

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

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| In re Applications of |) | |
| |) | |
| Beyond the Bay Media Group |) | NAL/Acct. No. MB2006041410030 |
| |) | FRN: 0010599314 |
| For Renewal of License |) | File No. BRED-20040601AZI |
| |) | |
| Beyond the Bay Media Group, Assignor |) | |
| and |) | |
| Educational Media Foundation, Assignee |) | |
| |) | |
| For Assignment of License |) | File No. BALED-20040325AGS |
| |) | |
| Educational Media Foundation |) | |
| |) | |
| For Construction Permit to Modify Facilities |) | File No. BPED-20040331AVG |
| |) | |
| Noncommercial Educational Station WTRK(FM), |) | Facility I.D. No. 5064 |
| Bay City, Michigan |) | |

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

Adopted: June 27, 2006

Released: June 29, 2006

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the following applications: (1) the application of Beyond the Bay Media Group (the “Licensee” or “BBMG”) for renewal of the license for noncommercial educational Station WTRK(FM), Bay City, Michigan (the “Station”) (the “Renewal Application”); (2) the application of the Licensee and Educational Media Foundation (“EMF”) for approval of the assignment of license and sale of the assets of the Station by the Licensee to EMF (the “Assignment Application”); and (3) the application of EMF for a construction permit to modify the station’s technical facilities (the “Modification Application”). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (“NAL”)* issued pursuant to Sections 309 and 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”)¹ by the Commission by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,² we find that the Licensee apparently violated Section 73.1350(a) of the Rules, by failing to operate substantially in accordance with the terms and conditions of its license.³ Based upon our review of the facts and

¹ 47 U.S.C. §§ 309, 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ 47 C.F.R. § 73.1350(a).

circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of four thousand dollars (\$4,000), and we grant the Renewal Application, the Assignment Application, and the Modification Application.

II. BACKGROUND

2. Section 73.1350(a) of the Rules prohibits operation of a broadcast station at variance with the terms of the station's authorization. On April 21, 1993, the staff granted BBMG's application for a new Class A noncommercial educational ("NCE") FM station in Bay City, Michigan,⁴ and issued a construction permit bearing the following specifications:

| | | |
|--|----------------|-------------|
| Antenna Coordinates: | North Latitude | 43° 35' 04" |
| | West Longitude | 83° 51' 36" |
| Height of Antenna Radiation Center Above Ground Level: | | 95 Meters |
| Height of Antenna Structure Above Ground Level: | | 131 Meters |

The permit specified an Effective Radiated Power ("ERP") of 2 kW. BBMG subsequently constructed the facility, choosing the call sign WTRK(FM), and filed a covering license application on March 3, 1993.⁵ The license application listed the coordinates and tower/antenna heights specified in the construction permit.

3. The tower for WTRK(FM)'s facilities was constructed and owned by Liggett Broadcasting, Inc. ("Liggett"). Liggett registered the tower with the Commission in 1996, with the following specifications:⁶

| | | |
|---|----------------|----------------------------------|
| Antenna Coordinates: | North Latitude | 43° 35' 06" |
| | West Longitude | 83° 51' 34" |
| Height of Antenna Structure Above Ground Level: | | 126.5 Meters (w/ appurtenances) |
| | | 125.5 Meters (w/o appurtenances) |

BBMG indicates that Liggett never informed it that the information in the tower registration application differed from that contained in the Station construction permit and supplied in BBMG's 1993 license application.⁷

4. In March of 2000, Liggett filed an Antenna Structure Registration modification⁸ for the tower, reporting a tower height above ground level of 88.4 meters with appurtenances and 82.5 meters without appurtenances; the coordinates remained unchanged. According to BBMG, "it is not clear" when it was notified of this 40-meter reduction in the WTRK(FM) antenna structure, and Liggett did not provide BBMG with information as to where on the shortened tower the WTRK(FM) antenna was relocated; in any event, the Commission was never informed by BBMG of any reduction in

⁴ File No. BPED-19911113MA.

⁵ File No. BLED-19930810KA. The staff granted the application on October 27, 1993.

⁶ See ASR File No. A0009206 for Tower ID No. 1007728.

⁷ BBMG May 6, 2004 Opposition at 2.

⁸ See ASR File No. A0117038. This application was dismissed by the Wireless Telecommunications Bureau staff, but an identical application, ASR File No. A0127408, was filed in June of 2000.

WTRK(FM)'s operating parameters.⁹ Liggett then sold the tower to Midwest Partners, LLC, ("MP") which sale was reported to the Commission in February of 2001. BBMG indicates that it had subsequent communications with MP to determine exactly where on the tower the WTRK(FM) transmission facilities were located, and on February 24, 2004, it received a copy of the "tower mapping" MP received when it acquired the tower from Liggett. BBMG states that this documentation shows that the WTRK(FM) antenna is mounted somewhere between 67 and 79 meters above ground level on the tower.¹⁰

5. On March 25, 2004, BBMG and EMF filed the Assignment Application. EMF shortly thereafter filed the Modification Application, as a contingent filing with BBMG's consent as proposed assignor, as required by Section 73.3517(a) of the Rules,¹¹ to modify WTRK(FM)'s authorized facilities by increasing to Class C2 facilities (15 kW ERP, Antenna Height Above Average Terrain of 255 meters) at a different site.¹² On June 1, 2004, BBMG timely filed the captioned Renewal Application for WTRK(FM)'s license.

6. On April 19, 2004, Michigan Community Radio ("MCR"), licensee of NCE station WWKM(FM), Imlay City, Michigan,¹³ filed a "Petition for Declaratory Ruling on the Unauthorized Modified Facilities of WTRK; Petition to Deny and/or Motion for Stay on Modification & Assignment of License" against the captioned Modification and Assignment applications;¹⁴ on December 2, 2004, MCR also filed an Informal Objection to the Renewal Application.¹⁵ MCR argues that the applications should be denied on the basis of BBMG's operation for more than four years with other than authorized facilities. MCR argues that granting the Modification and Assignment Applications would "reward BBMG for its bad behavior" and allow EMF to benefit from facilities to which it is not entitled. BBMG does not dispute that, from early 2000 until it took WTRK(FM) off the air¹⁶ and resumed operation with STA

⁹ Michigan Community Radio, which has filed pleadings in opposition to the captioned applications, disputes this contention. See discussion at paras. 15-17 *infra*.

¹⁰ BBMG May 6, 2004 Opposition at 3.

¹¹ See 47 C.F.R. § 73.3517(a).

¹² The Modification Application originally specified coordinates of 43° 37' 15" North Latitude and 83° 49' 59" West Longitude, although it was later amended to specify coordinates of 43° 33' 42" North Latitude, 83° 58' 52" West Longitude and modified the ERP and HAAT values accordingly.

¹³ The call sign of the Station was changed from WHYT(FM) to WWKM(FM) on August 9, 2004. For administrative convenience, we will use the Station's current call sign throughout this *NAL*.

¹⁴ This pleading (the "MCR Petition") also references and attempts to contest WTRK(FM)'s current license, BLED-19930810KA, which was granted on October 27, 1993. BBMG filed an "Opposition to Petition for Declaratory Ruling Concerning Alleged Unauthorized Modified Facilities" and "Opposition to Petition to Deny and Motion for Stay on Modification and Assignment Applications" on May 6, 2004.

¹⁵ This pleading is referred to herein as the "MCR Objection." BBMG filed an Opposition to the MCR Objection on January 4, 2005.

¹⁶ On June 28, 2004, BBMG suspended Station WTRK(FM)'s operations and took the Station silent. On July 27, 2004, BBMG requested special temporary authorization ("STA") to remain silent, claiming that it had lost permission to use the authorized site on MP's tower; the staff granted this request on August 10, 2004. *Letter to Scott C. Cinnamon, Esq.*, Reference 1800B3-GDG (MB Aug. 10, 2004). On June 1, 2004, BBMG also requested STA to operate with the facilities specified in the Modification Application. The staff granted this request on July 12, 2004, specifying operation with an ERP of 0.12 kW from the site specified in the original Modification Application. *Letter to Scott C. Cinnamon, Esq.*, (MB July 12, 2004). (BBMG informed the Commission that WTRK(FM) returned to the air on December 12, 2004. The Station has apparently been operational since that time.)

(continued...)

facilities in July of 2004, it operated the Station with a reduced, unauthorized, antenna height, and it admits that it should have filed a request for STA to operate at variance with its licensed facilities much sooner. BBMG argues that the consequences of its malfeasance should not be as extreme as MCR suggests, given that it (1) never operated WTRK(FM) with facilities in excess of those authorized; (2) has not had a single interference or other complaint about WTRK(FM)'s operation; and (3) has not been the subject of any prior FCC enforcement action.

III. DISCUSSION

7. *Procedural Matters.* As noted *supra*, MCR styles the MCR Petition as a “Petition for Declaratory Ruling on the Unauthorized Modified Facilities of WTRK; Petition to Deny and/or Motion for Stay on Modification and Assignment of License.” It raises objections to the Modification and Assignment Applications and against the original covering license application for WTRK(FM). The covering license application for WTRK(FM) was granted on October 27, 1993. That grant is long since final, and it cannot be collaterally challenged here.¹⁷ Accordingly, to the extent the MCR Petition addresses the WTRK(FM) covering license application, it will be dismissed.

8. Additionally, while MCR includes “Petition for Declaratory Ruling” in the caption of the MCR Petition, there is no controversy or uncertainty here that requires the issuance of any declaratory ruling of law by the Commission.¹⁸ Nor are the facts in this case in dispute. Accordingly, to the extent that MCR’s pleading is a Petition for Declaratory Ruling, it will be dismissed. Finally, although MCR requests a “Motion for Stay” in the caption of its pleading, the Rules are clear that “any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.”¹⁹ Additionally, it is unclear what “decision” MCR seeks to have stayed, as the staff has not yet acted on the Modification, Assignment, or Renewal applications, and the grant of the covering license application is final. Accordingly, to extent that the MCR Petition is a Motion for Stay, it will be dismissed.

9. Finally, because formal petitions to deny do not lie against minor modification applications such as that of EMF here,²⁰ the MCR Petition will be considered as an informal objection to the Modification Application under Section 73.3587 of the Rules.²¹ Although petitions to deny do lie

(...continued from previous page)

On October 18, 2004, BBMG sought another STA, to operate from the coordinates specified in the amended Modification Application. The staff granted that STA on October 19, 2004, permitting operations with 0.14 kW. *Letter to Scott C. Cinnamon, Esq.* (MB Oct. 19, 2004). On November 1, 2005, the staff granted an extension of this STA through May 1, 2006. On May 22, 2006, BBMG sought to reinstate and extend that STA.

¹⁷ See *Michael S. Rice*, Memorandum Opinion and Order, 16 FCC Rcd 18394, 18396 (2001) (“Petition for Equitable Relief” dismissed as an “untimely and collateral challenge to a final Commission action”); *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12757 (1999) (denying March 1993 motions for declaratory ruling as untimely petitions for reconsideration of, and impermissible collateral attacks on, the Commission's Frequency Coordination decision, which became final in 1987).

¹⁸ See 47 C.F.R. § 1.102 (the Commission may issue a declaratory ruling “terminating a controversy or removing uncertainty.”)

¹⁹ 47 C.F.R. § 1.44(e).

²⁰ See 47 U.S.C. § 308(c); 47 C.F.R. §§ 73.3580(a)(1), 73.3584.

²¹ 47 C.F.R. § 73.3597.

against applications for assignment of license, MCR's pleading was filed more than eight months after the filing of the Assignment Application, long after the 30-day period for filing petitions to deny that application.²² Accordingly, it will be considered as an informal objection to the Assignment Application.

10. *Substantive Matters. Antenna Height and Coordinate Discrepancy.* MCR asserts that: (1) WTRK(FM)'s antenna has not been at its licensed height since February 2000; and (2) the tower coordinates listed on the tower registration differ by two seconds latitude and longitude from those of the actual tower location.²³ BBMG states that it unsure when it became aware of the reduction in the WTRK(FM) antenna height. It also claims that the tower coordinate inconsistency of a mere two seconds latitude and two seconds longitude is *de minimis* and was unknown to it until 2004.²⁴ It concedes that, in failing to timely notify the Commission of the involuntary reduction of its antenna height, it failed to follow correct Commission procedure.

11. We reject BBMG's contention that a coordinate discrepancy of two seconds of latitude and two seconds of longitude is *de minimis*. Broadcast licensees are required to specify their transmitter locations to the nearest second, and those specific coordinates form the basis of the Commission's FM spacing²⁵ and interference calculations. BBMG's failure to discern the discrepancy in its antenna coordinates and change in antenna height, determine the correct Station coordinates and seek authority to operate with facilities differing substantially from those specified in the WTRK(FM) license, warrant a monetary forfeiture for violation of Section 73.1350 for operation at variance with its authorized parameters.²⁶

12. 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.²⁷ 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.²⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both

²² The WTRK(FM) Assignment Application was accepted for filing by *Public Notice* released on March 30, 2004. See *Broadcast Applications*, Report No. 25703 at 2. Petitions to deny the application were due within 30 days of that date. 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584.

²³ MCR asserts that BBMG's sloppiness has prevented it from improving the facilities of WWKM(FM) for more than four years. If WTRK(FM)'s facilities had reflected its actual, lesser operating parameters, states MCR, WWKM(FM) could increase its signal in the direction of WTRK(FM) and improve coverage to "many areas in which MCR desires to serve." MCR Petition at 4.

²⁴ BBMG also states that the discrepancy is a mere two seconds in latitude and longitude and can be corrected by the filing of a "simple" application. BBMG states that it plans to "take a GPS reading at the tower site, discuss its findings with the current tower owner, and coordinate making the tower information at the FCC consistent." The plan to remedy the coordinate discrepancy was "overtaken by events" such as BBMG's loss of authority to use the site; accordingly, no coordinate correction application was ever filed.

²⁵ See 47 C.F.R. § 73.207.

²⁶ The record is not dispositive as to whether the coordinates authorized for the station or those on the tower registration are correct. Because of our determination that the Licensee independently violated Section 73.1350 with regard to the unauthorized change in the antenna tower height and resulting operation, and because WTRK(FM) no longer operates from the MP tower site, we need not determine which set of coordinates is accurate.

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

²⁸ 47 U.S.C. § 312(f)(1).

Sections 312 and 503(b) of the Act,²⁹ and the Commission has so interpreted the term in the Section 503(b) context.³⁰ 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.”³¹

13. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$4,000 for constructing or operating at an unauthorized location, the violation closest to that by the Licensee here.³² 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.”³³

14. A station must be constructed and operated substantially as set forth in its construction permit and license authorizations. Otherwise, the station is subject to revocation of license or permit, or for imposition of a forfeiture.³⁴ In this case, BBMG concedes that it did not operate WTRK(FM) in accordance with its licensed facilities and that it failed to seek promptly Commission approval to operate with its modified facilities. BBMG operated WTRK(FM) for more than four years without either notifying the Commission or requesting permission to operate with the modified facilities. It thus appears that its violations were willful, and the duration of the violation, from March of 2000 until the station suspended operations on June 28, 2004, was substantial. We also note, however, that no compounding factors, such as the creation of air navigation hazards or radio interference, were created through either the construction or operation of the nonconforming facility.³⁵ 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

²⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³¹ 47 U.S.C. § 312(f)(2).

³² We are in this case applying the base forfeiture set forth in 47 C.F.R. § 1.80(b)(4) for “Construction or operation at an unauthorized location” rather than the more serious “Construction and/or operation without an instrument of authorization for the service.” BBMG does have a license to operate WTRK(FM) and, although it demonstrated a lack of diligence in determining WTRK(FM)’s exact antenna height, it was not responsible for moving the antenna to a lower height on the tower. The antenna move was carried out by the tower owner.

³³ 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).

³⁴ See 47 U.S.C. §§ 312(a)(2), 319(c), and 503(b)(1)(A) (forfeiture authorized for willful or repeated failure to comply substantially with the terms and conditions of any permit or other authorization issued by the Commission), and 47 C.F.R. § 73.1350(a) (each licensee is responsible for maintaining and operating its station in accordance with the terms of the station authorization). See also *Multicultural Radio Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20630 (2000).

³⁵ Compare *Triad Broadcasting Company, Inc.*, Memorandum Opinion and Order, 96 FCC 2d 1235 (1994) (“*Triad*”), *Liability of Equivox, Inc.*, Memorandum Opinion and Order, 87 FCC 2d 1099 (1981) (“*Equivox*”); *Metro Program Network, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 2940 (1990) (“*Metro*”). In *Triad*, *Equivox*, and *Metro*, the Commission assessed forfeitures of \$20,000 for unauthorized operations, under circumstances where the facilities actually constructed varied substantially from those specified in the applicable authorization, thereby creating potentially serious hazards to air navigation and radio interference. In *Metro*, for example, the facilities were built 25.4 miles from the authorized location; in *Triad*, the licensee increased its power from 34 kW to 100 kW; and in *Equivox*, the licensee changed its antenna location and increased its tower height from 75 feet to 140 feet without permission.

believe that a proposed forfeiture in the base amount of \$4,000 is appropriate.

15. Misrepresentation. In the MCR Objection, MCR states that it believes that BBMG's claim of ignorance is false and that was "well aware of what was happening at the tower site." MCR President Edward Czelada indicates that Mr. Robert Liggett, the owner of the tower at the time of its reduction in height, indicated that BBMG was "given plenty of notice and information regarding tower modifications."³⁶ Additionally, Mr. Czelada indicates that he showed WTRK's Opposition to Michael Grundel, Project Manager for the company that performed the structural modifications on the tower, and Mr. Grundel informed him that WTRK(FM) was contacted on January 17, 2000, regarding the construction schedule for the tower and that all involved parties were notified of the relocation of the WTRK(FM) equipment.³⁷

16. In its Opposition to the MCR Objection, BBMG disputes any claim that it misrepresented or lacked candor in its representations regarding the relocation of the WTRK(FM) antenna. It does not dispute the fact that it was notified of the tower height reduction prior to the time the work on the tower took place and, in fact, it acknowledges that it cooperated completely with the construction crew by powering WTRK(FM) down such that the tower workers were kept safe. BBMG states, however, that, until 2004, it did not have a "tower mapping" to show the exact modified location of its antenna on the tower. To the extent MCR charges that it should have acted sooner in notifying the Commission of the reduced antenna height, as discussed previously, BBMG admits that failure. However, it denies that it made any misrepresentations to the Commission regarding the relocation of WTRK(FM)'s facilities on the shortened tower.³⁸

17. We find no false statements or material omissions in BBMG's responses and explanations regarding its failure to timely seek approval to operate with other than its licensed facilities. At no point did BBMG represent, as MCR claims, that it was not notified of the height reduction of the tower on which WTRK(FM)'s antenna was mounted; rather, BBMG consistently stated simply that it was "not clear" when it was given that notification and that it was not given accurate information as to exactly where on the shorter tower the WTRK(FM) antenna was relocated. No further inquiry is warranted as to this allegation.³⁹

18. Additionally, MCR argues that BBMG made a misrepresentation to the Commission and to EMF when BBMG certified, in paragraph 5(c) of its Asset Purchase Agreement with EMF for the sale

³⁶ MCR Informal Objection at 2 and Declaration of Edward T. Czelada.

³⁷ *Id.* Czelada states that Mr. Grundel told him that:

It is not possible for our construction crew to disconnect a radio station without either severe damage to WTRK's equipment or injury to our crew. Our crew did not sustain any damage from RF exposure, and to my knowledge, no damage was sustained to WTRK's equipment. I do not believe BBMG's claims of not being notified of their equipment relocation to hold any merit at all.

Id., Declaration of Edward T. Czelada.

³⁸ BBMG January 4, 2005 Opposition at 3.

³⁹ MCR's evidence in support of this claimed misrepresentation consists of Mr. Czelada's account of conversations he had with Mr. Liggett, the owner of the tower at the time its height was reduced, and Mr. Grundel, project manager of the construction company that did the tower reconstruction. These statements constitute hearsay. *See* Fed. R. Evid. 801(c). Because we find that BBMG made no false or misleading statements, we need not address the issue of whether MCR's information in support of its misrepresentation claim is probative here.

of the station that WTRK(FM) has been “operating in substantial compliance with its FCC authorizations. . . .”⁴⁰ MCR states that “BBMG has not been upfront with both EMF or the FCC by filing these false statements” and that “BBMG has misled EMF into purchasing ‘damaged goods.’”⁴¹ We reject MCR’s contention that BBMG’s contractual assertion to EMF constituted a representation to the Commission. Thus, even if it were false, this “certification” would not and could not constitute a disqualifying “misrepresentation.” For this reason, we have previously held that we will not infer an intent to deceive the Commission based on allegedly false statements in contracts merely because the Commission’s rules require the submission of a copy of purchase agreements at the time license assignment applications are filed.⁴² We conclude that MCR has not made “the requisite *prima facie* demonstration of deception and of a desire, motive or logical reason to mislead” the Commission.⁴³

19. We also decline to pursue MCR’s breach of contract allegations regarding an agreement to which it is not a party. The Commission has consistently held that it is not the proper forum for the resolution of private disputes, and that the parties, if they are so inclined, should seek redress for such matters in a court of competent jurisdiction.⁴⁴ Consequently, the MCR Objection fails to present a substantial and material question of fact as to BBMG’s qualifications to be a licensee or to assign Station WTRK(FM) to EMF.

20. *Ex Parte Contacts.*⁴⁵ MCR argues in the MCR Objection that BBMG violated the Commission’s *ex parte* rules⁴⁶ because BBMG failed to serve MCR with copies of two amendments to the Modification Application⁴⁷ and with its various STA requests.⁴⁸ MCR is incorrect. The WTRK(FM) Modification, Assignment, and Renewal Applications are “restricted proceedings” triggering the prohibition on *ex parte* communications.⁴⁹ However, BBMG was not required to serve MCR with amendments to its Modification Application, because the filing of a required form – such as an FCC Form

⁴⁰ MCR Petition at 5.

⁴¹ *Id.*

⁴² See, e.g., *Roy M. Speer*, Memorandum Opinion and Order, 11 FCC Rcd 18393, 19424 (1996) (no intent to deceive when erroneous statement concerned an “immaterial” matter), and *FM Broadcasters of Douglas County*, Memorandum Opinion and Order, 10 FCC Rcd 10429 (1995).

⁴³ See *Fox Broadcasting*, Memorandum Opinion and Order, 93 FCC 2d 127, 129 (1983); *Garrett, Andrews, & Letizia, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981) *mod. on other grounds*, 88 FCC 2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from errors, inconsistencies or omissions accompanied by speculation that lacks factual support).

⁴⁴ *John F. Runner, Receiver (KBIF)*, Memorandum Opinion and Order, 36 RR2d 773, 778 (1976); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622 (1992).

⁴⁵ In accordance with 47 C.F.R. § 1.1212, we have coordinated the disposition of the *ex parte* allegations in this NAL with the Commission’s Office of the General Counsel.

⁴⁶ 47 C.F.R. §§ 1.1200 *et seq.*

⁴⁷ Amendments filed October 19, 2004 and November 9, 2004. These amendments were filed electronically and were available for viewing through the Commission’s CDDBS Public Access system.

⁴⁸ See Note 16, *supra*.

⁴⁹ See 47 C.F.R. § 1.1208.

301 for amendment to a modification application – is exempt under the *ex parte* rules.⁵⁰

21. Moreover, although BBMG's STA requests, unlike its Modification Application, were not required to be filed on a particular form, we do not deem the requests to be presentations that would have to be served under the *ex parte* rules. We find that the substance of the requests was distinct from the issues raised in the WTRK(FM) Modification, Assignment, and Renewal Application proceedings, and did not address the merits or outcome of these restricted proceedings.⁵¹ The STA requests did not relate to whether BBMG's applications should be granted in view of WTRK(FM)'s operation at variance with its authorization. Rather, as described in Note 16 *supra*, the first STA request was for authority to remain silent when WTRK(FM) lost the authority to use the MP tower; the second and third STA requests sought permission to resume operation with other than licensed facilities.

22. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act. That section provides 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 Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.⁵² 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.”⁵³

23. It is clear in this case that BBMG operated WTRK(FM) for several years with facilities that varied substantially from those specified in its authorization. However, because the facilities were actually less than those authorized, we believe that their use did not pose potentially serious hazards to air navigation or radio interference. On balance, we find on the facts of this case that BBMG's unauthorized operation does not constitute a “serious violation” of the Commission's rules warranting designation for evidentiary hearing.⁵⁴ Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.⁵⁵ Further, we find that station WTRK(FM) served the public interest,

⁵⁰ 47 C.F.R. § 1.1204(a)(1). See *Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682 (2004).

⁵¹ See 47 C.F.R. § 1.1202(d) (definition of a “presentation”).

⁵² 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).

⁵³ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁵⁴ We do not wish to minimize the gravity of BBMG's violations. In other circumstances, unauthorized operation could pose sufficient public safety risks or interference potential to support a “serious” violation finding.

⁵⁵ 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 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 Station] 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*, Memorandum Opinion and Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 4037 (1992).

convenience, and necessity during the subject license term. Accordingly, we grant the Renewal Application below.

24. *Modification and Assignment Applications.* We have also evaluated the WTRK(FM) Modification Application, and we find that it complies with all pertinent technical regulations. Moreover, we have examined the Assignment Application, and we find that BBMG and EMF are fully qualified to sell and acquire, respectively, the license for WTRK(FM). We also find that EMF is fully qualified to be the licensee of WTRK(FM) and that grant of the application will further the public interest, convenience, and necessity. Accordingly, we also grant the Modification Application and the Assignment Application below.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Beyond the Bay Media Group is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for its apparent willful and repeated violation of Section 73.1350(a) of the Commission's Rules.

26. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Beyond the Bay Media Group SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

27. Payment of the proposed 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 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.

28. 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 *NAL*/Acct. No. referenced above.

29. 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.

30. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁵⁶

31. IT IS FURTHER ORDERED, that the April 19, 2004 Petition for Declaratory Ruling filed by Michigan Community Radio IS DENIED.

⁵⁶ See 47 C.F.R. § 1.1914.

32. IT IS FURTHER ORDERED, that the April 19, 2004 Motion for Stay filed by Michigan Community Radio IS DISMISSED.

33. IT IS FURTHER ORDERED, that the April 19, 2004 Petition to Deny filed by Michigan Community Radio, when treated as an informal objection under Section 73.3587 of the Commission's Rules, and the December 2, 2004 Informal Objection filed by Michigan Community Radio, ARE GRANTED to the extent indicated above and ARE DENIED in all other respects.

34. IT IS FURTHER ORDERED, that, pursuant to Section 309 of the Communications Act of 1934, as amended, the applications of Beyond the Bay Media Group for renewal of license (File No. BRED-20040601AZI), of Beyond the Bay Media Group and Educational Media Foundation for approval of assignment of license (File No. BALED-20040325AGS), and of Educational Media Foundation for modification of facilities (File No. BPED-20040331AVG) for Station WTRK(FM), Bay City, Michigan, ARE GRANTED.

35. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Beyond the Bay Media Group, 919 29th Street, Bay City, Michigan 48708 and to its counsel, Scott C. Cinnamon, Esq., 1090 Vermont Avenue, N.W., Washington, DC 20005 and D. Keith Birchler, Esq., Learman, Peters, Sarow & McQuillan, PLC, 900 Center Avenue, Bay City, Michigan 48708, to Michigan Community Radio, 3302 N. Van Dyke Road, Imlay City, Michigan 48444, and to Educational Media Foundation, 5700 West Oaks Boulevard, Rocklin, California 95765 and its counsel, David D. Oxenford, Esq., Davis Wright Tremaine LLP, Suite 450, 1500 K Street, N.W., Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau