

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

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| In the Matter of |) | |
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| |) | |
| FNX Broadcasting, LLC |) | File No. EB-02-BS-114 |
| Licensee, WPHX(AM) |) | NAL/Acct. No. 200332260001 |
| Sanford, Maine |) | FRN 0004 0757 35 |
| |) | |

FORFEITURE ORDER

Adopted: July 19, 2004

Released: July 22, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of thirteen thousand six hundred dollars (\$13,600) to FNX Broadcasting, LLC (“*FNX*”), licensee of radio station WPHX(AM), Sanford, Maine, for willful and repeated violation of Sections 73.1125 and 73.3526(b) of the Commission’s Rules (“*Rules*”).¹ The noted violations involve FNX’s failure to maintain a meaningful managerial and staff presence at its main studio, and failure to maintain the public inspection file at the main studio.

2. On October 29, 2002, the Commission’s Boston, Massachusetts Office (“*Boston Office*”) released a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to FNX for a forfeiture in the amount of seventeen thousand dollars (\$17,000).² FNX filed a response on November 29, 2002 (“*Response to NAL*”), seeking cancellation or reduction of the forfeiture.³

II. BACKGROUND

3. On May 14, 2002, a Commission agent from the Boston Office attempted to inspect radio station WPHX(AM). Unable to locate WPHX(AM)’s main studio, the agent called the station’s local telephone number and spoke with Michael Waggoner, who was at that time the station’s General Manager. Mr. Waggoner stated that the main studio was unstaffed. When the agent met with Mr. Waggoner at the main studio, Mr. Waggoner stated that the main studio had not been staffed “since several months after FNX purchased the station in 1999.” Further, there were no personnel present at the main studio. In response to the agent’s inquiry about the public inspection file, Mr. Waggoner brought the file to the main studio when he met with the agent and explained that the file was being kept at the station’s Portland, Maine office. On August 2, 2002, the Boston Office issued a Notice of Violation (“*NOV*”) to FNX for a number of violations at station WPHX(AM), including violation of Sections

¹ 47 C.F.R. §§ 73.1125 and 73.3526(b).

² See *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332260001 (Enf. Bur., Boston Office, October 29, 2002).

³ The Boston Office issued two *NALs* to FNX for the same violations at WPHX(AM) and WPHX-FM. FNX filed a consolidated response.

73.1125 and 73.3526(b) of the Rules. In its August 26, 2003 response to the *NOV*, FNX acknowledged its violations of Sections 73.1125 and 73.3526(b) of the Rules.

4. On October 29, 2002, the Boston Office issued the subject *NAL* finding that FNX willfully and repeatedly violated Sections 73.1125 and 73.3526(b) of the Rules. In its response to the *NAL*, FNX contends that it was in substantial compliance with the Commission's rules at the time of the inspection. FNX also claims that the proposed forfeiture is excessive, the forfeiture amount is redundant, and, contrary to the *NAL*'s finding, the violations were not egregious. FNX further asserts that it moved promptly to come into compliance with the Commission's rules. Finally, FNX claims that it has experienced net operating losses at station WPHX(AM) and that imposition of the proposed forfeiture will not serve the public interest.

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("*Forfeiture Policy Statement*").⁶ In examining FNX's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁷

6. Section 73.1125 of the Rules requires the licensee of a broadcast station to maintain a main studio at one of the following locations: (1) within the station's community of license; (2) at any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station's community of license; or (3) within twenty-five miles from the reference coordinates of the center of its community of license. In adopting the main studio rules, the Commission stated that the station's main studio must have the capability to serve the needs and interests of the residents of the station's community of license.⁸ To fulfill this function, a station, among other things, must maintain a meaningful presence at its main studio.⁹ The Commission has defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel.¹⁰ The licensee need not have the same staff person and manager at the studio, as long as there is management and staff presence there during normal business hours.¹¹ Although management personnel need not be "chained to their desks" during normal business hours, they must "report at the main studio on a daily basis, spend a substantial amount of time there and ... use the studio as a home base."¹² At the time of the inspection, there was no managerial or staff person present or assigned to the main studio. Although station WPHX(AM)'s Chief Engineer, Peter Vernaglia, signed a sworn statement indicating that, at the time of the inspection, the General Manager and Engineer of WPHX(AM) made "regularly scheduled visits" to the main studio,

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215, 3217-18 (1987), *clarified*, 3 FCC Rcd 5024, 5026 (1988).

⁹ *Id.*

¹⁰ *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615, 3616 (1991), *clarified*, 7 FCC Rcd 6800 (1992).

¹¹ 6 FCC Rcd at 3616 n.2; 7 FCC Rcd at 6800 n.4.

¹² 7 FCC Rcd at 6802.

these visits did not rise to the level of that which is required to have a sufficient full-time management and staff presence under *Jones Eastern*.¹³

7. Section 73.3526(a)(2)¹⁴ of the Rules provides that broadcast stations shall maintain a public inspection file. Section 73.3526(b) requires the public inspection file to be maintained at the main studio of the station. At the time of the inspection, station WPHX(AM)'s public inspection file was not being kept at its main studio. It was being kept in FNX's Portland, Maine office.

8. FNX does not dispute the violations in its response to the *NAL*. Rather, FNX makes several arguments in support of its request for cancellation or reduction of the forfeiture. FNX asserts that station WPHX(AM) was in substantial compliance with the Commission's rules at the time of the inspection. However, we note that during the inspection, the station's then General Manager, Michael Waggoner, told the investigating agent that the station was unmanned and had not been staffed "since several months" after FNX purchased WPHX(AM) in 1999. We also note that, although two FNX employees were making "regularly scheduled" visits to the main studio, there is no evidence that these visits came close to comporting with *Jones Eastern's* requirement of having a full-time management and staff presence at the main studio. FNX has not, for example, suggested that the employees "regular" visits were daily. Thus, there is no justification for cancellation or a reduction here on the basis that FNX substantially complied with the rule and that the violation was a "minor" main studio rule violation. Similarly, although FNX did maintain a public inspection file for station WPHX(AM) at its corporate office, by failing to keep WPHX(AM)'s public inspection file where it is required to be kept -- at WPHX(AM)'s main studio -- we conclude that it was not in substantial compliance such that the forfeiture should be cancelled or reduced because the violation was a "minor" public file violation.

9. FNX further claims that the proposed amount of the forfeiture is excessive, the forfeiture amounts for the same violations at both WPHX-FM and WPHX (AM) is redundant, and, contrary to the *NAL's* finding, the violations were not egregious. We note that the forfeiture amounts proposed for each violation at station WPHX(AM), \$7,000 for the main studio violation and \$10,000 for the public file violation, are the *base* forfeiture amounts indicated in the *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules¹⁵ for the cited violations. The fact that the *NAL* described the violations as "egregious" is irrelevant since the *NAL* made no upward adjustment to the base forfeiture amount. However, we note that, whereas the *NAL* found the violations to be egregious, we do not find any justification for such a finding. We believe the base amounts here are appropriate and, as discussed above, no reductions are warranted. Further, the forfeitures are not redundant because FNX admittedly had two fully equipped main studios,¹⁶ both of which were found to be inadequately staffed during the inspection. Therefore, two separate forfeiture assessments for two separate violations of Section 73.1125 of the Rules are appropriate. Moreover, the rules require a station's public inspection file to be kept at the station's main studio. Neither WPHX(AM)'s nor WPHX-FM's public inspection file was maintained at the main studio at the time of the inspection. Therefore, two separate forfeiture assessments for two violations of Section 73.3526(b) of the Rules are appropriate.

¹³ According to the sworn declaration of station WPHX(AM)'s Chief Engineer, Peter Vernaglia, immediately after the inspection, a temporary full-time person was placed at the main studio and by August 26, 2002, station WPHX(AM) had a full-time Business Manager working at the station daily during normal business hours. In addition, the General Manager and sales staff are assigned to work out of the main studio on a rotating basis, such that each day, either the General Manager or a sales person spends some portion of their work day at the main studio.

¹⁴ 47 C.F.R. § 73.3526(a)(2).

¹⁵ 47 C.F.R. § 1.80(b)(4).

¹⁶ Response to *NAL* at page 4.

10. FNX asserts that it moved promptly to come into compliance with the Commission's rules and cites *Duchossois Communications Co. of Maryland, Inc.*, 78 RR 2d 1223, 1231 (1995)¹⁷ for the proposition that "[t]he Commission has held that prompt compliance after notification of a rule violation will be given consideration in mitigation of any sanctions that may be imposed upon a licensee." We do not read *Duchossois* to stand for this proposition. *Duchossois* was reviewed by the Commission as an application for review of the former Mass Media Bureau's grant of an Application for Assignment of License and Sale of the Assets of Station WHFS(FM). In the decision, the Commission stated that it agreed with the Mass Media Bureau that "the violations, while serious, do not, taken individually or as a whole, rise to the level which would require an evidentiary hearing."¹⁸ It concurred with the Mass Media Bureau that "[Duchossois's] stewardship of WHFS, while certainly not commendable," was not "conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable or unwilling to correct the operating deficiencies"¹⁹ The Commission then noted that *Duchossois* had taken steps to correct many of the admitted violations to support its conclusion that *Duchossois* was not unwilling to correct operating deficiencies and thus qualified to be a licensee, not to indicate that prompt compliance after notification of a rule violation will be given consideration in mitigation of a forfeiture that may be imposed upon a licensee. Indeed, the Commission's consistent position on remedial actions taken to correct violations is that they are commendable but they are not mitigating factors in the forfeiture context.²⁰

11. FNX states that it has experienced substantial net operating losses at station WPHX(AM). However, as the *NAL* states, in order for the Commission to consider a claim of inability to pay, the petitioner must submit: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.²¹ Although FNX has provided a declaration from its Chief Engineer, which includes some projected financial information for the station, it has not provided sufficient information to establish FNX's inability to pay the forfeiture.

12. Finally, FNX asserts that imposition of the proposed forfeiture will not serve the public interest given the improvements it has made to the stations. However, we believe that it is in the public interest to hold licensees accountable for non-compliance with the Commission's rules.

13. As a final matter, we note that the *NAL* found FNX to have a history of overall compliance with the Commission's rules, however, the *NAL* made no downward adjustment to reflect that determination. We therefore reduce the \$17,000 forfeiture amount to \$13,600 to reflect FNX's history of overall compliance with the Commission's rules.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²² FNX Broadcasting, LLC **IS LIABLE FOR A MONETARY**

¹⁷ 10 FCC Rcd 6688 (1995).

¹⁸ *Id.* at 6694.

¹⁹ *Id.*

²⁰ *See, e.g., AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

²¹ *See NAL* at para. 13.

²² 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

FORFEITURE in the amount of thirteen thousand six hundred dollars (\$13,600) for willful²³ and repeated²⁴ violation of Sections 73.1125 and 73.3526(b) of the Rules at station WPHX(AM).

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules 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.²⁵ Payment may be made 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 reference NAL/Acct. No. 200332260001 and FRN 0004 0757 35. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁶

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to FNX Broadcasting, LLC, c/o James L. Winston, Esq., Ruben, Winston, Diercks, Harris, Cooke, L.L.P., 1155 Connecticut Avenue, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²³ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387-88 (1991).

²⁴ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is “repeated” if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn 56 (2003).

²⁵ 47 U.S.C. § 504(a).

²⁶ See 47 C.F.R. § 1.1914.