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

In the Matter of	)	
	)	File No. EB-07-SE-379
Side by Side, Inc.	)	NAL/Acct. No. 200832100014
Toledo, Ohio	)	FRN # 0005850862
	)	

FORFEITURE ORDER

Adopted: May 5, 2008 **Released: May 7, 2008**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("*Order*"), we issue a monetary forfeiture in the amount of five thousand two hundred dollars ($5,200) against Side by Side, Inc. ("Side by Side"), former licensee of Ku Band earth station E950401,[1] for willful and repeated violations of Section 301 of the Communications Act of 1934, as amended ("Act"),[2] and Sections 25.102(a) and 25.121(e) of the Commission's Rules ("Rules").[3] The noted violations involve Side by Side's operation of earth station E950401 without Commission authority and its failure to file a timely renewal application for the station.

II. BACKGROUND

2. Section 301 of the Act and Section 25.102(a) of the Rules prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by an earth station except under and in accordance with a Commission granted authorization.[4] Section 25.121(c) of the Rules provides that the license term for an earth station is specified in the instrument of authorization.[5] Section 25.121(e) of the Rules requires the licensee of an earth station to file its renewal application "no earlier than 90 days, and no later than 30 days, before the expiration date of the license."[6] Absent a timely filed renewal application, an earth station license automatically terminates at the end of the license period.[7]

3. On January 30, 2008, the Enforcement Bureau's Spectrum Enforcement Division ("Division") released a *Notice of Apparent Liability for Forfeiture* ("*NAL*"),[8] finding that Side by Side

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[1] File No. SES-LIC-19950620-00796. Earth station E950401 was licensed to Side by Side, Inc., d/b/a Yes Ministries.

[2] 47 U.S.C. § 301.

[3] 47 C.F.R. §§ 25.102(a) and 25.121(e).

[4] 47 U.S.C. § 301; 47 C.F.R. § 25.102(a).

[5] 47 C.F.R. § 25.121(c).

[6] 47 C.F.R. § 25.121(e).

[7] 47 C.F.R. § 25.161.

[8] *Side by Side, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 898 (Enf. Bur., Spectrum Enf. Div. 2008) ("*NAL*").

continued to operate its station without Commission authority after the expiration of its license on August 25, 2005 – a situation that Side by Side did not seek to remedy until October 17, 2007 when it filed a request for Special Temporary Authority ("STA") to continue operations pending the grant of a new license application.[9] The NAL also found that Side by Side failed to timely file a renewal application for the station by the date of expiration.[10] Accordingly, the Division proposed a forfeiture in the amount of $5,200 for the apparent willful and repeated violations of Section 301 of the Act and Sections 25.102(a) and 25.121(e) of the Rules.[11]

4. In its February 29, 2008 response to the *NAL* ("NAL Response"),[12] Side by Side does not dispute that it engaged in unauthorized operations or that it failed to file a timely renewal application. Instead, it seeks a reduction of the proposed forfeiture due to an inability to pay. In support of this claim, Side by Side asserts that its past gross revenues do not accurately reflect its current financial status or its ability to pay, recounting several unforeseen and unavoidable expenses, including costs associated with an unexpected relocation of its facilities and the purchase of a new transmitter.[13] Side by Side also asserts that the introduction of a new national station into the market has negatively impacted Side by Side's gross revenues and fundraising abilities.[14] In light of these expenses and limitations on incoming revenue, Side by Side states that paying the assessed forfeiture would ultimately threaten its ability to operate, as the funds to pay the forfeiture would have to come from payroll allocations, necessitating a reduction in payroll expenses and a corresponding reduction of employees necessary to continue station operation.[15]

5. To substantiate these claims, Side by Side submits a Statement of Financial Position reflecting gross revenues and contributions for the four month period, October 1, 2007 – January 31, 2008; a Statement of Financial Position reflecting gross revenues and contributions for the 12-month period, October 1, 2006 – September 30, 2007; tax returns from 2004 and 2005 reflecting gross revenues and contributions from October 1, 2004 through September 31, 2006; a statement reflecting the current account status of Side by Side; and an Unpaid Bills Detail as of February 29, 2008.[16]

III. DISCUSSION

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,[17] Section 1.80 of the Rules,[18] and the Commission's *Forfeiture Policy Statement*.[19] In

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[9] *Id*. at 899.

[10] *Id*.

[11] *Id.* at 900 (proposing an aggregate forfeiture of $6,500 ($1,500 for failure to timely file a renewal application and $5,000 for unauthorized operation) reduced to $5,200 for voluntary disclosure and corrective measures after Side by Side learned of its violations and prior to any Commission inquiry or initiation of enforcement action).

[12] *See* Request for Reduction of Proposed Forfeiture Due to Inability to Pay, February 29, 2008 ("NAL Response").

[13] *Id*. at 5-6.

[14] *Id*. at 5.

[15] *Id*. at 7.

[16] Side by Side requests confidential treatment of the financial statements and other financial documents provided in its NAL Response. *Id*. at 2. We do not rule on Side by Side's confidentiality request at this time.

[17] 47 U.S.C. § 503(b).

[18] 47 C.F.R. § 1.80.

assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we 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.[20] We have considered Side by Side's response to the *NAL* and its request for a reduction of the forfeiture amount due to inability to pay, in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Side by Side willfully[21] and repeatedly[22] violated Section 301 of the Act and Sections 25.102(a) and 25.121(e) of the Rules and that no mitigating circumstances warrant cancellation or further reduction of the proposed forfeiture amount.

7. In analyzing financial hardship claims, the Commission generally looks to a company's gross revenues as a reasonable and appropriate yardstick to determine their ability to pay assessed forfeitures.[23] Indeed, the Commission has stated that if a company's gross revenues are sufficiently large, the fact that net losses are reported, alone, does not necessarily signify inability to pay.[24]

8. Based on the documentation provided, we find that Side by Side has not demonstrated that a reduction of the proposed forfeiture is warranted. Side by Side's financial documents for the most recent three-year period reflect gross revenues that effectively negate the financial hardship claim. The proposed forfeiture of $5,200 expressed as a percentage of Side by Side's gross revenues is significantly less than the threshold used to determine an inability to pay reduction.[25] While Side by Side's argument is premised on the Commission's recognition of an exception to the use of gross revenues – that other financial indicators, such as significant net losses and inability to continue operations, may be relevant to

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[19] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

[20] 47 U.S.C. § 503(b)(2)(E).

[21] 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. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. *See Southern California Broadcasting Co.,* Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied,* 7 FCC Rcd 3454 (1992) ("*Southern California*").

[22] Section 312(f)(1) of the Act defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(1). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

[23] *See PJB Communications of Virginia, Inc*., Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*"); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07.

[24] *See PBJ Communications*, 7 FCC Rcd at 2089 (noting that information about net losses may be relevant in assessing an inability to pay claim, but where "gross revenues are sufficiently great ... the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture.") *See also Local Long Distance, Inc*., Forfeiture Order, 15 FCC Rcd 24385, 24389 (2000), *recon. denied*, 16 FCC Rcd 10023, 10025 (2001); *Independent Communications, Inc*., Memorandum Opinion and Order, 14 FCC Rcd 9605 (1999), *recon. denied*, 15 FCC Rcd 16060 (2000) ("*Independent Communications*"); *Hoosier Broadcasting Corporation*, Forfeiture Order, 14 FCC Rcd 3356 (Consumer Info. Bur. 1999), *recon. denied*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) ("*Hoosier Broadcasting*").

[25] *See, e.g., PJB Communications*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting*, 15 FCC Rcd at 8641 (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

a claim of inability to pay[26] – the limited circumstances under which this exception has been successfully invoked are not implicated in this case. Side by Side's evidence of recent unexpected expenses, potential limits on its fundraising abilities, and potential reliance on payroll allocations to pay the forfeiture, does not demonstrate that Side by Side cannot pay the proposed forfeiture or that paying the proposed forfeiture would significantly impair its financial solvency or service to the public. Thus, the appropriate measure for determining Side by Side's ability to pay is gross revenues.[27] In this case, the forfeiture represents a percentage of Side by Side's gross revenues that falls well within the percentage range generally considered payable. As the Commission has recognized, 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 purposes of Section 503 of the Act.[28]

9. As a result of our review, we conclude that that no reduction is warranted for an inability to pay. Accordingly, we find that Side by Side willfully and repeatedly violated Section 301 of the Act and Sections 25.102(a) and 25.121(e) of the Rules and that a forfeiture in the amount of $5,200 is appropriate.[29]

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,[30] Side by Side, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of five thousand two hundred dollars ($5,200) for willful and repeated violation of Section 301 of the Act and Sections 25.102(a) and 25.121(e) of the Rules.

11. 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be

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[26] *See, e.g., PBJ Communications*, 7 FCC Rcd at 2089 (citing *Canby Telephone Association*, Memorandum Opinion and Order, 5 FCC Rcd 731 (Com. Car. Bur. 1990) (reducing forfeiture amount from $2,630 to $600 because Canby demonstrated that its ability to serve the public could be affected by the amount assessed)); *Rebus, Inc*., Forfeiture Order, 16 FCC Rcd 2964 (Enf. Bur. 2001) (reduction of forfeiture from $8,000 to $1,000 warranted due to inability to pay when station demonstrated significant net losses over the previous three years and substantial cumulative net losses since the station's inception, together with significant relocation costs, loss of lease, and other mitigating circumstances).

[27] *See, e.g., Independent Communications*, 15 FCC Rcd at 16060; *see also Fun Media Group, Inc.,* Memorandum Opinion and Order, 20 FCC Rcd 16149 (Enf. Bur. 2005) (reference to salaries and debt payments are not sufficient to offset the use of gross revenues as the standard for evaluating an inability to pay claim.)

[28] *See, e.g., Frank Neely,* Memorandum Opinion and Order, 22 FCC Rcd 1434, 1435 (Enf. Bur. 2007).

[29] *See Petracom of Texarkana, LLC*, Forfeiture Order, 19 FCC Rcd 8096, 8097-8098 (Enf. Bur. 2004). *See also Journal Broadcasting Corp*., Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18211, 18214 (Enf. Bur., Spectrum Enf. Div. 2005) (forfeiture paid).

[30] 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

12. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested to Side by Side, Inc., Attention: Mr. Todd Hostetler, 5115 Glendale Avenue, Toledo, Ohio 43614-1801, and its counsel, A. Wray Fitch III, Esq., Gammon & Grange, P.C., Seventh Floor, 8280 Greensboro Drive, McLean, Virginia 22102-3807.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau