

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

In the Matter of)	File No.: EB-03-DL-228
)	NAL/Acct. No. 200432500002
SM Radio, Inc.)	FRN 0010-0455-32
Licensee of KUOL(AM))	
San Marcos, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 2004

Released: December 28, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we grant in part and deny in part the petition for reconsideration filed by SM Radio, Inc. (“SM Radio”), licensee of Station KUOL(AM), San Marcos, Texas. SM Radio seeks reconsideration of the *Forfeiture Order*¹ in which the Chief, Enforcement Bureau (“Bureau”), found it liable for a monetary forfeiture in the amount of \$7,000 for willful violation of Section 73.1125 of the Commission’s Rules (“Rules”).² The noted violation involves SM Radio’s failure to maintain a main studio presence within its community of license.

II. BACKGROUND

2. On October 28, 2003, an agent from the Commission’s Dallas, Texas Office (“Dallas Office”) attempted to inspect the main studio of Station KUOL. A building located at the station’s tower site appeared to be the station’s studio; however, the building was locked, unattended, and appeared to be abandoned. Also on October 28, 2003, the agent spoke with SM Radio’s technical representative who advised the agent that the building at the tower site was KUOL’s main studio. SM Radio’s technical representative also informed the agent that the only personnel staffing the studio was an unpaid volunteer from a local church who was available to travel to the studio if requested.

3. On December 19, 2003, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to SM Radio in the amount of seven thousand dollars (\$7,000) for the apparent main studio violation.³ On April 5, 2004, believing that SM Radio had not filed a response to the NAL, the Bureau issued a *Forfeiture Order* to SM Radio upholding the NAL. On May 5, 2004, SM Radio, by its attorney, filed a petition for reconsideration (“petition”) of the *Forfeiture Order*, which it supplemented on June 17, 2004.⁴ In its petition, SM Radio does not contest the violations; however, it seeks reconsideration of the *Forfeiture Order*, citing its inability to pay and its history of compliance with the Commission’s Rules. In

¹ 19 FCC Rcd 6155 (Enf. Bur. 2004).

² 47 C.F.R. §§ 73.1125.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232500002 (Enf. Bur., Dallas Office, December 19, 2003). An erratum was released on January 9, 2004, which corrected the NAL to indicate that the NAL/Acct. No. is 200432500002.

⁴ In its petition, SM Radio points out that it had, indeed, filed a timely response to the NAL and provided a stamped copy of the response.

support of its request for reconsideration, SM Radio submits financial documentation for the year ended June 30, 2003. SM Radio also cites to two cases in which reductions were granted based upon the licensee's inability to pay the forfeiture: *Kenneth Paul Harris*, 15 FCC Rcd 23991 (Enf. Bur. 2000) (forfeiture reduced from 18% to 4.5% of gross receipts) and *Hill Country Radio, Inc.*, 14 FCC Rcd 17708 (MMB 1999) (forfeiture of approximately 12% reduced to approximately 4.5% of gross revenues). We do not reach the cases cited by SM Radio in support of its request for reconsideration because of the reasons discussed below.

III. DISCUSSION

4. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934 as amended ("Act"),⁵ Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁷ In examining SM Radio's petition, 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 any other such matters as justice may require.⁸

5. The Commission has determined that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.⁹ The Commission has also concluded that it is appropriate to take into account "*income derived from other affiliated operations*, as well as the financial status of the station(s) in question."¹⁰ As the Common Carrier Bureau stated in *Hinton Telephone Company of Hinton, Oklahoma*:

reviewing the data for consolidated operations rather than financial data limited to just [one station] accurately portrays whether a licensee can pay a proposed forfeiture. Our determination of a licensee's ability to pay should reflect whether the licensee in general is financially capable of paying a forfeiture, not whether financial data from a limited portion of its operations can sustain a forfeiture.

7 FCC Rcd 6643, 6644 (CCB 1992), *review denied*, 8 FCC Rcd 5176 (1993). Thus, it is the Commission's general policy to consider the financial condition of a licensee's consolidated operations, not just the financial condition of an individual station or a limited portion of its operations.

6. In support of its request for reconsideration, SM Radio has submitted only its own financial documentation. However, we note that there are several affiliated licensee entities whose gross revenues are also relevant to the issue of whether SM Radio can pay the proposed forfeiture because the entities share common ownership with SM Radio. Paulino Bernal is the 100% owner of SM Radio, Inc., Paulino Bernal Evangelism ("PBE"), La Radio Cristiana Network, Inc. ("LRCN"), and Consolidated Radio, Inc. ("CRI"). Paulino Bernal is also the individual licensee of AM broadcast Stations KCLR, Ralls, Texas, and KUBR, San Juan, Texas, as well as FM broadcast Stations KJAV, Alamo, Texas;

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

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

⁸ 47 U.S.C. § 503(b)(2)(D).

⁹ *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

¹⁰ *Emery Telephone*, 13 FCC Rcd 23854, 23859-60 (1998) (emphasis added), *recon. denied*, 15 FCC Rcd 7181 (1999).

KMFM, Premont, Texas; and KPBM, McCamey, Texas. Consistent with Commission policy, we will not make a determination that SM Radio can not pay the proposed forfeiture without first considering the gross revenues of the entities affiliated with SM Radio. Because SM Radio has not provided any information concerning the revenues of the several entities affiliated with it, we have no justification for reducing the forfeiture based upon SM Radio's claim of inability to pay the forfeiture. Although SM Radio claims that imposition of the forfeiture would limit its ability to generate programming in the public interest, the Commission has held that, consistent with its holding in *PJB Communications*, it will not find that a forfeiture will threaten a licensee's ability to serve the public unless a comparison of the forfeiture amount with the licensee's gross receipts shows that such a threat exists.¹¹ In this case, we can not make such a comparison because the inquiry would also require the inclusion of the gross receipts of affiliated entities, which have not been provided. However, having found that SM Radio does have a history of compliance with the Commission's Rules, we believe a reduction of the forfeiture to \$5,600 is warranted.

V. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act¹² and Section 1.106 of the Rules,¹³ SM Radio's petition for reconsideration of the April 5, 2004 *Forfeiture Order* **IS** hereby **GRANTED IN PART** to the extent discussed above and **DENIED** in all other respects.

8. 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.¹⁴ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the "Federal Communications Commission." The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank "Bank One," and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁵

9. **IT IS FURTHER ORDERED THAT** this *Order* shall be sent by regular mail and by certified mail, return receipt requested, to SM Radio, Inc., P.O. Box 252, McAllen, Texas 78502, and to its counsel, Barry D. Wood, Esq., 1827 Jefferson Place, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹¹ *KASA Radio Hogar*, 17 FCC Rcd 6256, 6259 (2002); *Emery Telephone* at 7185.

¹² 47 U.S.C. § 405.

¹³ 47 C.F.R. § 1.106.

¹⁴ 47 U.S.C. § 504(a).

¹⁵ *See* 47 C.F.R. § 1.1914.