Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Bay Broadcasting Corporation	)	NAL Acct. No. 915PO0001
	)	
Licensee, KHSN(AM)	)	
Coos Bay, Oregon	)	
Facility ID # 4082	)	
	)	
Former Licensee, KACW(FM)	)	
North Bend, Oregon	)	
Facility ID # 5210	)	
	)	
Former Licensee, KBBR(AM)	)	
North Bend, Oregon	)	
Facility ID # 5212	)	
	)	
Former Licensee, KOOS(FM)	)	
North Bend, Oregon	)	
Facility ID # 4080	)	
	)	
Former Licensee, K299AA	)	
North Bend/Coos Bay, Oregon	)	
Facility ID # 5211	)	

FORFEITURE ORDER

Adopted: April 26, 2000 **Released:** April 27, 2000

By the Chief, Enforcement Bureau:

1. This Forfeiture Order ("Order") imposes a forfeiture against Bay Broadcasting Corporation ("Bay") in the amount of nineteen thousand dollars ($19,000). We conclude that Bay willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (the "Act"), and Sections 73.1201, 73.1675, 73.1690 and 74.1251 of the Commission's rules.[1] The violations include: operation without Commission authorization of studio-transmitter links ("STL") for stations KHSN(AM), Coos Bay, and KACW(FM) and KBBR(AM), both in North Bend, all in Oregon; failure to broadcast required station identification announcements on Station KHSN(AM); use without Commission authorization of a long wire antenna for KHSN(AM); relocation without Commission authorization of the transmitter and transmitter line for KHSN(AM) and of FM translator station K299AA.

[1] 47 U.S.C. § 301; 47 C.F.R. §§ 73.1201, 73.1675, 73.1690, and 74.1251.

BACKGROUND

2. Following receipt of a complaint from Robert King, a former employee of Bay, the resident agent of the Commission's Portland Field Office conducted an inspection of the captioned stations. The inspection disclosed numerous violations of the rules, including: those noted above; failure to make appropriate entries in station records concerning EAS required weekly and monthly tests (47 C.F.R. § 11.61(b)); reliance on an inoperable telephone dial-up remote control for KHSN(AM) (47 C.F.R. § 73.1350(c)); and failure to post antenna registration numbers at the towers for KACW(FM) and KBBR(AM) (47 C.F.R. § 17.4). Following issuance of a Notice of Violation ("NOV") on April 21, 1999, and review of the licensee's response, the Portland Field Office, on August 24, 1999, issued a Notice of Apparent Liability ("NAL") to Bay, which proposed a forfeiture of $19,000. The NAL cited the violations noted in paragraph one of this Order.

3. In response to the NAL,[2] Bay concedes the occurrence of the violations. Nevertheless, Bay requests a substantial reduction in the forfeiture. Bay believes that its prior record, small business status, presence in a small market, and inability to pay the proposed forfeiture without substantial hardship warrant reduction of the forfeiture.

DISCUSSION

4. Section 503(b)(2)(D) of the Act directs us to consider two distinct matters in determining the appropriate amount of a forfeiture.[3] First, as to the violations, we must take into account their nature, circumstances, extent, and gravity. Second, with respect to the violator, we must consider the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

5. The record before us reflects that Bay relocated two transmitters and operated three others without Commission authorization. The unauthorized moves and/or operations began at various times between July 1997 and August 1998. Bay also violated the terms of its license for KHSN(AM) by using an unauthorized antenna beginning in July 1997. Bay acknowledges that the violations occurred largely because it sought to save money by taking the actions noted. Bay claims it was going to seek Commission approval at a later undetermined time; however, it did not do so until after it received the NOV. Moreover, even subsequent to the issuance of the NOV, Bay continued to operate all of the referenced transmitters, and, in the case of KHSN(AM), used the unauthorized antenna up to the dates when either Commission authorization occurred or, in the case of Station K299AA, the violation was corrected.[4] As for the failure to broadcast station identification announcements on KHSN(AM) over a two-day period, Bay indicates that

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[2] Bay submitted its response on September 30, 1999 and supplemented it on October 6, 1999, and March 10, 2000.

[3] 47 U.S.C. § 503(b)(2)(D). *See also* In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17100-01 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement").

[4] The Commission granted Bay's STL applications for KACW(FM), KBBR(AM) and KHSN(AM) on June 30, 1999. Bay relocated the transmitter for K299AA to its licensed site on July 27, 1999. Finally, although Bay, by letter dated June 15, 1999, sought special temporary authorization ("STA") for KHSN(AM)'s relocation and long wire antenna, STA was not granted by the Mass Media Bureau until April 5, 2000.

the violations occurred because it did not adequately monitor a malfunctioning software computer system that was supposed to insert commercials as well as station identifications.

6. After considering the above, we conclude that all of the violations were willful and repeated. In this regard, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules,[5] while "repeated" means more than once.[6] In addition, we find that the unauthorized moves and use of the unauthorized antenna were not only continuous but also intentional in that those violations continued even after Bay knew that its operations were at variance with the Act, the Commission's rules, and its licenses.[7] In this regard, it bears repeating that a licensee cannot legally engage in the activity that it wishes the Commission to authorize until it receives approval to do so.[8]

7. In mitigation, we note that, prior to the violations cited in the NAL, Bay and its sole owner, Laurence Goodman, had a history of overall compliance, dating back to December 1989. Further, it appears that Bay's stations are licensed to relatively small-market communities, a factor that has served as a basis for reducing a proposed forfeiture.[9] However, we believe the nature, circumstances, extent and gravity of the violations, as described above, and the culpability of Bay more than offset any mitigation that would be appropriate for these factors.

8. Bay argues that additional mitigation is warranted in light of its status as a "small business," pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").[10] We disagree. A radio broadcasting entity qualifies as a "small business" if its annual receipts are less than five million dollars. 13 C.F.R. § 121.201 (Major Group 48, SIC Code 4832). Annual receipts for businesses more than three years old are determined by totaling the entity's gross income for the three most recent fiscal years and dividing by three. 13 C.F.R. § 121.104. Bay's federal income tax returns for 1996-1998 demonstrate that it should be considered a "small business." Notwithstanding such status, however, Bay is not entitled to a reduction of the proposed forfeiture. The Commission has previously indicated that Section 503(b) of the Act[11] and the Commission's policies and precedent, as supplemented by the

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[5] *See* Jerry Szoka, 14 FCC Rcd 9857, 9865 (1999); Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991).

[6] *See* Hale Broadcasting Corp., 79 FCC 2d 169, 171 (1980).

[7] *See* Supervalu, Inc., DA 00-235 (Enf. Bur., released February 9, 2000).

[8] *See* SouthEast Telephone Inc., DA 00-325 (Enf. Bur., released February 22, 2000); Andres Santos, 14 FCC Rcd 6192, 6194-95 (Compl. & Inf. Bur. 1999).

[9] *See, e.g.*, Benito Rish, 10 FCC Rcd 2861, 2862 (1995), where the Commission reduced a forfeiture from $10,000 to $2,500 in large part because the station in question was a 5,000 watt daytime-only station in a community of 425, thereby suggesting an inherently low station value.

[10] Pub. L. 104-121, 110 Stat. 858 (1996).

[11] 47 U.S.C. § 503(b).

Forfeiture Policy Statement, comply with SBREFA.[12] We find no basis for reduction of the forfeiture based on these policies and precedents. The discovery of Bay's violations was unrelated to its participation in a compliance assistance or audit program, and Bay's subsequent actions do not warrant a conclusion that Bay undertook good faith efforts to comply with the law. In this regard, Bay continued to operate its unauthorized facilities during the pendency of its applications for licenses and its STA request. Considering such operations and the circumstances that led Bay to violate the Act and rules in the first instance (*see* para. 5, *supra*), we conclude that its violations were willful, which militates against reduction or cancellation of the proposed forfeiture.[13] *See* Forfeiture Policy Statement, *supra* note 3, 12 FCC Rcd at 17109. Also, as discussed *infra*, we conclude that Bay has the ability to pay the proposed forfeiture. Accordingly, a reduction of the forfeiture because of Bay's status as a small business is not warranted.

9. Finally, Bay contends that it is unable to pay a $19,000 forfeiture, notwithstanding its sale of KACW(FM), KBBR(AM), KOOS(FM) and K299AA, and the impending sale of KHSN(AM). Again, we disagree. Our analysis of Bay's financial condition leads us to conclude that, even prior to the sale of KHSN(AM), Bay has the wherewithal to pay the proposed forfeiture. In this regard, Commission records reflect that the sale of Bay's stations, except KHSN(AM), was consummated on September 24, 1999. According to Bay, it received $475,000 in cash, which was reduced immediately by payments of $382,364 to creditors. Bay's alleged remaining debts, which include $150,000 in current and anticipated expenses and a note payable of $107,000 appear to be covered by cash on hand plus a note receivable of $375,000 from the buyer of Bay's former stations. Moreover, once the sale of KHSN(AM) is consummated, Bay will have additional resources which appear more than sufficient to retire any existing debt, including the forfeiture.[14] The cases cited by Bay, both of which involved a reduction in a proposed forfeiture, are inapposite.[15] Unlike the licensees therein, Bay is capable of paying the forfeiture. Moreover, as discussed above, Bay continued to operate illegally long after it had been explicitly advised that its operations regarding the STLs, KHSN(AM) and K299AA were unauthorized.

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[12] *See* Forfeiture Policy Statement, *supra* note 3, 12 FCC Rcd at 17109.

[13] Citing Bronco Broadcasting Co., Inc., 13 FCC Rcd 9422 (Comp. & Inf. Bur. 1999), Bay argues that its small business status, standing alone, should warrant reduction of the forfeiture. We disagree. As we have discussed above, application of the Communications Act and Commission policy and precedent, which reflect SBREFA, to Bay and its actions does not justify or require a reduction of its forfeiture.

[14] According to records supplied by Bay, it is contracted to receive $150,000 for the sale of KHSN(AM), consisting of $25,000 cash at closing and a note receivable of $125,000.

[15] *See* Eddie Bond, 13 FCC Rcd 12526 (Mass Media Bur. 1998), *recon. granted* 14 FCC Rcd 5070 (Mass Media Bur. 1999) (reduction of forfeiture from $15,000 to $5,000 to $1,500 based on showing that former licensee had a "limited, fixed income"); and Gureckis, Michael A., 13 FCC Rcd 21757 (Compl. & Inf. Bur. 1998) (following review of documents related to its ability to pay and the results of two inspections subsequent to the NAL, which demonstrated that "considerable expenditures" had been made to come into compliance, a proposed forfeiture was reduced from $8,500 to $1,500). Bay also cites Morradio, Inc., 14 FCC Rcd 5201 (Compl. & Inf. Bur. 1999) and contends that although the proposed forfeiture of $4,000 for an unauthorized transmitter move was not reduced, forfeitures for other apparent violations were not proposed. Although Bay suggests that the Bureau's decision in Morradio not to propose forfeitures for all possible violations should be followed here, we note that the NAL issued to Bay did not include all of the violations uncovered during the inspection and referenced in the NOV. Consequently, we perceive no reason to reduce Bay's forfeiture because of Morradio.

10. After taking all of the foregoing into account, we conclude that the recommended $19,000 forfeiture should not be reduced. The seriousness and duration of Bay's violations, when coupled with its culpability, offset Bay's overall history and market situation. Further, neither Bay's small business status nor its asserted inability to pay warrants reduction or cancellation of the forfeiture. The forfeiture is appropriate and should be imposed.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act[16], and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's rules[17], Bay Broadcasting Corporation IS LIABLE FOR A MONETARY FORFEITURE in the amount of nineteen thousand dollars ($19,000). The forfeiture is imposed for willful and repeated violations of Section 301 of the Act and Sections 73.1201, 73.1675, 73.1690 and 74.1251 of the Commission's rules.[18] Among other things, those provisions proscribe operation of unlicensed transmitters; certain modifications to transmission systems without prior Commission approval; and omission of station identification announcements.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's rules[19] within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.[20] Payment may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1995 or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL No. referenced above (915PO0001). Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.[21]

13. IT IS FURTHER ORDERED that copies of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested to Bay Broadcasting Corporation at P.O. Box 180, Coos Bay, Oregon 97420 and to its counsel, Howard J. Braun, Esq. at Rosenman & Colin, LLP, 805 15th Street, N.W., 9th Floor, Washington, D.C. 20005-2212.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

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[16] 47 U.S.C. § 503(b).

[17] 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

[18] 47 U.S.C. § 301; 47 C.F.R. §§ 73.1201, 73.1675, 73.1690, and 74.1251.

[19] 47 C.F.R. § 1.80.

[20] 47 U.S.C. § 504(a).

[21] *See* 47 C.F.R. § 1.1914.