

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

In the Matter of)
)
CAPITAL ASSETS, INC.) Facility ID No. 8607
) NAL/Acct. No. MB20041810006
) FRN 0005085006
Licensee of Station WBMH(FM)) File No. BRH-20031205ADE
Grove Hill, Alabama)
)
)
)

FORFEITURE ORDER

Adopted: August 27, 2008

Released: August 28, 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 Capital Assets, Inc. ("Licensee"), licensee of Station WBMH(FM), Grove Hill, Alabama (the "Station"), for its willful and repeated violation of Section 73.3526 of the Commission's Rules ("Rules")¹ by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On December 21, 2004, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL"), in the amount of nine thousand dollars (\$9,000) to Licensee for the violations.² Licensee filed a Request for Reduction of Proposed Forfeiture ("Request") on January 14, 2005.

3. On December 5, 2003, Licensee filed an application to renew the licenses of the Stations. 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, attaching an Exhibit explaining that the Station file was missing the issues/programs lists for the first, second and third quarters of 1997; the third and fourth quarters of 1998; the first, second and fourth quarters of 1999; the first, second, third and fourth quarters of 2000; the first, third and fourth quarters of 2001; and the first quarter of 2002. Licensee states that, "the reason for the missing reports is that the manager in charge of the station at that time failed to properly organize the information needed to prepare the quarterly reports and has made it impossible to now recreate the reports for submission in the

¹ 47 C.F.R. § 73.3526

² Letter to Mark Lipp, Esq. from Peter Doyle, reference 1800B3-MAT (MB Dec. 21, 2004).

public file. When the situation was discovered, a new manager was hired in early 2002 and the quarterly issues/programs lists have been properly prepared and placed in the station public file since then."³

4. On December 21, 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 public inspection file, over the license period. In response, Licensee filed the subject Request.

5. In support of its Request, Licensee states that the omission of the issues/programs lists from the files was "unintentional" and that CAI's officials were "unaware" that the lists were missing. Licensee attributes the failure to properly maintain the public files to the "negligence of a previous manager." Licensee asserts that since it discovered the omission of the lists it hired a new manager and the issues/programs lists were properly prepared and placed in the Station's public file. Licensee states that cancellation or reduction of the proposed forfeiture is warranted because it has rapidly taken steps to correct the violations, and prevent them from reoccurring, and it has no record of prior offenses. Licensee also states that a proposed forfeiture "in any amount," would impose a substantial financial hardship.

III. DISCUSSION

6. The forfeiture amounts proposed in this case were assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and the Commission's *Forfeiture Policy Statement*.⁶ 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.⁷

7. It is undisputed that Licensee's public file was incomplete during the license term, missing sixteen issues/programs lists. We have examined Licensee's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Licensee willfully and repeatedly violated Section 73.3526 of the Commission's Rules. Specifically, 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.⁵ Furthermore, we reject Licensee's suggestion that its implementation of measures to ensure future compliance is a basis for reducing the forfeiture. While we recognize Licensee's efforts, corrective action taken to come into compliance with the Rules is expected, and does not nullify or mitigate any prior violations.

8. We also reject Licensee's assertion that "it has no record of prior offenses," suggesting that it has a history of compliance with the Rules. Licensee disclosed in the license renewal application for the Station that it had retained no issues-programs lists in the Station's public inspection files for seven years of the eight-year license term. It disclosed similar violations in the license renewal applications of Stations WRJX(AM) and WHOD(FM), Jackson, Alabama.⁸ Thus, the Licensee failed to comply with

³ See captioned application, Exhibit 11.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. 1.80.

⁶ *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).

⁷ 47 U.S.C. § 503(b)(2)(E).

⁸ See Application Nos. BR-20031205ACO (listing 16 missing issues-programs lists over six years) and BRH-20031205ADX (listing nine missing issues-programs lists over four years), Section III, Item 3 and Exhibit 11. The staff issued a \$9,000 *NAL* to the Licensee on December 22, 2004 for violation of Section 73.3526 of the Rules at these stations. *Letters to Mark Lipp, Esq. from Peter Doyle*, reference 1800B3-MAT (MB Dec. 21, 2004). We are

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Section 73.3526 of the Rules for a significant part of the license term at three separate stations. We therefore cannot find that Licensee's history of compliance warrants reduction of the forfeiture amount.⁹

9. Licensee also asserts that payment of the proposed \$9,000 forfeiture would result in a financial hardship. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the party against which the forfeiture is proposed submits: (1) federal tax returns for the most recent three year period; (2) financial statements prepared according to generally accepted accounting principles; or (3) some other reliable and objective documentation that accurately reflected the party'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.¹⁰

10. In general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. The Commission has found that the staff's use of gross revenues is a reasonable and useful yardstick to analyze a company's financial condition for forfeiture purposes.¹¹ In support of its request for reduction of the forfeiture, Licensee states that the Station operated at a loss during the three year period 2002 through 2004, and submits unsigned financial statements, specifying gross revenues of \$315,301, \$304,308, and \$268,398, respectively.¹²

11. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits adequate documentation to support its claim. Licensee failed to submit acceptable documentation, providing only unsigned financial statements for 2002, 2003 and 2004, therefore, we have no basis on which to analyze its claim.¹³ Accordingly, no reduction is warranted on the basis of an inability to pay.

12. 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 willfully¹⁴ and repeatedly¹⁵ violated Section 73.3526 of the Rules. We find that there is no basis for reduction of the proposed monetary forfeiture.

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this same date issuing a *Forfeiture Order* affirming the forfeiture amount for the violations at WRJX(AM) and WHOD(FM).

⁹ *Paulino Bernal Evangelism*, Memorandum Opinion and Order, 21 FCC Rcd 9532 (EB 2006) (In determining whether a licensee has a history of overall compliance, offenses need not be "prior" to be considered, and for stations having the same owner at the time of the violations, it is appropriate to consider such violations. Commission can consider violations occurring in cases where there has been no final determination).

¹⁰ *See Discussion Radio, Inc.*, 19 FCC Rcd 7433, 7441 (2004).

¹¹ *See PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992).

¹² Licensee's financial representative states that the Station does not file its own income tax return, but the information is included in the income tax returns for Licensee.

¹³ *See Portland Taxicab Company*, Forfeiture Order, 19 FCC Rcd 22511 (EB 2004) (stating that various non-verified documents are not acceptable documentation to establish an inability to pay).

¹⁴ 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.

¹⁵ 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).

IV. ORDERING CLAUSES

13. 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,¹⁶ that Capital Assets, 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 Stations.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Forfeiture 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.¹⁷ 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. 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 St, SW, Room 1-A625, Washington, DC 20554.¹⁸

15. 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 Capital Assets, Inc., 324 Bradford Street N.W., Gainesville, Georgia 30501 and to its counsel, Mark Lipp, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

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

¹⁷ 47 U.S.C. § 504(a).

¹⁸ See 47 C.F.R. § 1.1914.