



Federal Communications Commission  
Washington, D.C. 20554

March 2, 2006

DA-06-500

***In Reply Refer to:***

1800B3-JP

NAL/Acct No.: MB200541410016

FRN: 0010298131

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Joe McKissick  
McKissick Enterprises  
879 South Alabama Avenue  
Monroeville, AL 36460

Robert Hilliard Boothe  
1101 Cameron Road  
Opp, AL 36467

In re: WYNI(AM), Monroeville, AL  
McKissick Enterprises  
Facility ID: 40900  
File No. BR-20040331AVB

Dear Gentlemen:

We have before us: (1) the captioned application of McKissick Enterprises (“McKissick”) for renewal of license for station WYNI(AM), Monroeville, Alabama; (2) Robert Hilliard Boothe’s (“Boothe”) Formal Petition to Deny filed on May 28, 2004; and (3) related responsive pleadings.<sup>1</sup> For the reasons set forth below, we issue a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE to McKissick for violation of Sections 73.3539 and 73.3526 of the Commission’s rules regarding renewal application filings and a broadcast station’s public inspection file, and grant the WYNI(AM) license renewal application.

**Procedural Issue.** McKissick charges that Boothe does not have standing to file a petition to deny the WYNI(AM) renewal application because Boothe’s residence is outside WYNI(AM)’s service area and because Boothe failed to include an affidavit certifying to the best of his knowledge, information and belief that there are grounds to support the petition.<sup>2</sup> In addition, McKissick charges that Boothe failed to demonstrate any grounds for the denial of the renewal application.

We find that Boothe clearly established that he resides within the WYNI(AM) service area<sup>3</sup> and that he has stated adequate and specific factual allegations to meet the statutory standard.<sup>4</sup> However,

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<sup>1</sup> McKissick filed an Opposition to the Formal Petition to Deny on June 28, 2004, to which Boothe filed a Reply on July 30, 2004.

<sup>2</sup> See 47 U.S.C. § 309(d).

<sup>3</sup> See Reply to Opposition at 1-2.

<sup>4</sup> See 47 U.S.C. § 309(d) and *Area Christian Television, Inc.*, 60 R.R. 2d 862 (1986).

Boothe has not submitted the requisite affidavit, and therefore his pleading is procedurally defective and cannot be considered a petition to deny.<sup>5</sup> It will be considered as an informal objection under Section 73.3587 of the Commission's rules.<sup>6</sup>

**Background.** Boothe's informal objection raises two issues: the failure of McKissick to file a license renewal in a timely fashion pursuant to Section 73.3539 and the failure to maintain a public inspection file pursuant to Sections 73.3526. Boothe states that the licensee admits to repetitive and blatant mismanagement of the public trust with the admission of numerous public file violations.<sup>7</sup> Boothe clearly has identified rule violations by McKissick in its operation of WYNI(AM). However, as discussed below, these violations do not warrant designation of the WYNI(AM) license renewal application for evidentiary hearing.

**Discussion. Section 73.3539 Violation.** WYNI(AM)'s renewal application for the current license term was due on December 1, 2003, four months prior to the April 1, 2004, license expiration date.<sup>8</sup> Boothe states the renewal application was filed on April 2, 2004, after the WYNI(AM) license had expired, based upon the Commission's website reporting the WYNI(AM) renewal was accepted for filing on April 2, 2004. An application is considered filed upon receipt by the Commission,<sup>9</sup> hence McKissick's application is considered to be filed on March 31, 2004, one day before the station's license expiration date. McKissick provides no explanation or acknowledgement of the untimely filing of the renewal application.

Commission precedent holds that a forfeiture, rather than designation for evidentiary hearing is the appropriate sanction for licensees that do not timely file a renewal application.<sup>10</sup> The guidelines contained in the Commission's *Forfeiture Policy Statement*<sup>11</sup> specify a base forfeiture amount of \$3,000 for a failure to file a required form. Section 503(b)(2)(D) of the Communications 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."<sup>12</sup> In this case, McKissick failed to timely file the WYNI(AM) renewal application. 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*, including the fact that the WYNI(AM) license renewal application was filed before the station's license expiration date, we will impose a \$1,500 forfeiture for

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<sup>5</sup> See 47 U.S.C. § 309(d).

<sup>6</sup> 47 C.F.R. § 73.3587.

<sup>7</sup> Boothe makes no independent claims outside of what was revealed on the renewal application as he does not claim to have looked at the WYNI(AM) public inspection file himself.

<sup>8</sup> See 47 C.F.R. §§ 73.1020, 73.3539(a).

<sup>9</sup> 47 C.F.R. § 1.7.

<sup>10</sup> See, e.g., *Discussion Radio Inc.*, 19 FCC Rcd 7433, 7438 (2004).

<sup>11</sup> *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*").

<sup>12</sup> 47 U.S.C. § 503(b)(2).

the late filing.<sup>13</sup> 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 the staggered filing deadlines set forth in Section 73.1020 of the Commission's rules.

