

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

In the Matter of

Boulder Community Broadcast Association, Inc.
Licensee of KGNU
Denver, Colorado
Facility ID# 31349

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File Number: EB-07-DV-193

NAL/Acct. No.: 200832800002

FRN: 0006024319

FORFEITURE ORDER

Adopted: May 27, 2008**Released: May 29, 2008**

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("*Order*"), we issue a monetary forfeiture in the amount of three thousand, two hundred dollars (\$3,200) to Boulder Community Broadcast Association, Inc. ("BCBA"), licensee of KGNU(AM) in Boulder, Colorado, for willful and repeated violation of Section 73.1745(a) of the Commission's Rules ("*Rules*").¹ On December 21, 2007, the Enforcement Bureau's Denver Office issued a Notice of Apparent Liability for Forfeiture ("*NAL*") to BCBA in the amount of \$4,000 for failing to operate KGNU(AM) in accordance with the station's authorized power as specified on the station's license. In this *Order*, we consider BCBA's arguments that it did not willfully violate Section 73.1745(a) of the Rules, that it took steps to remedy the violation as soon as it was notified of it, that it lacks the ability to pay the forfeiture, and that it has a history of compliance with the Commission's Rules.

II. BACKGROUND

2. KGNU(AM) is authorized to operate with a non-directional pattern on 1390 kHz with 5000 watts during daytime hours and 139 watts during nighttime hours. Daytime is defined as the "period of time between local sunrise and local sunset" and nighttime is defined as the period "between local sunset and local sunrise."² In Denver, Colorado, during the month of April, local sunrise occurs at 6:30 a.m., and local sunset occurs at 7:45 p.m.³

3. On April 26, 2007, in response to a complaint, an agent from the Enforcement Bureau's Denver Office monitored KGNU(AM) through the post-sunset nighttime hours with a spectrum analyzer, and determined that KGNU(AM) failed to reduce its power to its licensed nighttime power level of 139 watts. The agent continued monitoring the station on April 27, 28 and 29, 2007, throughout the post-sunset nighttime hours and determined that on each night, KGNU(AM) failed to reduce its power to its licensed nighttime power of 139 watts.

¹ 47 C.F.R. § 73.1745(a).

² 47 C.F.R. § 73.14.

³ All times indicated are local Mountain Daylight Savings Time.

4. On April 30, 2007, a Denver agent contacted KGNU about the over-power operation. KGNU(AM)'s engineer indicated to the agent that a March 16, 2007, software update had corrupted the remote control input and output systems. According to the KGNU(AM) engineer, this meant that the system was unable to switch the transmitter to low power at sunset or switch to full power at sunrise. It also meant that the system was no longer able to dial out to the preprogrammed BCBA numbers to inform station personnel that the transmitter had failed to reduce power at sunset.

5. On May 4, 2007, a Denver agent contacted KGNU(AM), requesting to review the station's logs covering April 1 through May 3, 2007. On May 9, 2007, a representative of KGNU(AM) provided the Denver Office with a letter acknowledging the remote control failure and the immediate actions undertaken by KGNU(AM) to fully restore the remote control system, including manually ensuring the power was reduced at the station at sunset. Also, KGNU(AM) provided copies of remote control telemetry readings for the period January 18, 2007, to April 24, 2007, that confirmed KGNU(AM)'s remote control problems.

6. On December 7, 2007, Denver agents inspected KGNU(AM)'s operations at the transmitter site and viewed additional remote control telemetry readings on the station's remote control unit that showed KGNU(AM) operated with daytime power levels of 5000 watts 24 hours a day for the period from March 17, 2007, to April 30, 2007. The station's remote control readings directly corresponded to the Denver agent's observations from April 26, 2007, through April 29, 2007, of KGNU(AM) operating at power levels exceeding its authorized nighttime power during nighttime hours.

7. On December 21, 2007, the Denver Office issued a *NAL* in the amount of \$4,000 to BCBA.⁴ In the *NAL*, the Denver Office found that the BCBA apparently willfully and repeatedly violated Section 73.1745(a) of the Rules,⁵ by failing to operate KGNU(AM) in accordance with the station's authorized power as specified on the station's license. BCBA filed a response ("*Response*") to the *NAL* on January 8, 2008. In its *Response*, BCBA argues it did not willfully violate Section 73.1745(a) of the Rules, that it took steps to remedy the violation as soon as it was notified of it, that it lacks the ability to pay the forfeiture, and that it has a history of compliance with the Commission's Rules.

III. DISCUSSION

8. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁶ Section 1.80 of the Rules,⁷ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁸ In examining the *Response*, 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 other such matters as justice may require.⁹

⁴ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200832800002 (Enf. Bur., Western Region, Denver Office, released December 21, 2007).

⁵ 47 C.F.R. § 73.1745(a).

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁹ 47 U.S.C. § 503(b)(2)(E).

