are staffed entirely by student volunteers.²⁰ It mischaracterizes the policy by stating that it applies to "primarily" student-run stations and that the underlying rationale is simply the small budget of those stations.²¹ To the contrary, the *William Penn* order states that the policy is limited to NCE stations "staffed *completely* by student volunteers," differentiating those stations from others "predominantly" staffed by student volunteers, and expressly disqualifying stations with *any* professional staff other than a faculty advisor.²² The decision explains that those stations are valuable because they provide a unique educational opportunity for students who have expressed interest in pursuing broadcasting careers, but forfeitures threaten the existence of those stations.²³ Two rationales for limiting the policy to entirely student-run stations, identified in the *William Penn* decision, are not true of Peconic: (1) students who are young, busy with other curricular and extracurricular commitments, and unlikely to have had any experience in regulatory compliance matters, are more prone to unintentionally committing a documentation violation than experienced professional staff;²⁴ and, (2) offering a one-time opportunity to enter into a consent decree ensures education and training on regulatory compliance issues for students who may go on to broadcast careers.²⁵ Unlike the narrow class of stations eligible for the *William Penn* policy,²⁶ Peconic's employees admittedly have ample experience and knowledge to comply with regulations.²⁷ Additionally, even eligible stations staffed completely by student volunteers must submit a copy of the station's operating budget in order to qualify for the *William Penn* mitigation policy,²⁸ whereas here Peconic ignored repeated staff requests for such documentation.²⁹

standard for the ability to pay" based on gross revenues. Petition at 1. In fact, *PJB Communications* was cited to explain that willful violations can be the result of inadvertent error, making no mention of gross revenues. *Forfeiture Order*, 31 FCC Rcd at 1906, para. 6 & n.19.

¹⁹ See, e.g., *Lake City Lighthouse, Inc.*, Letter Order, 28 FCC Rcd 411 (MB 2013) (dismissing petition for reconsideration that raised arguments which could have been raised earlier); *CCBL Broadcasting Licenses*, 23 FCC Rcd 4526, Letter Order (MB 2008) (same).

²⁰ *William Penn Univ.*, 28 FCC Rcd at 6939.

²¹ Petition at 2.

²² *William Penn Univ.*, 28 FCC Rcd at 6932 n.2 (emphasis added).

²³ *Id.* at 6934.

²⁴ See *Id.* at 6933, para. 3.

²⁵ See *Id.* at 6936, para. 9.

²⁶ At the time of that decision, fewer than 500 out of nearly 3,800 licensed NCE FM stations were entirely student-run.

²⁷ Response, Declaration of Peconic President Wallace A. Smith, at 5, para. 5 (declaring that, as a veteran broadcaster, Smith understands that the public file is one of the most important rules).

²⁸ *William Penn Univ.*, 28 FCC Rcd at 6938, para. 12.

²⁹ See, e.g., *Lincoln County School Dist.*, Order and Consent Decree, 30 FCC Rcd 6925, 6928, para. 3 (MB 2015).

8. Additionally, we reject Peconic's argument that the forfeiture amount should be reduced based on the language "such other matters as justice may require" in Section 503(b) of the Act,³⁰ which Peconic argues to mean "fairness, equity, and public interest policies."³¹ Section 1.80(b)(8) of the Rules provides specific standards for upward or downward adjustments of forfeitures,³² expressly identifying both "history of overall compliance" and "inability to pay" as considerations for downward adjustment. The Commission held in adopting the current version of Section 1.80 that "base forfeiture amounts may be increased or decreased upon evaluation of the unique facts of the case in light of the adjustment factors. These factors mirror the concerns outlined in Section 503 of the Act regarding the violation as well as the violator."³³ The Commission thus accounted for "fairness," "equity," and "public interest policies" when it promulgated the Section 1.80(b)(8) adjustment criteria. In evaluating Peconic's Response, the Bureau properly took into account Section 503(b) considerations. Accordingly, Peconic's argument is without merit.

9. We note also that the Commission contemplated inability to pay arguments such as that advanced by Peconic here. In amending Section 1.80, the Commission indicated that it "would consider objective documented evidence in evaluating a violator's ability, or lack thereof, to pay a forfeiture."³⁴ It is well settled that "[t]he Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner 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 petitioner's current financial status."³⁵ Despite numerous requests from Commission staff, Peconic failed to provide any documentation to support its claim.

10. Finally, to the extent that Peconic argues that the baseline forfeiture amount disproportionately impacts small public broadcasters, the Commission has previously held that its forfeiture policy complies with the Small Business Regulatory Enforcement Fairness Act (SBREFA),³⁶ and properly considers factors that could uniquely burden small broadcasters, including ability to pay.³⁷

IV. ORDERING CLAUSES

11. We find that Peconic has not shown the existence of any material error in the original order, and its new arguments are not based on changed circumstances or new facts that could not have been known during its last opportunity to present such matters. Accordingly, IT IS ORDERED, that the

³⁰ Section 503(b)(2)(E) indicates that, in determining the amount of a forfeiture penalty, the Commission "shall 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."

³¹ Petition at 3.

³² See 47 CFR § 1.80(b)(8).

³³ See Federal Communications Commission, Forfeiture Proceedings, 62 Fed. Reg. 43474, 43475, para. 5 (July 28, 1997) (*FCC Forfeiture Proceedings*); see also *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules*, Report and Order, 12 FCC Rcd 17087, 17100, para. 27 (1997) (*Forfeiture Policy Statement*).

³⁴ See *FCC Forfeiture Proceedings*, 62 Fed. Reg. at 43475, para. 6; see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17158, para. 113.

³⁵ See *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7441, para. 28 (2004); see also *La Tremenda Radio Mexico Inc.*, Forfeiture Order, 26 FCC Rcd 9296, 9298, para. 8 (MB 2011).

³⁶ See 5 U.S.C. §§ 603-604.

³⁷ *Pac. Empire Radio Corp.*, Forfeiture Order, 29 FCC Rcd 1177, 1179-1180, para. 6-7 (2014) (finding no merit in petitioner's contention that a \$25,000 forfeiture for public inspection file violations should be reduced because petitioner was a small broadcaster).

Petition for Reconsideration filed by Peconic Public Broadcasting on March 7, 2016, IS DISMISSED to extent indicated above and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
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Media Bureau