

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

In the Matter of)	NAL/Acct. No. 20051810112
)	FRN: 0002527612
Viper Communications)	
)	
Applications for Renewal of License for Stations)	Facility ID Nos. 35554/35553
KRMS(AM) and KRMS-FM, Osage Beach, MO)	File Nos. BR-20040929AHW/BRH-
)	20041230AAX
)	
)	
)	

**MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY**

Adopted: December 20, 2005

Released: December 22, 2005

By the Chief, Media Bureau:

1. The Media Bureau has before it the captioned license renewal applications of Viper Communications (“Viper”) for stations KRMS(AM) and KRMS-FM, Osage Beach, Missouri. The KRMS-FM license renewal application was not timely filed.¹ The Media Bureau also has before it the results of a review of the stations’ EEO public file reports for compliance with the Commission’s equal employment opportunities (“EEO”) rule. For the reasons set forth below, we issue a Notice of Apparent Liability in the amount of \$9,500 to Viper for violation of Sections 73.3539 and 73.2080 of the Commission’s rules, and we grant the KRMS(AM) and KRMS-FM license renewal applications.

2. *Section 73.3539 Violation.* Viper’s renewal application for the current KRMS-FM license term was due on October 1, 2004, four months prior to the February 1, 2005 expiration date.² The application was not filed until December 30, 2004. Viper explains that it did not timely file a license renewal application for KRMS-FM because it had pending before the Commission a license application³ to cover modified facilities for KRMS-FM and it believed that a renewal application specifying the station’s previous facilities was not required. Viper attempts to analogize its circumstances to those of a new station operating pursuant to program test authority with a pending license application; such a facility it argues, would not have to file a license renewal application. Viper’s argument is unpersuasive. KRMS-FM is not a new, unlicensed station, and Viper provides no authority to support its position that it was not required to file a license renewal application during the pendency of its license to cover a KRMS-

¹ See 47 C.F.R. § 73.3539. The KRMS(AM) license renewal application was timely filed.

² See 47 C.F.R. §§ 73.1020, 73.3539(a).

³ File No. BLH-20000327ABP, covering an upgrade from Class A to Class C2 facilities pursuant to MM Docket No. 90-66. See *Lincoln, Osage Beach, Steelville, and Warsaw, MO*, 7 FCC Rcd 3015 (MMB 1992), *recon. denied*, 11 FCC Rcd 6372 (MMB 1996), *second pet. for recon. dismissed*, 12 FCC Rcd 4987 (MMB 1997), *review denied*, 17 FCC Rcd 6119 (2002), *pet. for recon. dismissed*, 19 FCC Rcd 12679 (2004).

FM facilities upgrade. Moreover, its misunderstanding does not justify its failure to comply with the rules.⁴

3. Section 503(b) of the Communications Act, 47 U.S.C. Section 503(b) and Section 1.80(a) of the Commission's rules, 47 C.F.R. Section 1.80(a), each state that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission's rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Communications Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.⁵ A continuing violation is "repeated" if it lasts more than one day.⁶

4. The guidelines contained in the Commission's *Forfeiture Policy Statement*⁷ specify a base forfeiture amount of \$3,000 for a failure to file a required form. Section 503(b)(2)(D) of the Act requires the Commission to consider "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." In this case, Viper apparently willfully failed to timely file the KRMS-FM license renewal application. Taking into consideration all of the factors required by Section 503(b)(2)(D) of the Act and the Forfeiture Policy Statement, including the fact that the renewal application was filed prior to expiration of the station's license, we will reduce the forfeiture to \$1,500 for the late filing.⁸ We will not excuse the violation, because licensees are responsible for the timely submission of required forms, and untimely renewal applications disrupt the orderly processing of renewal applications in accordance with Section 73.1020 of the Commission's rules.

5. *EEO Review*. EEO staff reviewed the renewal applications and EEO public file reports of KRMS(AM)/KRMS-FM for compliance with the EEO rule, Section 73.2080 of the Commission's rules.⁹

6. Under Section 73.2080(c)(2) of the Commission's rules,¹⁰ station employment units must engage in at least two outreach initiatives during a two-year time period if they have five to ten full-time employees and/or are located entirely in a smaller market like KRMS(AM)/KRMS-FM. The relevant time period here is March 10, 2003 through October 1, 2004.¹¹ Our review shows that during the period at issue (March 10, 2003, through October 1, 2004), KRMS(AM)/KRMS-FM (the "Unit") failed to engage in at least one outreach initiative during a period of over 18 months. The Unit reports in its public file reports that for the period at issue (March 10, 2003, through October 1, 2004), it had intended to list every upper-

⁴ See, e.g., *Mississippi Broadcasting Partners*, 13 FCC Rcd 19401 (MMB 1998) (human error, inadvertence and/or misunderstanding of the rules did not constitute a basis for excusing licensee's violations).

⁵ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-4388 (1991).

⁶ *Id.*, 6 FCC Rcd at 4388.

⁷ *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 ("*Forfeiture Policy Statement*").

⁸ See *Discussion Radio, Inc.*, 19 FCC Rcd 7433, 7438 (2004) at ¶ 15.

⁹ 47 C.F.R. § 73.2080.

¹⁰ 47 C.F.R. § 73.2080(c)(2) requires two outreach initiatives "during each two-year period beginning with the date stations in the station employment unit are required to file renewal applications, or the second, fourth, or sixth anniversaries of that date."

¹¹ 47 C.F.R. § 73.2080(c)(2). The Commission's EEO rule went into effect on March 10, 2003. As stated above, the stations' renewal application filing deadline was October 1, 2004. The Commission stated in adopting the rule that if the initial period starting with the effective date of the rule "is less than two years, the number of menu options [outreach initiatives] may be reduced proportionally to the amount of time available." *Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018, 24057 (2002), *recon. pending*.

level opening in a job bank or newsletter of a media trade group whose membership includes substantial participation of women and minorities as a specific outreach initiative in accordance with Section 73.2080(c)(2)(xii). The Unit explains that it did not fulfill this initiative because it did not have any upper-level openings.

7. The Unit's explanation that it did not fulfill its outreach initiative because it did not have the opportunity to complete the initiative it chose is unsatisfactory. The outreach initiative was a mandatory requirement of the Unit's EEO program. If the Unit could not perform one initiative, then it was obligated to perform another initiative from the extensive menu of options listed in Section 73.2080(c)(2). Accordingly, we conclude that the Unit failed to engage in at least one outreach initiative during the period at issue (March 10, 2003, through October 1, 2004), as required by Section 73.2080(c)(2) of the rules. We also find that the Unit failed to self-assess adequately its EEO program in violation of § 73.2080(c)(3).

8. Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any of the provisions of the Communications Act or any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹² 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."¹³ During the time period of March 10, 2003, through October 1, 2004, it is apparent that the Unit willfully violated Sections 73.2080(c)(2) and (c)(3) of the Commission's rules because it performed no initiatives and failed to self-assess adequately.

9. The Commission's guidelines for assessing forfeitures, set forth in Section 1.80(b)(4) of the rules,¹⁴ do not specify base amounts for EEO violations, such as a failure to perform required outreach initiatives or to self-assess EEO performance.¹⁵ However, in *Emmis Television Licensee, LLC*, we issued an \$18,000 forfeiture for a licensee's violations of 47 C.F.R. §§ 73.2080(c)(3), (c)(5), (c)(6)(iv), and 73.3526(e)(7) as a result of an EEO audit.¹⁶ Considering the totality of the circumstances in this case, including that it involves fewer violations than we found in *Emmis*, we believe that the apparent violations warrant issuance of a Notice of Apparent Liability in the amount of \$8,000 for the EEO violations by KRMS(AM) and KRMS-FM. The Unit failed to perform any outreach initiatives over an 18-month period and to self-assess its EEO program. Adequate self-assessment of the Unit's EEO program during that time period would have resulted in the actual performance of an initiative from the list of extensive menu options. We will also impose reporting conditions as set forth below to ensure that the licensee, or any successor licensee, maintains an adequate EEO program on an ongoing basis.

10. *License Renewal Applications.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Communications Act. That section provides

¹² 47 U.S.C. § 503(b).

¹³ 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17100 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

¹⁴ 47 C.F.R. § 1.80(b)(4).

¹⁵ Section 1.80(b)(1) of the Commission's rules, 47 C.F.R. § 1.80(b)(1), limits the forfeiture penalty for a broadcast station to \$32,500 for each violation or each day of a continuing violation, with a limit of \$325,000 for a continuing violation for any single act or failure to act described in paragraph 1.80(a) of the Commission's rules, 47 C.F.R. § 1.80(a).

¹⁶ *Emmis Television Licensee, LLC*, DA 05-2345 (released August 26, 2005).

that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹⁷ 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.”¹⁸

11. We find that Viper's violation of Section 73.3539 of the Commission's rules for KRMS-FM and its violation of Sections 73.2080(c)(2) and (c)(3) of the Commission's rules for KRMS(AM) and KRMS-FM do not constitute “serious violations” of the Commission's rules warranting designation for evidentiary hearing. Additionally, we find no evidence of violations that, when considered together, evidence a pattern of abuse.¹⁹ Further, we find that stations KRMS(AM) and KRMS-FM served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.²⁰

12. *Ordering Clauses.* Upon review of the record, IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended,²¹ and Sections 0.61, 0.283, and 1.80 of the Commission's rules,²² Viper Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of nine thousand five hundred dollars (\$9,500) for violating Sections 73.2080 and 73.3539 of the Commission's rules, as described herein.

13. IT IS FURTHER ORDERED that pursuant to Section 1.80 of the Commission's rules, within thirty days of the release of this NOTICE OF APPARENT LIABILITY, Viper Communications, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. 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. (20051810112) and FCC Registration Number (“FRN”) (0002527612) referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under the installment plan

¹⁷ 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 *Order, Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 11 FCC Rcd 6363 (1996).

¹⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁹ For example, we do not find here that the licensee's station operation “was 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*, 32 F.C.C.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 [its station] in the future in accordance with the requirements of its licenses and the Commission's Rules.” *Heart of the Black Hills Stations*, 32 F.C.C.2d at 200. See also *Center for Study and Application of Black Economic Development*, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 (1992).

²⁰ See 47 U.S.C. § 309(k).

²¹ 47 U.S.C. § 503(b).

²² 47 C.F.R. §§ 0.61, 0.283, and 1.80.

should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, SW, Washington D.C. 20554.²³

14. The response, if any, must be mailed to Donna C. Gregg, Chief, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-C740, Washington, D.C. 20554 and MUST INCLUDE the NAL/Account number (MB20051810112) and FRN (0002527612) referenced in the caption of this document.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. IT IS FURTHER ORDERED that Viper Communications, Inc. or, as applicable, the successor licensee(s) of KRMS(AM) and KRMS-FM, shall submit to the Federal Communications Commission, Media Bureau, EEO Staff, an original and one copy of the Units’ most recent EEO public file reports on October 1, 2006; October 1, 2007; and October 1, 2008.

17. IT IS FURTHER ORDERED that the renewal applications of Viper Communications, Inc. for stations KRMS(AM) and KRMS-FM, Osage Beach, Missouri, (File Nos. BR-20040929AHW and BRH-20041230AAX, respectively) ARE GRANTED.

18. IT IS FURTHER ORDERED that pursuant to Section 73.3526(e)(10) of the Commission’s rules, the licensee place a copy of this Notice in its units’ public inspection files.

19. Finally, IT IS ORDERED that a copy of this Notice shall be sent by First Class and Certified Mail, Return Receipt Requested, to Viper Communications, Inc. and its attorney of record in this proceeding, Richard J. Hayes, Jr., Esq., 8404 Lee’s Ridge Road, Warrenton, Virginia 20186.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

²³ See 47 C.F.R. § 1.1914.