9. The Rules state that each licensee is responsible for maintaining and operating its broadcast station in a manner which complies with the technical rules and in accordance with the terms of the station license.¹⁰ Specifically, Section 73.1745(a) of the Commission's Rules states that no broadcast station shall operate at times or with modes or power, other than those specified and made part of the license. During the month of April 2007, KGNU(AM) was authorized to operate at 5000 watts between 6:30 a.m., and 7:45 p.m. After 7:45 p.m., and before 6:30 a.m., KGNU(AM) was authorized to operate at 139 watts.¹¹ Between April 26, 2007, and April 29, 2007, monitoring by a Denver agent revealed that KGNU(AM) was not reducing its operating power after 7:45 p.m., as required by its authorization. Further investigation by Denver agents revealed that telemetry readings made by KGNU(AM) showed that KGNU(AM) was operating at 5000 watts 24 hours a day, from March 17, 2007, to April 30, 2007, confirming the Denver agent's observations between April 26, 2007, and April 29, 2007.

10. In its *Response*, BCBA does not dispute the facts, as stated by the Denver Office, but argues that the violation was not willful pursuant to Section 312(f)(1) of the Act.¹² Specifically, BCBA states that it did not "knowingly" violate Section 73.1745(a) because the software that it installed in its remote control system "corrupted" the system, and, consequently, the remote control system failed to change the KGNU(AM) transmitter to lower power and failed to advise station personnel of the failure to reduce power at sunset. Therefore, BCBA asserts that it was not aware of the violation.¹³ We find no merit to this argument. A licensee is required to operate consistent with its authorization,¹⁴ and BCBA, at all times, had exclusive control of the KGNU(AM) transmitter. As detailed above, and in the *NAL*, BCBA produced telemetry data from March 17, 2007 to April 30, 2007 which showed that its transmitter was operating at variance with its licensed parameters for six weeks. Given that BCBA was aware of the power limits on its authorization, and had data within its control that showed that for six weeks it was operating the KGNU(AM) transmitter at a power above its licensed power, but failed to correct the violation until notified by a Denver agent, we find that BCBA's violation was willful.

¹⁰ 47 C.F.R. § 73.1745(a).

¹¹ *Id.*

¹² Section 312(f)(1) states that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act..." 47 U.S.C. § 312(f)(1). BCBA does not dispute that the violations were repeated. See Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) (violation liable for forfeiture if violation is willful or repeated).

¹³ BCBA argues its situation is analogous to that in *Vernon Broadcasting, Inc.*, 60 Rad. Reg 2d (Pike and Fischer) 1275 (1986) ("*Vernon Broadcasting*"), in which the Commission cancelled a \$1,000 forfeiture against Vernon Broadcasting, Inc. ("Vernon") licensee of WYGO(AM), Corbin, Kentucky, for maintaining an inadequate fencing around the WYGO(AM) tower because "the evidence indicate[d] that the fence had been vandalized just prior to [the field office's] inspection [and that there was] no indication that the licensee was aware of the broken fence before the [field office's] inspection or that it failed to monitor the condition of the antenna site." *Vernon Broadcasting, Inc.* at para 3. In *High Country Communications, Inc.* 2 FCC Rcd 7427 (1987), the Commission distinguished its decision in *Vernon Broadcasting* finding that High Country Communications, licensee of KVLE(FM), Gunnison, Colorado, willfully violated Section 73.317(a)(8) of the Rules, by causing spurious emissions, because, among other reasons, "[w]hile the fence in Vernon was, by its very nature and location, subject to influences outside the immediate knowledge and control of the licensee, KVLE(FM)'s transmitter was, at all relevant times, under the exclusive domain of High Country [and any] spurious emissions produced by the KVLE(FM) transmitter [were] attributable directly and solely to High Country." 2 FCC Rcd at 7428.

¹⁴ *Dominic DeNaples*, 19 FCC Rcd 12303 (EB 2004).

11. BCBA also argues that its violations were inadvertent and that it took steps to remedy the violations as soon as it was notified by the Denver agent. BCBA's efforts to resolve the over-power operation subsequent to the Denver agent's inspection do not justify a downward adjustment. The Commission has determined that it expects the entities it regulates to correct errors when they are brought to the regulated entity's attention.¹⁵

12. BCBA also argues that it is a nonprofit organization that operates KGNU(AM) on a noncommercial basis, and that its ability to pay a forfeiture is less than its commercial counterparts. BCBA, however, submits no data to substantiate its claim. We note that in the *NAL*, the Denver Office instructed BCBA, if it sought cancellation or reduction of the forfeiture based on an inability to pay, to supply:

(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

Because BCBA has provided no documentation, it has not provided us with a sufficient basis to support cancellation or reduction of the forfeiture based on its inability to pay.¹⁷

13. Finally BCBA contends that it has a history of overall compliance with the Commission's Rules. We have reviewed our records and we concur. Consequently, we reduce BCBA's forfeiture amount to \$3,200.

14. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that BCBA willfully and repeatedly violated Section 73.1745(a) of the Rules. Considering the entire record and the factors listed above, we find that reduction of the proposed forfeiture to \$3,200 is warranted.

IV. ORDERING CLAUSES

15. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Boulder Community Broadcast Association, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$3,200 for willfully and repeatedly violating Section 73.1745(a) of the Rules.¹⁸

16. 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.¹⁹ 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

¹⁵ See *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21871-76 (2002).

¹⁶ *NAL* at para 15.

¹⁷ See *Webnet Communications, Inc.*, 18 FCC Rcd 6870, 6878 (2003).

¹⁸ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.1745(a).

¹⁹ 47 U.S.C. § 504(a).

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 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. Boulder Community Broadcast Association, Inc., shall also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

17. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Boulder Community Broadcast Association, Inc., at its address of record, and John Crigler, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION



Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau