

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

In the Matter of)
Phoenix Broadcasting Group, Inc.) Facility ID No. 52904
) NAL/Acct. No. MB20041810085
) File No. BRH-20040130BRN
Licensee of Station KQDD(FM)) FRN: 0005941414
Osceola, Arkansas)
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)
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FORFEITURE ORDER

Adopted: July 14, 2008

Released: July 15, 2008

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of nine thousand dollars (\$9,000), to Phoenix Broadcasting Group, Inc. ("Licensee"), licensee of Station KQDD(FM), Osceola, Arkansas ("Station"), for its willful and repeated violation of Section 73.3536 of the Commission's Rules ("Rules")¹ by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On September 10, 2004, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of nine thousand dollars (\$9,000) to Licensee for these violations.² Licensee filed a Request for Cancellation of Proposed Forfeiture ("Request") on October 12, 2004.

3. On January 30, 2004, Licensee filed an application to renew the license of the Station. 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 of the Rules, as applicable, has been placed in the station's public inspection file at the appropriate times. Licensee indicated "No" to that certification, filing an amended Exhibit explaining that the following issues/programs lists were not in the Station's public files: in 1999, quarters two through four; in 2000, quarters one through three; in 2001, quarters one, two and four; in 2002, quarters one through four; and in 2003, quarters one through three. On September 10, 2004, the staff advised Licensee of its apparent liability for a forfeiture of \$9,000 for willfully and repeatedly violating Section 73.3526 of the Rules, based on the fact that, by its admission, sixteen issues/programs lists were missing from the Stations' public inspection files between 1999 and 2003.³ In response, Licensee filed the subject Request.

¹ 47 C.F.R. § 73.3539.

² Letter to Gary S. Smithwick, Esq. from Peter Doyle, reference 1800B3-KV (MB Sep. 10, 2004) ("Letter").

³ The Commission granted the above-referenced license renewal application on September 10, 2004.

4. In support of its Request, Licensee states that a cancellation of the forfeiture is warranted because its failure to update the Station's public file was neither willful nor repeated, but was an "honest mistake." Licensee also maintains that the forfeiture is inconsistent with the decision in *Vernon Broadcasting*,⁴ where the Commission rescinded a forfeiture against a licensee based upon a finding that the licensee's apparent violation of the Rules was not committed willfully.

5. Licensee further states that the forfeiture amount cannot be harmonized with *Mel Wheeler, Inc.*, a case in which the Commission issued a forfeiture of \$3,000 for the licensee's public file Rule violations.⁵ Finally, Licensee claims that imposing a forfeiture against licensees that voluntarily disclose their Rule violations is contrary to public interest because it will discourage licensees from "com[ing] clean" with the Commission. Licensee asserts these reasons warrant a cancellation of the assessed forfeiture.

III. DISCUSSION

6. The forfeiture amount proposed 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*.⁸ In 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.⁹

7. Licensee does not dispute that it failed to maintain its public file for the Station, but states that these violations were an "honest mistake." Licensee further maintains that the violations were neither willful nor repeated. As the Commission has held, violations resulting from inadvertent error are willful violations.¹⁰ In the context of a forfeiture action, "willful" does not require a finding that the rule violation was intentional. Rather, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Rules.¹¹ Licensee has failed to justify why departure from this precedent is warranted.

8. Moreover, Licensee's reliance on *Vernon Broadcasting* is misplaced. There, the Commission rescinded a forfeiture imposed against a licensee who allegedly failed to enclose its antenna tower with a

⁴ *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 R.R. 2d 1275 (1986) ("*Vernon Broadcasting*").

⁵ See *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20215 (MB 2003).

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ *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).

⁹ 47 U.S.C. § 503(b)(2)(E).

¹⁰ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992); See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*") (stating that "inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance"); *Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358 (1986) (stating that "employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations").

¹¹ See *Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd 2649 (EB 2008) (declining to reduce or cancel forfeiture for late-filed renewal based on licensee's administrative error); *Southern California*, 6 FCC Rcd at 4387. See also *Domtar Industries, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 13811, 13815 (EB 2006); *National Weather Networks, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 3922, 3925 (EB 2006).

secure fence, in apparent violation of Section 73.49(a)(8) of the Rules. The Commission acknowledged that the existing fence had been vandalized on prior occasions and that, because of such vandalism, the licensee regularly inspected the fence and made necessary repairs. The evidence before the Commission further indicated that the fence had been vandalized just after the licensee's most recent inspection, but prior to an official Commission inspection, during which damage to the fence was revealed. On the basis of the foregoing, the Commission ruled that there was no indication that the licensee was either aware of the most recent damage to the fence or that it had failed to monitor the condition of its transmitter site. It did, however, affirm a liability for an unintentional public file violation, rejecting the licensee's argument that its public file violations were the result of its "misinterpretation" of the Rules.

9. While the fence in *Vernon Broadcasting* was, by its very nature and location, subject to influences outside the immediate knowledge and control of the licensee, Licensee's public files were, at all relevant times, under its exclusive domain. Any public file violations are attributable directly and solely to Licensee. This distinction is underscored by the Commission's holding in *Vernon Broadcasting*. Thus, Licensee's failure to properly maintain the Station's public file constituted a "willful" violation of Section 73.3526 of the Rules, irrespective of Licensee's lack of intent.

10. Licensee next argues that its violations of Section 73.3526 of the Rules were not repeated. The term "repeated" merely means that the act was committed or omitted more than once, or lasts more than one day.¹² In this case, Licensee's violations of Section 73.3526 of the Rules lasted several years. Accordingly, we find that that its violations were repeated.

11. Licensee also argues that the forfeiture amount is inconsistent with that issued for public file violations in *Mel Wheeler, Inc.*¹³ We find this case to be inapposite. There, the Commission issued a forfeiture of \$3,000 for the licensee's public file Rule violations, where the public files were missing a total of three issues/programs lists. By contrast, Licensee's public files were missing sixteen issues/programs lists. The \$9,000 forfeiture issued is consistent with prior forfeitures for similar violations.¹⁴

12. Finally, Licensee argues that the Commission should rescind the proposed forfeiture given its voluntary disclosure of its violations, and that forfeiture in this instance would discourage companies from voluntarily disclosing Rules violations. We disagree. To the contrary, our decision is consistent with our Rules and our *Forfeiture Policy Statement* and encourages companies to voluntarily disclose violations and promptly correct violations.¹⁵ Indeed, the Commission reduced Licensee's forfeiture amount by \$1,000 in light of its voluntary disclosure.¹⁶

¹² *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

¹³ See n.5, *supra*.

¹⁴ See *Texas Educational Broadcasting Cooperative, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13038, 13045-46 (MB 2007) (\$10,000 forfeiture issued for sixteen missing issues/programs lists); *Eastern Illinois Christian Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 8449, 8451 (MB 2007) (same).

¹⁵ See 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Guidelines for Assessing Forfeitures. See also *Local Phone Services, Inc.*, Order of Forfeiture, 2008 WL 2130273 (2008) (finding that the issuance of a forfeiture despite petitioner's voluntary disclosure of its Rule violations was appropriate and would not discourage other parties from voluntarily disclosing violations of the Act or Rules).

¹⁶ See Letter at 2. Since 2007, we have declined to reduce forfeiture amounts based on a licensee's voluntary disclosure because, although licensees may admit to Section 73.3526 Rule violations, they only do so in the context of a question contained in the license renewal applications compelling such disclosure. See *Texas Educational Broadcasting Cooperative, Inc.*, 22 FCC Rcd at 13045; *Eastern Illinois Christian Broadcasting, Inc.*, 22 FCC Rcd at 8451.

13. We have considered Licensee's response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Licensee willfully¹⁷ and repeatedly¹⁸ violated Section 73.3526 of the Rules at the Station and that no mitigating circumstances warrant cancellation or further reduction of the proposed forfeiture amount.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,¹⁹ that Phoenix Broadcasting Group, Inc., SHALL FORFEIT to the United States the sum of \$9,000 for willfully and repeatedly violating Section 73.3526 of the Commission's Rules at the Station.

15. 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 in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at 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, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If 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).²⁰

16. IT IS FURTHER ORDERED, that a copies of this Forfeiture Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail, to Phoenix Broadcasting Group, Inc., P.O. Box 989, Blytheville, AR 72316-0989, and to its counsel, Gary S. Smithwick, Esq., Smithwick & Belundiuk, P.C., 5028 Wisconsin Ave., N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁷ 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*, 6 FCC Rcd at 4387-88.

¹⁸ 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).

¹⁹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

²⁰ *See* 47 C.F.R. § 1.1914.