**Section 73.3526 Violation.** Section III, Item 3 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 or 73.3527, as applicable, has been placed in the station's public inspection file at the appropriate times. As stated above, Boothe argues that McKissick failed to properly maintain a public inspection file for WYNI(AM) in violation of Section 73.3526. In the WYNI(AM) license renewal application, McKissick acknowledges its public file deficiencies. Specifically, McKissick indicated "No" to that certification, filing an Exhibit explaining that all issues/programs lists for every quarter between April 1996 and January 2000 were missing from the public inspection file. McKissick states that an employee retained by an entity operating the station under a time brokerage agreement removed the lists and it has been impossible to reconstruct the missing information. In addition, the exhibit details that issues/programs lists corresponding to the first and second quarters of 2000; the first, second and third quarters of 2002; and the first, second and third quarters of 2003 do not exist because the station was off the air during these times. Furthermore, the lists corresponding to the third and fourth quarters of 2000 and the fourth quarter of 2002 are missing as the result of a former employee's actions. McKissick also admits that the lists corresponding to the fourth quarter of 2003 and the first quarter of 2004 were placed in the public inspection file in an untimely manner.

Section 73.3526 of the Commission's Rules requires broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period.<sup>14</sup> In this regard, where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.<sup>15</sup>

We believe that, consistent with Commission precedent, a forfeiture, rather than designation for evidentiary hearing, is the appropriate sanction for the violation of Section 73.3526 in this case.<sup>16</sup> Section 503(b) of the Communications Act, 47 U.S.C. § 503(b) and Section 1.80(a) of the Commission's rules,<sup>17</sup> 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

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<sup>13</sup> See *Discussion Radio Inc.*, 19 FCC Rcd at 7438.

<sup>14</sup> Cf. *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division* (April 3, 1997), 13 FCC Rcd 4102 (1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, 8 FCC Rcd 6400 (1993)).

<sup>15</sup> See *Padre Serra Communications, Inc.*, 14 FCC Rcd 9702 (1999) (citing *Gaffney Broadcasting, Inc.*, 23 F.C.C.2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, 33 F.C.C. 706 (1962)).

<sup>16</sup> See *R&L Broadcasters*, 7 FCC Rcd 5551, 5557 (1992); *Millard V. Oakley*, 45 R.R.2d 661, 663 (1979) (Commission generally will not designate public file issue for hearing when there is no evidence of intentional misconduct); and *Felix H. Moralis*, 58 F.C.C.2d 642, 642 (1976).

<sup>17</sup> 47 C.F.R. § 1.80(a).

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.<sup>18</sup> A continuing violation is “repeated” if it lasts more than one day.<sup>19</sup>

The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$10,000 for public file violations.<sup>20</sup> In this case, the violations were disclosed to the Commission in the context of the license renewal application. On the other hand, the missing issues/programs lists cover a significant portion of the license term from 1996 to 2000, and from 2002 through 2004. In fact, from the record in this case it appears that only the lists from 2001 were properly filed and made continuously available to the public. Considering the record as a whole, we believe that a \$10,000 forfeiture is appropriate for the violation in this case.<sup>21</sup> We will, however, reduce the forfeiture to \$9,000 due to the licensee’s voluntary disclosure of the violation.<sup>22</sup>

**License Renewal Application.** In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Communications 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 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.<sup>23</sup> 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.”<sup>24</sup>

On balance, we find that McKissick’s violation of Sections 73.3539 and 73.3526 do not constitute “serious violations” of the Commission’s rules warranting designation for evidentiary hearing.<sup>25</sup> Moreover, notwithstanding the licensee’s clear inattention to the WYNI(AM) public inspection file, we

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<sup>18</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 (1991).

<sup>19</sup> *Id.* at 4388.

<sup>20</sup> *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission’s Rules*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* FCC 99-407 (rel. Dec. 28, 1999).

<sup>21</sup> See *Dick Broadcasting Company, Inc. of Tennessee*, 19 FCC Rcd 6319 (MB 2004); *Pacific Spanish Network, Inc.*, 14 FCC Rcd 10021 (MMB 1991); and *Padre Serra Communications, Inc.* 14 FCC Rcd at 9706.

<sup>22</sup> See *Surrey Front Range Limited Partnership*, 7 FCC Rcd 6361 (FOB 1992) (voluntary disclosure constitutes a downward adjustment criterion)

<sup>23</sup> 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).

<sup>24</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>25</sup> See *Discussion Radio Inc.*, 19 FCC Rcd at 7438.

find no evidence of violations that, when considered together, evidence a pattern of abuse.<sup>26</sup> Further, we find that station WYNI(AM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.<sup>27</sup>

**Conclusion/Actions.** For the reasons set forth above, and pursuant to Section 503 (b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), and Sections 0.283 and 1.80 of the Commission's Rules, 47 U.S.C. Sections 0.283 and 1.80, McKissick is hereby advised of its apparent liability for a forfeiture of \$10,500 for violating Section 73.3539 and willfully and repeatedly violating Section 73.3526.

Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, McKissick SHALL PAY to the United States 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. (MB200541410016) and the FCC Registration Number ("FRN") (0010298131) as referenced above. Payment by check or money order may be mailed to 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.

The response, if any, must be mailed to Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 2-A360, Washington, D.C. 20554 and MUST INCLUDE the FRN (0010298131) and NAL/Account Number (MB200541410016) referenced in the caption of this document.

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.

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<sup>26</sup> 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 WJJS-FM 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).

<sup>27</sup> *See* 47 U.S.C. § 309(k).

Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554.<sup>28</sup>

Finally, IT IS ORDERED, that the May 28, 2004 Informal Objection of Robert Hilliard Boothe IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and the application (File No. BR-20040331AVB) of Joe McKissick for renewal of license for station WYNI(AM), Monroeville, Alabama, IS GRANTED.

Sincerely,

Donna C. Gregg  
Chief, Media Bureau

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<sup>28</sup> See 47 C.F.R. § 1.1914.