

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

In re Applications of)
Citicasters Licenses, L.P.) NAL/Acct. No. MB-200741410372
) FRN: 0004953659
)
For Renewal of License for Station) BRH-20050728ADU
KSJO(FM), San Jose, California) Facility ID No. 4117
)
and)
)
AMFM Broadcasting Licenses, LLC) NAL/Acct. No. MB-200741410373
) FRN: 00012325395
)
For Renewal of Licenses for Stations) FCC File Nos.
KNEW(AM), Oakland, California) BR-20050801DPR
) Facility ID No. 59966
)
KYLD(FM), San Francisco, California) BRH-20050728AKR
) Facility ID No. 59989
)
)
KMEL(FM), San Francisco, California) BRH-20050728AKL
) Facility ID No. 35121
)

MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY

Adopted: November 2, 2007

Released: November 5, 2007

By: Chief, Media Bureau

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I. INTRODUCTION

1. The Media Bureau has under consideration the above-captioned license renewal applications (the “Renewal Applications”) of AMFM Broadcasting Licenses, LLC (“AMFM Broadcasting”), and Citicasters Licenses, L.P. (“Citicasters”), both of which are subsidiaries of Clear Channel Communications, Inc. (“Clear Channel”).¹ Also on file are: (1) Petitions to Deny, filed by Youth Media Council and Media Alliance (collectively, “YMC”), seeking denial of the Renewal Applications; (2) a Petition to Deny filed by India Weeks and James Burns on October 31, 2005, seeking denial of KSJO(FM)’s renewal application (the “Weeks Petition”); (3) informal objections seeking denial of license renewals of KNEW(AM), KYLD(FM), and KMEL(FM), filed by the objectors listed in the Appendix;² and (4) related pleadings.³

2. We also address disclosures made by AMFM Broadcasting in its license renewal application for KNEW(AM), Oakland, California, that, during the station’s preceding license term, its public inspection file was missing certain quarterly issues and programs lists. Based on our review of the facts and circumstances, we conclude that AMFM Broadcasting apparently has willfully and repeatedly violated Section 73.3526 of the Commission’s Rules (the “Rules”)⁴ at

¹ Clear Channel and its subsidiaries are collectively referred to herein as “Clear Channel.”

² Specifically, YMC submitted the following petitions on October 28, 2005: KSJO(FM) Petition to Deny; KYLD/KMEL Petition to Deny, and KNEW(AM) Petition to Deny. YMC’s Petitions, the Weeks Petition, and the informal objections raise substantially the same or overlapping issues. For administrative efficiency, we consolidate the pleadings on our own motion and address the issues accordingly. 47 C.F.R. § 1.227(a).

³ Clear Channel filed an Opposition to Petition to Deny KSJO(FM)’s renewal application (“KSJO Opposition”), and a Consolidated Opposition to Petitions to Deny the license renewals of KMEL(FM), KNEW(AM), and KYLD(FM) (the “Consolidated Opposition”) on November 28, 2005. YMC filed replies to the KSJO Opposition and the Consolidated Opposition on December 23, 2005. YMC asserts that Clear Channel’s Oppositions were untimely filed and should therefore be barred from consideration. Section 1.45(b) of the Rules requires oppositions to be filed within 10 days after a motion or request is filed. See 47 C.F.R. § 1.45(b). YMC’s petitions were filed on October 28, 2005. Thus, Clear Channel’s Oppositions were due November 7, 2005. However, it did not file its Oppositions until November 28, 2005, nearly 3 weeks after the filing deadline. As such, we agree that Clear Channel failed to comply with the filing requirements prescribed in Section 1.45(b) of the Rules. While we do not condone Clear Channel’s failure to file its Oppositions in a timely manner, we will consider them in the interest of having a complete factual record in this proceeding. See, e.g., *In the Matter of: KM Television of El Dorado, LLC v. Classic Cable of Louisiana, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 12845, 12848 n. 3 (MB 2004); *Donna J. Olson*, Order, 18 FCC Rcd 5075, 5078 n. 8 (WTB Mar. 20, 2003).

⁴ 47 C.F.R. § 73.3526.

KNEW(AM). As such, we propose a forfeiture against AMFM Broadcasting in the total amount of \$10,000. We also conclude that Citicasters apparently has willfully violated Section 1.17(a) of the Rules for falsely responding “Yes” to Section II, Item 4, of KSJO(FM)’s renewal application,⁵ and propose a forfeiture against Citicasters in the total amount of \$10,000. As discussed below, we will grant the YMC Petitions to the extent indicated, otherwise deny the petitions to deny and informal objections, and grant the Renewal Applications.

II. THE RENEWAL APPLICATIONS

3. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k)(1) of the Communications Act of 1934, as amended (the “Act”).⁶ That section provides that we are to grant the application if, upon consideration of the application and pleadings, we find that, with respect to the station that is the subject of the renewal application, during the preceding term of the station’s license: (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.⁷ 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.”⁸

4. The petitioners and informal objectors raise a number of identical or related issues in their pleadings, including arguments that Clear Channel provides insufficient public affairs programming, fails to provide reasonable access to its public files, lacks emergency preparedness in the Bay Area, and broadcasts offensive programming. In determining whether allegations raise a substantial and material question of fact requiring an evidentiary hearing, we are guided by the statutorily prescribed two-step process of Section 309(d)(1) of the Act. This section mandates that we must first determine whether the allegations of fact, if true, constitute a *prima facie* case that grant of the applications would be inconsistent with Section 309(k) of the Act.⁹ If so, the second step is for the Commission to determine whether, “on the basis of the applications, the pleadings filed, or other matters which it may officially notice,” a “substantial and material question of fact is presented.”¹⁰ We must weigh against the allegations all evidence before us and, on the basis of all of these materials, we must decide whether the ultimate question of fact is “substantial” (*i.e.*, “whether the totality of the evidence arouses a sufficient doubt on the

⁵ See BRH-20050728ADU.

⁶ 47 U.S.C. § 309(k).

⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁹ 47 U.S.C. §§ 309(d)(1), 309(k).

¹⁰ 47 U.S.C. § 309(d).

point that further inquiry is called for”).¹¹ The Commission may focus on either of the two steps, as it deems appropriate, in resolving the issues raised by a petition.¹²

5. As discussed in detail below, after consideration of the totality of the evidence before us, we find that the petitioners and informal objectors have failed to raise a substantial and material question of fact calling into question Clear Channel’s character or its basic qualifications as a licensee so as to require an evidentiary hearing. Instead, we conclude that Stations KNEW(AM), KYLD(FM), KMEL(FM) and KSJO(FM) have served the public interest, convenience, and necessity during their subject license terms; there have been no serious violations of the Act or the Rules; and that there have been no other violations which, taken together, constitute a pattern of abuse. Accordingly, we deny the petitions and informal objections and grant the Renewal Applications.

A. PROGRAMMING ISSUES

1. Lack of Public Affairs Programming

6. *Background.* YMC maintains that the Commission requires broadcasters to air programming that meets the needs and interests of *all* significant groups within its community.¹³ It contends that KYLD(FM), KMEL(FM), and KNEW(AM) fail in this regard because they do not broadcast meaningful public affairs programming which addresses the needs and interests of the “Bay Area’s diverse wide ranging community.”¹⁴ YMC bases these assertions on media studies and on the listening experiences of its members.

7. YMC submits two declarations to support its claim that KYLD(FM) fails to broadcast any programming that addresses the needs of the local community. Jeff Perlstein, an Oakland resident and the Executive Director of Media Alliance, declares that he listens to KYLD(FM) and has never heard any advertising for local public affairs programming, nor has he seen any references to local programming on the station’s website.¹⁵ Jennifer Soriano, a San Francisco resident and YMC’s program director, declares that she listens regularly to both KMEL(FM) and KYLD(FM) and has never heard local news broadcast on either station.¹⁶

8. In addition, YMC submits a media study it conducted over a three week period between September 10, 2002, and October 6, 2002, entitled, “Is KMEL the People’s Station?” (“KMEL Study”).¹⁷ During the course of the study, ten researchers listened to 24 “drive time” broadcasts (6 a.m.-10 a.m. and 3 p.m.-6 p.m.) and four broadcasts of KMEL’s nationally-syndicated weekly talk show, “Street Soldiers.” According to YMC, the study concludes that: “(1) KMEL routinely excludes the voices of local youth organizers and artists; (2) KMEL

¹¹ *Citizen for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985) (citing *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 330 (D.C. Cir. 1974); *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968)).

¹² *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

¹³ KNEW Petition at 4; KMEL/KYLD Petition at 4, both citing *In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12425 (2004) (“*Localism NOP*”). *See also* KNEW Petition at 10.

¹⁴ KNEW Petition at 10.

¹⁵ KYLD/KMEL Petition, Declaration of Jeff Perlstein.

¹⁶ KYLD/KMEL Petition, Declaration of Jennifer Soriano.

¹⁷ KYLD/KMEL Petition, Exhibit A.

neglects discussion of policy debates affecting youth and people of color; (3) KMEL focuses disproportionately on crime and violence, and (4) KMEL has no clear avenues for listeners to hold the station accountable.”¹⁸ YMC also contends that during the study, it “never once heard a public service announcement from a single community organizing group on KMEL-FM.”¹⁹

9. Finally, YMC offers a media study to support its claim that KNEW fails to broadcast any programming that addresses the needs of the local community (“KNEW Study”).²⁰ Participants in the study reviewed two weekday programs – the Jeff Katz Show and the Michael Savage show – during a three week period from August 8, 2005, through August 26, 2005, for a total of nineteen hours of listening time. In reviewing the Jeff Katz Show, which deems itself to be “local talk for the Bay Area,” YMC concluded that there was still a “critical absence of local content.” Specifically, the KNEW Study concluded that Mr. Katz addressed local issues in 28% and local events in 45% of the programs studied. According to YMC, neither host featured any local guests on their programs during the course of the study.²¹

10. In its Consolidated Opposition, Clear Channel argues that KMEL(FM), KNEW(AM) and KYLD(FM) each broadcast programming responsive to the interests and needs of the Bay Area community during the preceding license term. Clear Channel describes activities conducted by each station designed to ascertain the needs and interests of the community, and points to programs on each station that address issues of local concern.²² For example, Clear Channel asserts that it “expects every individual within each station’s Promotions and Programming department ... to address community affairs as part of his or her daily job.”²³ Each station’s Promotions Director must conduct five ascertainment activities quarterly and follow up with action items that address the issues raised. In addition, Clear Channel’s Community Affairs Manager for Clear Channel Radio San Francisco, Mr. Gerald Wayne Dove, declares that he meets with ten to fifteen community leaders each week to discuss local issues. Each station then uses the information gathered from these ascertainment activities to plan public affairs programming. According to Mr. Dove, each station broadcasts weekly public affairs programs, numerous public service announcements (“PSAs”), and news, weather and traffic reports several times daily.²⁴

11. In addition, Clear Channel describes public affairs programs and local talk programs offered on each station, including: (1) KMEL’s “Street Soldiers” program, a call-in radio talk show which focuses on youth violence; (2) KNEW’s Armstrong & Getty show and the Jeff Katz Show, both of which address topics of local and national importance, and (3) KYLD’s weekly public affairs program entitled, “Que Pasa.”

¹⁸ KYLD/KMEL Petition at 11.

¹⁹ *Id.*

²⁰ KNEW Petition, Exhibits A and B.

²¹ *Id.* at 6.

²² While Clear Channel describes its various ascertainment activities, it correctly notes that the Commission abolished specific ascertainment and programming requirements over 20 years ago. *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 1009-10 (1981).

²³ Consolidated Opposition at 7.

²⁴ Consolidated Opposition, Declaration of Gerald Wayne Dove. In its reply, YMC argues that Clear Channel has submitted scant evidence that demonstrates that the station licensees have conducted genuine ascertainment activities or broadcast meaningful programs that address local needs. Consolidated Reply at 4-6.

12. Finally, Clear Channel attacks the methodology and findings of the KNEW Study. Clear Channel argues that YMC “cannot possibly justify their sweeping generalizations about KNEW programming as a whole” from its review of 36 hours of programming. Clear Channel argues that YMC fails to justify why it chose to review the Jeff Katz Show and the Michael Savage show to the exclusion of other programs, and notes that YMC does not define what constitutes “local content.” Accordingly, Clear Channel contends that YMC has failed to show that it has abused its discretion in its issues programming choices with respect to KMEL(FM), KNEW(AM), and KYLD(FM).²⁵

13. *Discussion.* We find that YMC has not made a *prima facie* case that these stations have failed to meet their public interest obligations to present programming that is responsive to the needs and interests of the Bay Area community. We grant licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the best way to address those issues. The Commission will defer to the broadcaster's judgment absent a showing that the broadcaster was “unreasonable or discriminatory in its selection of issues” or that the licensee has “offered such nominal levels of responsive programming as to have effectively defaulted on its obligation” to contribute to the discussion of issues facing its community.²⁶ In this case, YMC has not met its burden to show that the licensees have abused their discretion.²⁷

14. Specifically, we find that the declarations submitted by YMC lack any probative value as to whether KMEL, KYLD and KNEW broadcast programs that address issues of local importance. While Mr. Perlstein and Ms. Soriano both state that they listen to the respective stations regularly and that they have never heard any local news or public affairs programming advertised or broadcast on these stations, neither Mr. Perlstein nor Ms. Soriano provides us with any detailed information regarding when they listen to the stations or what they consider to be issue-responsive programming. As such, neither declaration provides any information that would be helpful to make a determination in this matter.

15. Further, we find that both the KMEL Study and the KNEW Study only analyze a small sampling of each station's programming broadcast over the preceding license term – approximately three weeks out of an eight-year license term.²⁸ Moreover, neither the studies nor the petitions filed by YMC identify any criteria for what constitutes “public affairs” programming, nor do they appear to take into account the licensees' local news, weather and

²⁵ Consolidated Opposition at n. 17. YMC also argues that KSJO fails to broadcast any programming that addresses issues facing the community. KSJO Reply at 10. However, because YMC first raises this argument in its reply brief, we will not consider its merits. 47 C.F.R. § 1.45(c).

²⁶ *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) (“*Philadelphia Station License Renewals*”), citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (subsequent history omitted).

²⁷ *Id.*

²⁸ The KMEL Study did not focus on whether the station broadcast issue-responsive programming. Rather, it analyzed KMEL's alleged media bias with regard to its focus on crime and violence in its programming. Accordingly, in addition to the reasons set forth above, we find that this study lacks any probative value with regard to the level of issue-responsive programming broadcast on this station.

traffic broadcasts, all of which address issues of local concern.²⁹ Accordingly, YMC failed to show that the broadcasts reviewed are representative of the stations' overall efforts to address issues of importance to the Bay Area.³⁰ However, even if we were to accept the validity of YMC's studies, their reported results do not show that the stations' programming was devoid of discussion about local issues. On the contrary, for example, the KNEW Study, undertaken according to criteria developed and applied by YMC, acknowledges that Jeff Katz addressed local issues in 28% of the programs studied and local events in 45% of the programs studied. Accordingly, we find that YMC's own data shows that KNEW broadcast more than a "nominal level" of issue-responsive programming, even in the limited amount of programming that YMC analyzed.

16. Finally, we note that the "Commission has recognized that efforts to develop balanced programming do not necessarily require that a station attempt to provide service to all segments of the community in markets where multiple broadcast stations are available to satisfy the needs of certain groups."³¹ Despite YMC's arguments to the contrary, Clear Channel is under no obligation to address the needs of every community in the Bay Area, especially given its diverse population. Moreover, Clear Channel has demonstrated that it does provide programming that is responsive to the needs of the community – just not at a level or in a form that is acceptable to YMC.

17. We find that the declarations and studies provided by YMC are insufficient to establish a *prima facie* case that Clear Channel's public affairs programming was *de minimis*. It further appears that the stations have provided programming to the extent and in a manner within their broad discretion, and therefore, even if a *prima facie* case had been raised, we find that there are no substantial and material questions of fact requiring a hearing to resolve.

2. Other Programming-Related Complaints

18. *Background.* Petitioners and informal objectors also raise a host of programming related complaints, including the broadcast of alleged hate speech³² and speech that allegedly

²⁹ As we have previously held, "issue-responsive programming may include, but is not limited to, programs described as public affairs, public service announcements... editorials, free speech messages, community bulletin boards and religious programs... it may also include news programming." *License Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 5 FCC Rcd 3847, 3848 (1990) ("*Philadelphia Television Renewals*") (subsequent history omitted). The KNEW Study demonstrates that the Katz and Savage programs addressed issues such as war, incarceration, immigration, race, and welfare. We fail to see how these issues are *not* matters of local concern.

³⁰ See, e.g., *Letter to Dr. Paul Klite from Barbara A. Kreisman, Chief, Video Services Division*, 12 CR 79, 82-83 (MMB 1998) (analysis of only small segments of stations' programming "cannot support an allegation that the station has offer such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community").

³¹ *Localism NOI*, 19 FCC Rcd at 12434-35.

³² According to YMC, the Jeffrey Katz and Michael Savage programs on KNEW(AM) consistently stereotype and advocate violence against undocumented workers, Muslims, women, lesbian, gay, bisexual, and transgendered persons. YMC further contends that KNEW(AM) encourages "physical violence as a solution to social problems." KNEW Petition at 8. YMC contends that this alleged programming incites violence and fear and is contrary to the public interest. KNEW Petition at 10. We have also received hundreds of postcard-style objections opposing the renewals of KMEL(FM), KYLD(FM) and KNEW(AM), based on the stations' alleged broadcast of hate speech.

incites violence.³³ Petitioners and objectors also express their dissatisfaction with the stations' formats, employment practices,³⁴ and alleged failure to listen to community concerns.³⁵ YMC also contends that Clear Channel engages in acts of censorship.³⁶ In response, Clear Channel asserts that the First Amendment prohibits the Commission from interfering with its programming decisions.³⁷

19. *Discussion.* The Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming.³⁸ Licensees have broad discretion – based on their right to free speech – to choose, in good faith, the programming they believe serves the needs and interests of their communities.³⁹ This holds true even if the material broadcast is insulting to a particular minority or ethnic group in a station's community.⁴⁰ Indeed, as we have held in earlier decisions, “if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial.”⁴¹ We will intervene in programming matters

³³ See note 32, *supra*.

³⁴ Petitioners and Objectors raise a host of programming-related and formatting complaints, including the manner in which Mike Weiner covered the presidential debates on KNEW(AM), the hiring of controversial announcer Rick Delgado on KYLD(FM), the lack of local music, comments made by Bill O'Reilly on KNEW(AM) that allegedly condones a terrorist attack on San Francisco, and the alleged broadcast of “tips” for kidnapping young girls on KSJO(FM). YMC asserts that KNEW(AM) has failed to serve the public interest because “it shares the same Community Affairs Director with numerous other Clear Channel stations.” See KYLD/KMEL Petition, Declaration of Jeff Perlstein. We have also received a number of identical, postcard-style objections, unassociated with any particular Clear Channel station, requesting that we require Clear Channel to “reinstate the position of Community Affairs Director at each of its Bay Area radio stations...”

³⁵ YMC asserts that Clear Channel has failed to respond to requests to meet with community members to address concerns regarding its programming and employment practices. KYLD/KMEL Petition at 5-7, 15. While Clear Channel, in its reply, demonstrates that it has, indeed, made efforts to meet with community members, YMC's argument fails to implicate any provision of the Rule or the Act. Accordingly, we will not address this argument any further.

³⁶ YMC points to the firing of KMEL's popular talk show host, Davey D., arguing that he was fired because he interviewed Bay Area Congresswoman Barbara Lee about her vote in Congress opposing the war in Afghanistan. KYLD/KMEL Petition at 12. YMC also asserts that Clear Channel issued a “blacklist” of songs that stations were urged not to play after the September 11, 2001 attacks on the World Trade Center. *Id.*

³⁷ Consolidated Opposition at 14-15.

³⁸ See *WGBH Educational Foundation*, Memorandum Opinion and Order, 69 FCC 2d 1250, 1251 (1978).

³⁹ See, e.g., *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401, citing *Time-Life Broadcast, Inc.*, Memorandum Opinion and Order, 33 FCC 2d 1081, 1082 (1972), and *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

⁴⁰ *Zapis Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 3888 (MB 1992).

⁴¹ *Id.* (citing *Anti-Defamation League of B'nai B'rith*, Memorandum Opinion, 4 FCC 2d 190, 192 (1966), *aff'd*, Memorandum Opinion and Order, 6 FCC 2d 385 (1967), *aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC*, 403 F. 2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969)).

only if a licensee abuses that discretion.⁴² Neither the petitioners nor the informal objectors have demonstrated that Clear Channel has done so here.

20. Moreover, there is no statutory provision or Rule that directly prohibits the viewpoints expressed in the Jeffrey Katz and Michael Savage programs described in note 32, *supra*, that allegedly incite violence. Consequently, the only question before us is whether the broadcasts raise a substantial question about the licensee's basic qualifications. In light of Commission precedent on point, we find that no question regarding the licensee's basic qualifications is raised. Indeed, in an enforcement action, the Enforcement Bureau analyzed broadcasts which, according to the objectors in that case, advocated violence against bicyclists. There, it stated:

Commission action in response to an allegation that a broadcast should be characterized as an 'incitement' to violence or illegal action meeting the "clear and present danger" test is limited to situations where a local court of competent jurisdiction has made such a determination. *See Cattle Country Broadcasting*, 58 R.R.2d 1109, 1113 (1985); *see also Brandenburg v. Ohio* ("*Brandenburg*"), 395 U.S. 444, 447 (1969) (speech becomes illegal advocacy when "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). This aspect of the test requires a court to "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1975).

... Under *Brandenburg*, any determination that particular speech poses a "clear and present danger of serious substantive evil" presupposes a familiarity with the circumstances, issues, and concerns of the community where such speech was heard, a familiarity which the Commission, in most cases, does not have and cannot practically obtain. Local authorities responsible for keeping the peace and enforcing the law are better positioned to know and assess the specific and unique circumstances in the ... community and, thus, to determine whether the *Brandenburg* test has been met."⁴³

21. The information before us reflects that no local court of competent jurisdiction has found that any of the broadcasts at issue here met the "clear and present danger" test. Indeed, neither the Renewal Applications nor any of the petitions or informal objections filed reflect that any civil or criminal action of any kind has been brought against Clear Channel for the complained-of broadcasts. Viewing these circumstances in light of the clear precedent regarding treatment of broadcast speech that allegedly advocates or incites violence, we conclude that that YMC has failed to raise a substantial and material question of fact which establishes a *prima facie* case supporting the denial of the Renewal Applications.

⁴² *Philadelphia Station License Renewals*, 8 FCC Rcd at 6401. For these same reasons, it is also the Commission's general policy to leave format issues to the discretion of the licensee. *See Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858 (1976).

⁴³ *Capstar TX Limited Partnership*, Memorandum Opinion and Order, 19 FCC Rcd 11303, ¶¶ 9, 10 (EB 2004) (*quoting Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9959, ¶¶ 21-22 (1995)).

3. Use of “Shock Jocks”

22. *Background.* YMC argues that the “antisocial antics of Clear Channel’s widely promoted ‘shock jocks’ ... warrant hearings to determine whether renewal of KYLD(FM)’s license is in the public interest.”⁴⁴ According to YMC, many of the “antics” broadcast on KYLD have resulted in lawsuits, and one stunt allegedly resulted in a conviction.⁴⁵ In that case, two announcers allegedly dressed as prisoners and went to the homes of area residents, asking for help to remove their handcuffs. According to YMC, one announcer pleaded no contest to lesser charges of disturbing the peace, while the other announcer was convicted of causing an emergency to falsely be reported.⁴⁶

23. *Discussion.* Independent staff investigation indicates that the specific conduct discussed above resulted in a misdemeanor conviction.⁴⁷ While convictions for misconduct constituting felonies are most relevant to our evaluation of an applicant's character, we retain the discretion to consider serious misdemeanor convictions where appropriate, particularly where there is a pattern of such convictions.⁴⁸ YMC has provided evidence of only one misdemeanor conviction in the instant case. We find that such evidence fails to establish a pattern to provide a basis for designating KYLD’s application for hearing.⁴⁹

24. Citing to various online news articles, YMC also briefly describes several other stunts allegedly conducted by announcers at KYLD which have resulted in lawsuits as evidence of Clear Channel’s lack of character and fitness as a licensee.⁵⁰ However, these allegations lack the requisite specificity under Section 301(d) of the Act.⁵¹ Moreover, YMC has not presented us with evidence that the alleged lawsuits have been adjudicated.⁵² For these reasons, we will not consider them further.

B. PUBLIC FILE ISSUES

25. *Background.* YMC claims that Clear Channel has failed to provide reasonable access to KYLD’s, KMEL’s and KNEW’s public inspection files by placing “numerous hurdles”

⁴⁴ KYLD/KMEL Petition at 10. *See also* KSJO Petition at 12-14.

⁴⁵ KYLD/KMEL Petition at 8 (*citing People of California v. Lopez*, Calif. Superior Court No. NM306518A (Sept. 26, 2000) (convicted of causing false report of emergency)).

⁴⁶ *Id.*

⁴⁷ CAL. PENAL CODE §148.3(a).

⁴⁸ *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252 n. 3 (1990) (subsequent history omitted).

⁴⁹ *See, e.g., Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9150 (2003) (“*Secret Communications*”) (finding that one misdemeanor conviction of animal cruelty failed to provide a basis for designating the renewal application for a hearing).

⁵⁰ KYLD/KMEL Petition at 8-9.

⁵¹ *See* 47 U.S.C. §309(d)(1); *Secret Communications*, 18 FCC Rcd at 9151, n. 55 (holding that newspaper articles are not acceptable substitutes for Section 309(d) requirement that allegations in a petition to deny be supported by affidavit of person with personal knowledge of facts alleged).

⁵² *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986) (subsequent history omitted) (generally narrowing the range of non-FCC related misconduct to be considered when assessing an applicant’s character qualifications to matters upon which there has been an adjudication by a tribunal of competent jurisdiction).

before members of the public who seek access to the public files.⁵³ Taishi Duchicela, a resident of Oakland, California, and a YMC employee, declares that she visited Clear Channel's office twice for the purpose of reviewing the public files for these stations. During her visit on August 12, 2005, Ms. Duchicela states that nearly an hour passed before she could access KYLD's file. During that time, Ms. Duchicela states that she and the rest of her group were "shuffled" from room to room by Clear Channel personnel to find a computer that would allow them to access the public files electronically.⁵⁴

26. During her visit on October 17, 2005, Ms. Duchicela states that again, nearly an hour passed before she was able to view the public files for KYLD, KMEL, and KNEW. Ms. Duchicela states that she was initially told by Clear Channel personnel that no one was available to assist her with her request to view the public files, and that she was asked to make an appointment for another day. After informing the Clear Channel employee that it was her right to view the public files at any time during regular business hours, Ms. Duchicela was escorted to a waiting room where she was asked to wait until a Clear Channel employee who could assist her could be located. Once the appropriate employee was located, Ms. Duchicela was led to a computer that would not allow her to access the public files. Ms. Duchicela was then led to another computer, where she successfully logged onto the system and viewed the public files. According to Ms. Duchicela, "none of the four Clear Channel staff had any experience how to grant the public access to the files, nor the protocol for printing copies."⁵⁵ YMC argues that this "repeated inability to comply with Section 73.3626 in providing reasonable access to its Public Files also raises substantial questions about its commitment to localism and its ability to operate in the public interest."⁵⁶

27. Clear Channel contends that it did not abrogate its responsibilities under the Commission's Rules. It argues that, despite the delays in accessing the electronic files, Clear Channel provided the required access to all public files during normal business hours; made available a computer terminal for review of the electronic files; copied the requested public file materials, and provided the copied materials to YMC.⁵⁷ Clear Channel states that all receptionists receive training on procedures allowing access to the public files. For security reasons, Clear Channel explains that all visitors must be accompanied by station personnel. Finally, Clear Channel explains that the technical difficulties in accessing the public files were due to the fact that Clear Channel was in the process of uploading the public files to an electronic database and installing a dedicated kiosk for public use.⁵⁸

28. *Discussion.* Section 73.3526(a) of the Rules requires broadcast licensees to maintain a public file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals

⁵³ KNEW Petition at 5-6; KYLD/KMEL Petition at 7, Declaration of Taishi Duchicela.

⁵⁴ KYLD/KMEL Petition, Declaration of Taishi Duchicela.

⁵⁵ *Id.*

⁵⁶ KYLD/KMEL Petition at 7.

⁵⁷ Tony Ho Ng, KMEL's Promotions Manager, declares that the YMC visitors gained access to, and made copies of, the requested materials in the public file on October 17, 2005. Clear Channel also provided a copy of the receipt for the copies made.

⁵⁸ Consolidated Opposition at 4-5.

throughout the license period.⁵⁹ The file must be available to the public at any time during regular business hours. Moreover, Section 73.3526(c) of the Rules provides that requests for copies of documents required to be kept in the station's public file be fulfilled by the licensee at a reasonable cost and within a reasonable period of time, i.e., not more than seven days.⁶⁰

29. We have considered the totality of the evidence before us and find that no substantial and material question of fact has been presented warranting further inquiry. The record provides no indication that Clear Channel was intentionally trying to prevent access to its public files or was negligent in providing such access. Indeed, Clear Channel has adequately demonstrated that the delay experienced by YMC was the result of its efforts to facilitate access to the public files by uploading the files electronically and making them available to members of the public on a dedicated kiosk. Any additional delays were due to Clear Channel's efforts to find the appropriate personnel to escort the YMC visitors through the building. Brief delays caused by legitimate security procedures, such as those described by Clear Channel, are not unreasonable.⁶¹ Accordingly, given the circumstances in this case, we conclude that the delay experienced by YMC in accessing the public files was not unreasonable and was consistent with the intent of Section 73.3526 of the Rules.⁶²

C. EMERGENCY PREPAREDNESS ISSUES

30. *Background.* Without citing any specific Rule violation, YMC claims that it "remains concerned about Clear Channel's lack of disaster preparedness ... in the Bay Area," noting that it is "evident that Clear Channel lack[s] any plan for advising listeners ... in the event of a disaster."⁶³ Ms. Duchicela attended a community advisory meeting organized by Clear Channel and declares that the meeting made it clear that "San Francisco has a plan for disasters, but Clear Channel does not."⁶⁴ In response, Clear Channel asserts that all of its Emergency Alert System ("EAS") equipment is fully functioning and that the company is continuing to develop a

⁵⁹ Cf. *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division*, 13 FCC Rcd 4102 (MMB 1997) (citing *Philadelphia Station License Renewals*, 8 FCC Rcd at 6400).

⁶⁰ 47 C.F.R. § 73.3526(c).

⁶¹ See, e.g., *In the Matter of Isothermal Community College*, Memorandum Opinion and Order, 16 FCC Rcd 21360, 21364 (EB 2001) (delay caused by security considerations deemed reasonable); *In re Application of Gross Telecasting, Inc.*, Decision, 92 FCC 2d 204 (1982) (40 minute delay due to security measures not unreasonable).

⁶² While we are unpersuaded that Clear Channel intentionally tried to prevent public access to its files, we note that statements made by station personnel may have suggested that appointments are required. We remind Clear Channel that "members of the public cannot be required to inspect that file only through prior appointments or at times most convenient to the licensee. . . ." *Philadelphia Television Renewals*, 5 FCC Rcd at 3853. Because the YMC visitors ultimately viewed and made copies of the public files at the time the requests were made, no further action is required on this point. In the future, however, Clear Channel should ensure that members of the public, as well as its own staff, unequivocally understand that appointments to view the public files are not required.

⁶³ KNEW Petition at 11, KMEL/KYLD Petition at 10.

⁶⁴ KNEW Petition, Declaration of Taishi Duchicela.

comprehensive emergency action plan that will include identifying ways that will effectively gather emergency information most useful to Bay Area listeners during a disaster.⁶⁵

31. *Discussion.* While YMC implies that Clear Channel is in violation of the EAS requirements set forth in part 11 of the Rules, it has failed to support its allegations with specific information.⁶⁶ Additionally, Section 73.1250 of the Rules does not require stations to have an emergency plan to remain operational during emergencies. Nevertheless, Clear Channel has demonstrated that the stations have been actively developing a plan.⁶⁷ Moreover, YMC has provided no evidence that the stations' EAS equipment is not functional or that Clear Channel has otherwise violated our EAS Rules.

D. FCC VIOLATIONS AT OTHER STATIONS

32. *Background.* YMC cites various actions taken by the Commission against Clear Channel stations other than the above-captioned stations, as well as various other non-broadcast-related lawsuits and investigations involving Clear Channel, as grounds for a hearing into whether the Renewal Applications should be granted.⁶⁸ In support of its argument, YMC cites the Commission's *Character Policy Statement*,⁶⁹ asserting that "the Commission may take into

⁶⁵ Consolidated Opposition, Declaration of Kim Bryant. Ms. Bryant states that Clear Channel has and continues to work hard to prepare for disasters. For example, many Clear Channel stations have auxiliary power equipment. In addition, Clear Channel is currently working on a technical plan that will allow it to air programming even if it cannot be originated locally. Finally, Ms. Bryant states that she has spoken with a representative from the San Francisco mayor's office about working together to create a comprehensive emergency plan for the Bay Area.

⁶⁶ *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986).

⁶⁷ See note 65.

⁶⁸ In addition to KSJO's violations, discussed *infra*, YMC cites the following indecency violations: *Capstar TX Limited Partnership (WZEE-FM)*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 901 (2001); *Clear Channel Broadcasting Licenses, Inc. (WPLA-FM)*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768 (2004); *AMFM Radio Licenses (WDDC-FM)*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5005 (2004). YMC also cites the following Commission actions: *Citicasters, Co. (WBTJ-FM)*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 3415 (2001) (illegally taking operational control of a radio station); *Clear Channel Broadcasting Licenses, Inc. (KRPP-FM)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 2734 (2000) (misleading public about radio contest rules); *AMFM Radio Licenses (WWDC-FM)*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5032 (2002) (broadcasting conversations without permission); *Clear Channel Broadcasting Licenses, Inc. (WGBF-FM)*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 5893 (2002) (same); *Clear Channel Broadcasting Licenses, Inc. (WINZ-AM)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 23839 (2000) (same). KSJO Petition at 11-12, 15-17; KNEW Petition at 11-15; KYLD/KMEL Petition at 15-18. YMC also points to character-related allegations raised against Clear Channel in connection with an assignment of license of WQYZ(FM), Ocean Springs, Mississippi, and a minor change application filed by KSBL(FM). KNEW Petition at 11-15; KYLD/KMEL Petition at 15-18. In addition, YMC cites the conviction of an announcer for stunts involving animal cruelty that were allegedly broadcast on KBPI(FM), Denver, Colorado, as well as the payment of \$80,000 in fines to settle a deceptive advertising complaint brought by Florida's Attorney General. KYLD/KMEL Petition at 9. Citing various online news articles, YMC also points to Clear Channel's alleged involvement in New York Attorney General's payola investigation, as well as Clear Channel's alleged agreement to pay \$30,000 in fines in 2005 for improperly failing to disclose an independent expenditure campaign backing candidates in a California 2001 election. KSJO Petition at 17; KNEW Petition at 14; KYLD/KMEL Petition at 17.

⁶⁹ KNEW Petition at 15, KMEL/KYLD Petition at 15, and KSJO Petition at 17, citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).

consideration on a case by case basis misconduct at one station when considering the licensee's operation of other stations."⁷⁰

33. In response, Clear Channel argues that, in citing the *Character Policy Statement*, YMC has ignored subsequent updates made to the Act, which confine the Commission by statute to consideration of the operation of the individual station seeking license renewal.⁷¹ In its Reply, YMC urges the Commission to "understand that these stations are operated out of the same building, overseen by the same staff and reliant on the same resources, a consequence of deregulation, media consolidation and Clear Channel's never ending quest to reduce overhead."⁷²

34. *Discussion.* Section 309(k) of the Act limits the scope of the license renewal inquiry to matters occurring at the particular station for which license renewal is sought.⁷³ Accordingly, allegations of misconduct by Clear Channel at stations other than those at issue in this case are not relevant for consideration in this proceeding.⁷⁴

E. KSJO(FM), SAN JOSE, CALIFORNIA

1. Notice of Apparent Liability for False Certification in KSJO's Renewal Application

35. *Background.* YMC alleges that Clear Channel has made misrepresentations to the Commission by answering Section II, Item 4, of KSJO's renewal application in the affirmative. This question requires an applicant to certify that there have been no violations of the Act or Rules with respect to that station during the preceding license term. If the renewal applicant has violated the Act or the Rules, it must respond "No" and submit an explanatory exhibit detailing the number and nature of the violations and any adjudication by the Commission.⁷⁵

36. YMC contends that Clear Channel tried to mislead the Commission by failing to include information on KSJO's renewal application about two Notices of Apparent Liability for Forfeiture it had received in 2000 for violating the Commission's indecency rules ("NALs").⁷⁶ In its Opposition, Clear Channel asserts that its failure to report the NALs was not intentional.⁷⁷ According to Clear Channel, Gabrielle Medeck, the Clear Channel employee responsible for gathering the information necessary to complete the renewal application, had not been working at the station when the Commission issued the NALs and was not otherwise made aware of the

⁷⁰ *Id.*

⁷¹ Consolidated Opposition at 20; KSJO Opposition at 9-10. As part of the Telecommunications Act of 1996, Congress adopted Section 309(k), which limits the scope of review to the station for which renewal is sought. Telecommunications Act of 1996, Pub. L. No 104-104, § 204(a), 110 Stat. 56 (1996).

⁷² Consolidated Reply at 13.

⁷³ See *Letter to Mr. James Donohue*, Ref. No. 1800B3 (MB Oct. 7, 2002).

⁷⁴ In addition, the Commission entered into a Consent Decree with Clear Channel in 2004, in which it resolved all pending indecency cases and found Clear Channel to be fully qualified to remain a Commission licensee. See *Clear Channel Communications, Inc.*, Consent Decree, 19 FCC Rcd 10880 (2004) (discussed *infra*).

⁷⁵ Instructions for FCC 303-S, Page 7, Item 4.

⁷⁶ See *In The Matter Of Citicasters, Co. (KSJO)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 19091 (2000); *In The Matter Of Citicasters, Co. (KSJO)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 19095 (2000).

⁷⁷ Clear Channel amended the application to include disclosure of the NALS on November 8, 2005.

NALs. According to Clear Channel, Ms. Medeck checked KSJO's online public file materials while preparing the renewal application and, while the NALs were available in the paper files, they had not yet been uploaded to the online files. Thus, she found no evidence of reportable violations and answered Section II, Item 4, on KSJO's renewal application in the affirmative.⁷⁸

37. Clear Channel also maintains that attempting to conceal the NALs would serve no purpose because they are a matter of public record.⁷⁹ Moreover, Clear Channel notes that the Commission has granted several renewal applications which have reported the issuance of NALs, and as such, Clear Channel understands that this does not preclude the license renewal grant. Accordingly, Clear Channel asserts that it has no motive for failing to report these violations in KSJO's renewal application.⁸⁰

38. Section 1.17(a) of the Rules provides that no person, in any written or oral statement of fact, may provide material factual information that is incorrect or misleading. It also provides that no person may provide in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading."⁸¹ Any applicant for a Commission authorization is subject to this rule.⁸² Recently, the Commission expanded the scope of Section 1.17,⁸³ with respect to investigations and adjudications, to prohibit written and oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing the statement is correct and not misleading.⁸⁴ Misrepresentation involves false statements made with an intent to deceive.⁸⁵ Lack of candor involves concealment, evasion, or other failure to be fully forthcoming, accompanied by an intent to deceive.⁸⁶ However, "a false statement, even absent an intent to deceive, may constitute an actionable violation of Section 1.17 of the Rules."⁸⁷

39. *Discussion.* We find that Clear Channel's certification of Section II, Item 4, of KSJO's renewal application in the affirmative is demonstrably false, as Clear Channel has failed to provide a reasonable basis for its failure to list the NALs in the application.

40. Clear Channel asserts that the NALs were not listed in KSJO's license renewal application because Ms. Medeck found no evidence of such violations in KSJO's online public files. However, the NALs were a matter of public record; moreover, by Clear Channel's own admission, they were available in KSJO's physical public files. Accordingly, even a minimum amount of diligence would have alerted Ms. Medeck to the existence of the NALs. As such, we

⁷⁸ KSJO Opposition at 2-3.

⁷⁹ *Id.*

⁸⁰ In its Reply, YMC argues that Clear Channel was motivated to mislead the Commission because KSJO received "multiple NALs [and] subsequently engaged in identical misbehavior." KSJO Reply at 3.

⁸¹ 47 C.F.R. § 1.17(a)(2).

⁸² *See* 47 C.F.R. §1.17(b)(1).

⁸³ 47 C.F.R. §1.17.

⁸⁴ *In the Matter of Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Report and Order, 18 FCC Rcd 4016 (2003).

⁸⁵ *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

⁸⁶ *Id.*

⁸⁷ *See e.g., Southern Skies Corporation*, Memorandum Opinion and Order, 11 FCC Rcd 19176, 19182 (1996).

believe there was no reasonable basis for Clear Channel's certification that there were no violations of the Act or Rules during the preceding license term. Accordingly, we find that Clear Channel's certification in KSJO's license renewal application was demonstrably false.

41. *Proposed Forfeiture.* The Commission and the courts have recognized that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."⁸⁸ Full and clear disclosure of all material facts in every application is essential to the efficient administration of the Commission's licensing process, and proper analysis of an application is critically dependent on the accuracy and completeness of information and data which only the applicant can provide. The choice of remedies and sanctions is an area in which we have broad discretion.⁸⁹ While Clear Channel falsely certified that KSJO had not violated the Act or Rules during the preceding license term, our consideration of all of the facts lead us to conclude that Clear Channel's actions in this regard do not rise to such a level or pattern of misconduct so as to warrant designation for evidentiary hearing. In particular, we find nothing in the record that evidences an intent to mislead the Commission. Accordingly, we conclude, based upon the information before us, that no substantial and material question of fact remains with respect to Clear Channel's qualifications to remain a Commission licensee. We believe, however, that Citicasters, the licensee, should be sanctioned for its false certification. Accordingly, we will impose a monetary forfeiture for the apparent violation of Section 1.17 of the Commission's Rules.

42. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission 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.⁹⁰ 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.⁹¹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁹² and the Commission has so interpreted the term in the Section 503(b) context.⁹³

43. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules and Section 503(b)(2)(A) of the Communications Act of 1934, as amended,⁹⁴ establish a base forfeiture amount of \$32,500 for misrepresentation/lack of candor.⁹⁵ In determining the

⁸⁸ See *Commercial Radio Service, Inc.*, Order to Show Cause, 21 FCC Rcd 9983, 9986 (2006)(citing, e.g., *Contemporary Media, Inc.*, v. FCC, 214 F.3d 187, 193 (D.C. Cir. 2000)).

⁸⁹ See, e.g., *RKO General, Inc. v. F.C.C.*, 670 F. 2d 215, 237 (D.C. Cir. 1981); *Leflore Broadcasting Co. Inc. v. F.C.C.*, 636 F. 2d 454, 463 (D.C. Cir. 1980); *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 831 (D.C. Cir. 1965); *USA Broadcasting, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4253, 4256 (2004).

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

⁹¹ 47 U.S.C. § 312(f)(1).

⁹² See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁹³ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁹⁴ 47 U.S.C. § 503(b)(2)(A).

⁹⁵ 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. See also *Inflation Adjustment of Maximum Forfeiture Penalties*, Order, 69 FR 47788 (August 6, 2004).

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."⁹⁶

44. In this case, Clear Channel falsely certified in KSJO's renewal application that it had complied with the Act and the Rules during the preceding license term. Although it is essential that licensees make full and clear disclosure of all material facts in every application, the false certification here was not made with the intention of deceiving the Commission. As Clear Channel has noted, attempting to conceal the NALs would serve no purpose because they are a matter of public record.⁹⁷ In addition, Clear Channel has stated that it understands that the issuance of NALs does not necessarily preclude a license renewal grant. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose to reduce the forfeiture from the base amount to \$10,000 for the false certification.⁹⁸

2. Indecent Programming Issues

45. *Background.* YMC argues that KSJO(FM) has failed to serve the public interest because it has repeatedly violated the Commission's indecency rules. YMC first points to the NALs, discussed above. YMC also contends that KSJO(FM) has continued to broadcast indecent material since the issuance of the NALS, including: (1) a joke about oral sex; (2) a broadcast discussing tips for murdering young girls; and (3) the broadcast of the a song about statutory rape, all of which were broadcast in 2002.⁹⁹ In response, Clear Channel asserts that the NALs and the complained-of broadcasts are barred from consideration by the terms of a consent decree entered into by the Commission and Clear Channel (the "Consent Decree").¹⁰⁰

⁹⁶ 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).

⁹⁷ *Id.*

⁹⁸ See, e.g., *Access1 New York License Company, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 2007 WL 2323664, at *4 (MB Aug. 15, 2007) (imposing a \$10,000 NAL for licensee's false certification in its license renewal application regarding compliance with the Commission's public file requirements); *Cumulus Licensing LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13711, 13718 (MB 2007) (same).

⁹⁹The Weeks Petition raises identical arguments regarding KSJO's alleged broadcast of indecent programming, and includes an audiotape of allegedly indecent programs broadcast during a two-week period in July of 2002. Weeks Petition at 1.

¹⁰⁰ *Clear Channel Communications, Inc.*, Consent Decree, 19 FCC Rcd 10880 (2004). YMC argues that the Consent Decree is not binding on them for the following reasons: (1) YMC was not a party to it; (2) the Consent Decree is arbitrary and capricious and constitutes an abuse of discretion in violation of the APA 5 USC § 706(2)(a), and (3) the Consent Decree is an *ultra vires* act that exceeds the Commission's authority because it essentially eviscerates the Commission's statutory mandate to consider the totality of the licensee's conduct when considering renewal of the Clear Channel stations under 47 USC § 309(k). YMC is precluded from arguing that the Consent Decree is unenforceable. Had YMC wished to protest the Consent Decree, it should have filed a petition for reconsideration within 30 days of the public notice of the Consent Decree pursuant to Section 1.104(b) of the Rules. Moreover, the Commission has recently considered similar arguments and has concluded that it has requisite authority to settle indecency enforcement actions by means of a Consent Decree. See *In the Matter of Viacom Inc.*, Order on

(footnote continued . . .)

46. *Discussion.* The NALs and the broadcasts described above are barred from consideration by the terms of the Consent Decree. The Consent Decree resolved certain matters before the agency involving the possible violation by Clear Channel of the restrictions in the broadcast of obscene, indecent or profane material.¹⁰¹ By the terms of the Consent Decree, Clear Channel agreed to undertake certain compliance measures and to pay the United States Treasury the sum of \$1,750,000 in consideration for the Commission rescinding, vacating and canceling certain forfeiture orders and notices of apparent liability for forfeiture issued against Clear Channel-owned broadcast licensees, terminating certain inquiries, and dismissing, with prejudice, pending indecency complaints against those licensees. In addition, the Commission agreed to refrain from taking any action against Clear Channel or any future application - including renewal applications - to which Clear Channel is a party, based in whole or in part on “any similar complaints alleging violation by any [station operated by Clear Channel] of the Indecency Laws with respect to any broadcast occurring prior to the Effective Date.”¹⁰² The Effective Date of the Consent Decree is June 9, 2004, the date of its public release.¹⁰³

47. The broadcasts that are the subject of the NALs and those raised by petitioners, discussed above, were aired in 2002 – before the Effective Date of the Consent Decree. Accordingly, petitioners’ indecency allegations are barred from being considered in connection with KSJO’s license renewal application.

3. Local Ownership Issues

48. *Background.* YMC asserts that Clear Channel violated the Commission’s local radio ownership limits by continuing to simulcast KSJO(FM)’s programming on KFJO(FM) after Clear Channel sold that station in order to comply with the Commission’s radio ownership rules.¹⁰⁴ In its Opposition, Clear Channel states that KFJO(FM) was properly divested and that the station elected to carry programming originated by KSJO(FM) under a network affiliation agreement that was terminable by the affiliate on 30 day’s notice and, in fact, was so terminated.¹⁰⁵

49. *Discussion.* YMC does not offer any probative evidence that would lead us to conclude that Clear Channel has violated the Commission’s radio ownership limits with respect to KFJO(FM). Indeed, YMC admittedly bases its argument on an article published in the *San Jose Mercury News* and acknowledges that it has not verified these allegations.¹⁰⁶ Accordingly, we find that YMC has failed to raise a substantial and material question of fact which establishes a *prima facie* case for denial of the KSJO(FM)’s renewal application.¹⁰⁷

Reconsideration, 21 FCC Red 12223 (2006). Accordingly, we will not address the merits of these arguments any further.

¹⁰¹ *Id.*

¹⁰² See 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 (the “Indecency Laws”). See also Consent Decree, ¶ 8.

¹⁰³ Consent Decree, ¶ 2(h).

¹⁰⁴ See KSJO Petition at 14-15.

¹⁰⁵ See KSJO Opposition at 5-6.

¹⁰⁶ KSJO Petition at 15, states: “These acts, *if verified*, raise serious questions about Clear Channel’s candor with the Commission...” (emphasis added).

¹⁰⁷ The Weeks Petition also states that “Clear Channel owned more than its legal limit of stations in [the] broadcast region,” but fails to substantiate this assertion with any probative evidence. Weeks Petition at 2.

F. NOTICE OF APPARENT LIABILITY FOR KNEW'S FAILURE TO MAINTAIN ITS PUBLIC FILE

50. *Background.* Section 73.3526 of the Rules requires commercial broadcast licensees 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 at regular intervals throughout the license period.¹⁰⁸ Among the materials required for inclusion in the file are a station's quarterly issues/programs lists, which must be retained until final Commission action on the Stations' next license renewal applications.

51. Section III, Item 3, of KNEW(AM)'s 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 files at the appropriate times. The licensee indicated "No" to that certification in its application and attached an exhibit that provided the following explanation:

[T]he station had no issues/programs lists from the period the licensee's ultimate parent company, Clear Channel Communications, Inc., purchased the station in August 2000, through the second quarter of 2003. During this time, the station aired an all technology talk format programmed by CNET Networks, Inc. Apparently, station personnel at the time did not realize they needed to complete such lists . . . since it was not programmed by the licensee. No one with knowledge about the station's programming during this time period presently works at KNEW(AM). For this reason recreation of the lists is not possible.

In addition, the licensee pledged future compliance with the Commission's public file rule and has taken steps to ensure such compliance.¹⁰⁹

52. *Discussion.* As Clear Channel has acknowledged, at the time of filing of the KNEW(AM) license renewal application and during the preceding license term, the station's public inspection files did not contain many of the quarterly issues/programs lists 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 nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.¹¹⁰

¹⁰⁸ 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)).

¹⁰⁹ YMC asserts that KNEW's public file violations "demand [] harsh sanctions." KNEW Petition at 5. In its Consolidated Response, Clear Channel provides a more detailed explanation as to why it failed to maintain KNEW's public files, and argues that its missing Issues/Programs lists should not preclude KNEW's license renewal grant. Consolidated Opposition at 3-4. In its Consolidated Reply, YMC asserts that Clear Channel lacks candor because it did not supply any evidence to support its explanation. Consolidated Reply at 2-3. YMC offers no evidence indicated that Clear Channel was less than candid and we see no reason to doubt the veracity of Clear Channel's explanation. Accordingly, we reject YMC's argument.

¹¹⁰ 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*, Letter, 7 FCC Rcd 6361 (FOB 1992).

53. *Proposed Forfeiture.* Section 503(b) of the Act and Section 1.80(a) of the Rules each state that any person who is determined by the Commission 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.¹¹¹ 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.¹¹² The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹¹³ and the Commission has so interpreted the term in the Section 503(b) context.¹¹⁴ 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.”¹¹⁵

54. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of the public file rules.¹¹⁶ In determining the appropriate forfeiture amount, we must consider 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.”¹¹⁷

55. In this case, although Clear Channel admitted to the violations, it did so only in the context of the question contained in its captioned license renewal applications that compelled such disclosure. Moreover, these violations occurred over a period of several years, from the third quarter of 2000 through the second quarter of 2003, and involved twelve missing issues/programs lists. Considering the record as a whole, we believe that a \$10,000 forfeiture is appropriate for the violations in this case.¹¹⁸ Accordingly, we find that the licensee, AMFM Broadcasting, is apparently liable for a forfeiture in the amount of \$10,000 for its apparently willful and repeated violation of Section 73.3526.

III. CONCLUSION

56. In light of the foregoing, we conclude that neither petitioners nor objectors have met the burden to demonstrate why the Renewal Applications should not be granted. Moreover, we find that neither Clear Channel’s apparent violation of Section 73.3526 of the Rules at Station

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

¹¹² 47 U.S.C. § 312(f)(1).

¹¹³ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹¹⁴ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹¹⁵ 47 U.S.C. § 312(f)(2).

¹¹⁶ *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.

¹¹⁷ 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).

¹¹⁸ *See, e.g., Capstar TX Limited Partnership*, 22 FCC Rcd 12715, 12715 (MB 2007) (imposing a \$10,000 NAL for 14 missing issues/programs lists); *CC Licenses, LLC*, 22 FCC Rcd 12695, 12695 (imposing a \$10,000 NAL for 12 missing issues/programs lists).

KNEW(AM) nor its apparent violation of Section 1.17 of the Rules at Station KSJO(FM) constitute a “serious violation” warranting designation for evidentiary hearing, and we find no evidence of violations involving any of the above-captioned radio stations that, when considered together, evidence a pattern of abuse.¹¹⁹ Further, we find that the above-captioned stations served the public interest, convenience, and necessity during their subject license terms. We will therefore grant the license renewal applications for these stations. We further conclude that Clear Channel is apparently liable for willful and repeated violations of Section 73.3526 of the Rules at KNEW(AM), Oakland, California, and is also apparently liable for its willful violation of Section 1.17 of the Rules at KSJO(FM), San Jose, California.

57. Accordingly, IT IS ORDERED THAT the October 28, 2005, Petitions to Deny filed by YMC ARE GRANTED to the extent indicated and ARE DENIED in all other respects.

58. IT IS FURTHER ORDERED THAT the October 31, 2005, Petition to Deny filed by India Weeks and James Burns IS DENIED.

59. IT IS FURTHER ORDERED THAT the informal objections filed by the objectors listed in the Appendix are DENIED.

60. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹²⁰ and Section 1.80 of the Commission’s Rules,¹²¹ THAT AMFM Broadcasting Licenses, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$10,000 for its apparently willful and repeated violations of Section 73.3526 of the Rules at Station KNEW(AM), Oakland, California.¹²²

61. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹²³ and Section 1.80 of the Commission’s Rules,¹²⁴ THAT Citicasters Licenses, L.P. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$10,000 for its apparently willful violation of Section 1.17(a) of the Rules at KSJO(FM), San Jose, California.¹²⁵

62. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules,¹²⁶ THAT, within thirty (30) days of the release date of this *Memorandum Opinion and Order and Notice of Apparent Liability*, AMFM Broadcasting Licenses, LLC, and Citicasters

¹¹⁹ For example, we do not find here that Clear Channel’s station operations were “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 stations] in the future in accordance with the requirements of its licenses and the Commission’s Rules.” *Heart of the Black Hills Stations*, 32 FCC 2d 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).

¹²⁰ 47 U.S.C. § 503(b).

¹²¹ 47 C.F.R. § 1.80.

¹²² 47 C.F.R. § 73.3526.

¹²³ 47 U.S.C. § 503(b).

¹²⁴ 47 C.F.R. § 1.80.

¹²⁵ 47 C.F.R. § 73.3526.

¹²⁶ 47 C.F.R. § 1.80.

Licenses, L.P., respectively, SHALL PAY the full amount of the proposed forfeitures or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeitures.

63. Payment of the proposed forfeitures must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payment must include the respective NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

64. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the respective NAL/Acct. No. referenced above.

65. 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.

66. Requests for full payment of the forfeitures proposed in this *Memorandum Opinion and Order and Notice of Apparent Liability* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹²⁷

67. IT IS FURTHER ORDERED THAT the above-captioned applications of Clear Channel for renewal of its licenses for various radio stations ARE GRANTED.

68. IT IS FURTHER ORDERED THAT copies of this *Memorandum Opinion and Order and Notice of Apparent Liability* shall be sent, by First Class and Certified Mail, to Youth Media Council and Media Alliance, through its counsel, Alan Korn, Esquire, Law Office of Alan Korn, 1840 Woolsey St., Berkeley, California 94703, to India Weeks and James Burns, P.O. Box 16595, San Diego, CA 92176, to the informal objectors listed in Appendix A, and to Clear Channel Communications, Inc., through its counsel, Dorann Bunkin, Esquire, Wiley Rein LLP, 1776 K St., N.W., Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

¹²⁷ See 47 C.F.R. § 1.1914.

APPENDIX

John Minck
642 Towle Place
Palo Alto, CA 94306-2535

Julie Roby
17 Captains Landing
Tiburon, CA 94920

Jude Swan
62 Corte Madera Ave.
Corte Madera, CA 94925

Joe Morant
1301 Grant Ave.
Novato, CA 94949

Mary Troop
41 Patrick Way
Half Moon Bay, CA 94019

David Mathison
96 Barbaree Way
Tiburon, CA 94920

Eric Bissinger
3130 Mayer Way
Carmichael, CA 95608

Shanna Haines
1732 McGee Ave.
Berkeley, CA 94703

Deborah Merritt
153 Lakeville Circle
Petaluma, CA 94954

Julia A. Cato
2431 Jefferson Ave., Apt. E
Berkeley, CA 94703

Kenneth Ernest
546 Paradise Park
Santa Cruz, CA 95060

Andrea Daniel
5015 Dublin Ave.
Oakland, CA 94602

Kelly Doordan
133 Buchanan St., Apt 3
San Francisco, CA 94102

TJ Johnston
c/o 1095 Market St. #307
San Francisco, CA 94107

Scout Campbell
518 40th St., Apt. 5
Oakland, CA 94609