

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

In the Matter of	)	
	)	
Frank Neely	)	File No. EB-03-NF-014
Licensee, Station WLTC(AM)	)	NAL/Acct. No. 200332640007
Gastonia, North Carolina	)	FRN 0008-4986-68
Rock Hill, North Carolina	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 29, 2007**

**Released: January 31, 2007**

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny a Petition for Reconsideration filed by Frank Neely (“Mr. Neely”), licensee of AM broadcast station WLTC, Gastonia, North Carolina, of an Enforcement Bureau (“Bureau”) *Forfeiture Order*<sup>1</sup> which imposed a forfeiture of four thousand dollars (\$4,000) to Mr. Neely for repeated violation of Section 73.1745(a) of the Commission’s Rules (“Rules”).<sup>2</sup> The noted violation involved Mr. Neely’s operation of its broadcast station at unauthorized power levels.

**II. BACKGROUND**

2. In a July 16, 2003 *Notice of Apparent Liability for Forfeiture*, the Commission’s Norfolk, Virginia Resident Agent Office (“Norfolk Office”) issued a monetary forfeiture in the amount of \$4,000 to Mr. Neely for apparent repeated violation of Section 73.1745(a) based on overpowered operations observed on April 22, 23, and 24, 2003.<sup>3</sup> In his response to the *NAL*, Mr. Neely did not dispute that WLTC operated with excessive power on the dates specified in the *NAL*, but opposed the *NAL*, stating that he had set up procedures to prevent the reoccurrence of the violation, and that he had a history of overall compliance with the Commission’s Rules. In addition, Mr. Neely claimed to be financially unable to pay the forfeiture. On August 23, 2004, the Bureau issued a *Forfeiture Order* finding Mr. Neely liable in the amount of \$4,000 for repeated violation of Section 73.1745(a). In the *Forfeiture Order*, the Bureau found that Mr. Neely’s corrective efforts were insufficient to nullify or mitigate the forfeiture,<sup>4</sup> and that Mr. Neely did not have a history of compliance because of previous enforcement action taken against WLTC.<sup>5</sup> Further, the Bureau found that the proposed forfeiture amount was a very small percentage of the gross revenues of Rejoice, Inc. (“Rejoice”), the parent company of WLTC, and held that no mitigation

<sup>1</sup> *Frank Neely*, Forfeiture Order, 19 FCC Rcd 16135 (Enf. Bur. 2004) (“*Forfeiture Order*”).

<sup>2</sup> 47 C.F.R. §§ 73.1745(a).

<sup>3</sup> *Frank Neely*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200332640007 (Enf. Bur., Norfolk Office, released July 16, 2003) (“*NAL*”).

<sup>4</sup> *Forfeiture Order*, 19 FCC Rcd at 16135.

<sup>5</sup> *Id.*

or reduction of the proposed forfeiture was warranted based on the financial information provided.<sup>6</sup>

3. On September 9, 2004, Mr. Neely filed a Petition for Reconsideration of the *Forfeiture Order*. He argues the single point that the financial information submitted with his response to the *NAL* supports his request for reduction or elimination of the forfeiture based on an inability to pay. The financial information provided is a set of tax returns for Rejoice. No financial information for Mr. Neely himself is provided.

4. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>7</sup> Section 1.80 of the Rules,<sup>8</sup> and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,<sup>9</sup> (“*Forfeiture Policy Statement*”). In examining Mr. Neely’s Petition for Reconsideration, 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.<sup>10</sup>

### III. DISCUSSION

5. Under the *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules,<sup>11</sup> inability to pay is a downward adjustment factor for Section 503 forfeitures. In analyzing economic-hardship claims, the Commission generally looks to a violator’s gross revenues from the three most recent tax years as a reasonable and appropriate yardstick to determine its ability to pay an assessed forfeiture.<sup>12</sup> Thus, 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.<sup>13</sup>

6. In the Petition for Reconsideration, Mr. Neely argues that it is not appropriate to look at the “gross revenues” for Rejoice in assessing his ability to pay the forfeiture, but rather that the Bureau should consider that Rejoice has had a net operating loss after expenses. Mr. Neely argues that he was not paying himself a salary from the revenues of the company; he states that the provided tax returns show that the bulk of Rejoice’s expenses are salaries, repairs and maintenance, rent, and taxes and licenses, which are expenses, he argues, that must be met to keep the business running.<sup>14</sup>

7. First, we note that Mr. Neely, the licensee of WLTC, and the person whom the Bureau found liable for the violations herein and the forfeiture, has not provided any financial information in support of his own individual inability to pay the forfeiture. Instead, Mr. Neely argues only that his

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<sup>6</sup> *Id.*

<sup>7</sup> 47 U.S.C. § 503(b).

<sup>8</sup> 47 C.F.R. § 1.80.

<sup>9</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>10</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>11</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

<sup>12</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992) (“*PJB Communications*”); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07, ¶ 43.

<sup>13</sup> See *NAL* at ¶ 13.

<sup>14</sup> Petition for Reconsideration at 4.

company Rejoice has an inability to pay. That Mr. Neely receives no salary from Rejoice simply means that we must infer there are other sources for Mr. Neely's support. All of a violator's sources of revenue must be identified, and the requisite financial information regarding them provided, in order for us to consider a request to reduce a forfeiture for inability to pay.<sup>15</sup> Accordingly, Mr. Neely has failed to make the requisite showing that he has an inability to pay the forfeiture.

8. While we recognize that the financial information of Rejoice is relevant in analyzing Mr. Neely's ability to pay, however, standing alone, it is not conclusive in determining Mr. Neely's financial ability. Furthermore, considering the information on Rejoice in the light most favorable to Mr. Neely, we find that this information also does not demonstrate an inability to pay the forfeiture. In *PJB Communications*, the Commission stated that:

[i]n general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators, such as net losses, may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture.<sup>16</sup>

In examining the relevant three years of Rejoice's financial information, we note that the gross revenues for Rejoice have increased each year. Moreover, in comparing the average gross revenues for the three year period to the \$4,000 forfeiture, we note that the forfeiture amount represents a percentage significantly less than the threshold used to determine an inability to pay reduction.<sup>17</sup> We therefore believe that the gross revenues are sufficiently great when compared to the forfeiture amount such that the mere fact that Rejoice may be experiencing an operating loss does not demonstrate that it cannot afford to pay the forfeiture. The Commission stated in *Radio X Broadcasting Corporation* that: "[i]n setting an appropriate forfeiture amount, we are guided by Congress's stated goal of imposing forfeitures that are 'sufficiently high to deter violations and constitute a meaningful sanction.'"<sup>18</sup> If a violator could escape meaningful sanctions for violations of the Rules by seeking an inability to pay reduction that is unsupported by its gross revenues, it would be in a position to undermine the remedial purpose of Section 503 of the Act.

9. Moreover, Mr. Neely has provided incomplete information concerning the nature of Rejoice's operating losses. Rejoice's financial information appears to be missing a number of schedules that would shed light on the specific assets and liabilities upon which Mr. Neely relies to show a net operating loss. Accordingly, we are unable to assess the precise nature of all of Rejoice's operating losses. We are able to observe from the information provided, however, that some of the operating losses

<sup>15</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17158 ¶ 113 ("As for forfeitures that a licensee believes it cannot afford to pay relative to its financial situation, we must look to the totality of the circumstances surrounding the individual case."). See, e.g., *Radio X Broadcasting Corporation*, 21 FCC Rcd 12209, 12217 (2006) (subsidiary and parent company financial information are both relevant to an inability to pay determination by the Commission); *A-O Broadcasting*, 20 FCC Rcd 756, 761 (2005) (financial information of the corporate owner is relevant to the Commission evaluation of an inability to pay claim); *KASA Radio Hogar*, 17 FCC Rcd 6256, 6258-59 (2002) (it is appropriate to consider other income to determine whether the violator, in general "is financially capable of paying a forfeiture, not whether financial data from a limited portion of its operations can sustain a forfeiture" citing *Hinton Telephone Company*, 7 FCC Rcd 6643, 6644 (Com. Car. Bur. 1992), review denied, 8 FCC Rcd 5176 (1993)).

<sup>16</sup> *PJB Communications*, 7 FCC Rcd at 2089.

<sup>17</sup> See *PJB Communications*, supra n. 20 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corp.*, 14 FCC Rcd 3356 (CIB 1999), recon. denied, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2000) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

<sup>18</sup> *Radio X Broadcasting Corporation*, 21 FCC at 12217, ¶ 19, citing S. Rep. No. 580, 95th Cong. 1st Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 109, 111.

include non-cash expenses of depreciation of, for example, more than \$75,000 in 2003.<sup>19</sup> Depreciation is not an actual expenditure which affects the licensee's cash availability in any negative way.<sup>20</sup> Accordingly, a significant amount of Rejoice's operating losses are not relevant.

10. The holding in *First Greenville Corporation*<sup>21</sup> that Mr. Neely cites in his petition does not support his request for reduction of forfeiture. In that case, the Commission found that the sole shareholder of the licensee had loaned the violating station and its affiliates the funds to continue operating and that, without regard for depreciation, the stations' losses had generally exceeded their revenues.<sup>22</sup> The petitioner in *Greenville* also was able to successfully argue that significant loss of service to the public would occur if it were found liable for the full amount of the proposed forfeiture because it was the sole service provider to its area.<sup>23</sup>

11. Likewise, the holding in *Benito Rish*<sup>24</sup> does not support Mr. Neely's request for a reduction in forfeiture for inability to pay. The Commission noted in that case that the station was a daytime-only, directional station that served a community of 425, and that it was the only service to the area. These conditions of inherently low station value, in addition to the lack of its profitability, are the reasons the Commission reduced the forfeiture it assessed against the station.<sup>25</sup> Mr. Neely has not argued or demonstrated similar qualities showing inherently low station value and that it is the sole radio resource to its service area.

12. We have examined Mr. Neely's Petition for Reconsideration pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that a reduction of the \$4,000 forfeiture amount is not warranted and hereby affirm the *Forfeiture Order*.

#### IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act,<sup>26</sup> and Section 1.106 of the Rules,<sup>27</sup> the Petition for Reconsideration filed by Frank Neely, Licensee, Station WLTC(AM), **IS DENIED**, and the *Forfeiture Order* finding Mr. Neely liable for a \$4,000 forfeiture for repeated violation of Section 73.1745(a) of the Rules **IS AFFIRMED**.

14. 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.<sup>28</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the

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<sup>19</sup> In addition, the financial information refers to "other deductions" of more than \$255,000, which are not identified and itemized.

<sup>20</sup> *Applications of Farr Communications, Inc.*, 12 FCC Rcd 10733, 10736 ¶ 8 (1997).

<sup>21</sup> 11 FCC Rcd 7399 (1996) ("*Greenville*").

<sup>22</sup> *Id* at 7403, ¶ 13.

<sup>23</sup> Even with a significant forfeiture reduction based on inability to pay, the *Greenville* petitioner was found liable for a forfeiture higher than the one assessed in the instant proceeding.

<sup>24</sup> 10 FCC Rcd 2861 (1995).

<sup>25</sup> *Id* at 2862, ¶ 7.

<sup>26</sup> 47 U.S.C. § 405.

<sup>27</sup> 47 C.F.R. § 1.106(f).

<sup>28</sup> 47 U.S.C. § 504(a).

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, 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 an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, SW, Room 1A625, Washington, D.C. 20554.<sup>29</sup>

15. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent by first class mail and certified mail return receipt requested to Mr. Frank Neely, 1286 Holland Road, Rock Hill, South Carolina 29732, and to his counsel David Tillotson, Esq., 4606 Charleston Terrace, N.W., Washington D.C. 20007-1911.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon  
Assistant Chief, Enforcement Bureau

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<sup>29</sup> See 47 C.F.R. § 1.1914.