

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

In the Matter of)
)
MFR, Inc.) Facility ID No. 67481
Licensee of Stations) NAL/Acct. No. MB20051810032
WJAQ(FM), Marianna, Florida, and) File No. BRH-20040312AEF
) FRN 0003761251
)
WTOT(AM), Marianna, Florida,) Facility ID No. 6751
) NAL/Acct. No. MB20051810033
) File No. BRH-20040312AEE
) FRN 0003761251

FORFEITURE ORDER

Adopted: May 18, 2009

Released: May 19, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of twelve thousand dollars (\$12,000), to MFR, Inc. ("Licensee"), licensee of Stations WJAQ(FM), WTOR(AM), Marianna, Florida (the "Stations"), for willfully and repeatedly violating Section 73.3539 of the Commission's Rules ("Rules") and Section 301 of the Communications Act of 1934, as amended ("Act") for its failure to timely file a license renewal application and for unauthorized operation of the Stations.¹

II. BACKGROUND

2. On March 24, 2005, the Bureau issued a Notice of Apparent Liability for Forfeiture ("NAL") to Licensee in the amount of twelve thousand dollars (\$12,000), for the violations at Stations WJAQ(FM) and WTOT(AM).² Licensee filed a Request for Cancellation or Reduction of Proposed Forfeiture ("Request") on April 25, 2005.

3. Licensee's renewal application for the Stations for the current license term should have been filed on October 1, 2003, four months prior to the February 1, 2004, expiration date.³ Commission records show that Licensee tendered WJAQ(FM) and WTOT(AM)'s renewal applications on October 1, 2003 without the required filing fee. Commission records show that Licensee subsequently attempted to submit the filing fee without resubmitting its renewal applications, and the fee was rejected. Accordingly, no license renewal was properly filed for the Stations, and on February 1, 2004, their licenses expired. On March 12, 2004, Licensee submitted the captioned renewal applications and also

¹ 47 C.F.R. § 73.3539; 47 U.S.C. § 301.

² Letter to Kathleen A. Kirby, Esq. from Peter H. Doyle, Chief, Audio Division, Media Bureau, ref. 1800B3 (MB March 24, 2005).

³ See 47 C.F.R. §§ 73.1020, 73.3539(a).

filed requests for Special Temporary Authorization (“STA”) to operate each Station, pending consideration of the renewal application. On March 24, 2005, the staff advised Licensee of its apparent liability for a forfeiture of \$12,000 for failure to timely file the Stations’ renewal applications and for unauthorized operation of Stations WJAQ(FM) and WTOT(AM).⁴ In response, Licensee filed the subject Request.

4. In support of its Request, Licensee states that: (1) its failure to file properly the renewal applications was inadvertent; (2) it immediately took corrective action upon learning that the Stations’ licenses had expired; (3) it has a history of overall compliance with the Rules; and (4) payment of the forfeiture would severely restrict its ability to operate the Stations. Licensee asserts that these reasons warrant a cancellation or reduction of the assessed forfeitures.

III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,⁵ Section 1.80 of the Rules,⁶ and the Commission’s *Forfeiture Policy Statement*.⁷ 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.⁸

6. Licensee does not dispute that it failed to file timely renewal applications for each Station, but states that these violations were unintentional. Licensee states that it was informed of its omission of its fees in a telephone call from Commission staff and attempted to tender the requisite filing fees on January 8, 2004, and January 28, 2004. It states that these efforts were unsuccessful because of errors it made in completing the FCC Form 159 (“Remittance Advice”) filed with its payment. It states that it failed to file the renewal application properly because it attempted to file without the advice of counsel and it was unfamiliar with the filing requirements.⁹ Commission records show that Licensee unsuccessfully re-filed its Form 159 and fee twice before its license expired, referencing the file number of its originally filed application on both occasions. Our records also show that co-owned GFR, Inc., licensee of Station WTOT-FM, Graceville, Florida, which similarly failed properly to file a license renewal application, was able to refile its entire renewal application and Form 159, with an appropriate filing fee (receiving a new file number as of the date of refiling) before that Station’s license expired. Neither Licensee nor GFR, Inc. offers an explanation for this discrepancy, and erroneously claim that all three stations followed the same license renewal procedure. As the Commission has held, violations resulting from inadvertent error or failure to become familiar with the FCC’s requirements are willful violations.¹⁰ In the context of a forfeiture action, “willful” does not require a finding that the rule

⁴ The Commission granted the stations’ license renewal applications on March 24, 2005.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ *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).

⁸ 47 U.S.C. § 503(b)(2)(E).

⁹ Request at 2.

¹⁰ 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”).

violation was intentional. Rather, the term “willful” means that the violator knew that it was taking (or in this case, not taking) the action in question, irrespective of any intent to violate the Rules.¹¹

7. Licensee next asserts that a reduction of the forfeiture is warranted because it took corrective action and full disclosure following the discovery of the applications’ deficiencies.¹² We reject this argument. 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 forfeitures or violations.¹³

8. In addition, we reject Licensee’s argument that it deserves a reduction based on its history of compliance with the rules. Licensee, by its own admission, failed to file properly its applications for Stations WJAQ(FM) and WTOT(AM), as did commonly owned GFR, Inc., licensee of Station WTOT-FM, Graceville, Florida.¹⁴ Based on these combined offenses, we cannot find that Licensee’s history of compliance warrants reduction of the forfeiture amount.¹⁵

9. Regarding Licensee’s claim of financial hardship, the Commission will not consider reducing or canceling a forfeiture in response to inability to pay unless the licensee 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 reflect the licensee’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 In general, a licensee’s gross revenues are the best indicator of its ability to pay a forfeiture. We recognize that, in some cases, other financial indicators, such as net losses, may also be relevant.¹⁷ If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not mean by itself that it cannot afford to pay. Here, Licensee has provided us with income statements purporting to show the Stations’ income and expenditures for the years 2003 and 2004. These show total income of over

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).

¹² Request at 2.

¹³ *Pittman Broadcasting Services, L.L.C.*, Forfeiture Order, 23 FCC Rcd 2742, 2744 (EB 2008). See also *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709, 9714 (MMB 1999) (stating that neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee’s rule violation) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)).

¹⁴ See Request p. 2, Licensee notes its affiliation with GFR, Inc. The staff issued a \$1500 NAL to GFR, Inc. for its violation of Section 73.3526 of the Rules. *Letter to Mr. Edgar Cearley from Peter H. Doyle, Chief, Audio Division, Media Bureau*, ref. 1800B3 (MB March 24, 2005). We are this same date issuing a *Forfeiture Order* affirming the forfeiture amount for the violation at WTOT-FM.

¹⁵ *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). See also *Petracom of Texarkana, L.L.C.*, Forfeiture Order, 19 FCC Rcd 8096 (EB 2004) (citing *CCN, Inc., et al.*, 13 FCC Rcd 13599, 13599-600 ¶ 1(1998); *Hill Country Real Estate Development Corp.*, 18 FCC Rcd 21079, 21080 ¶ 5 (Enf. Bur. 2003); *Rio Grande Transmission, Inc.*, 16 FCC Rcd 17040, 17042-43 ¶ 10 (Enf. Bur. 2001); *Mega Communications of St. Petersburg, Licensee, L.L.C.*, 16 FCC Rcd 15948, 15949 ¶ 6 (Enf. Bur. 2001)).

¹⁶ See *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7441(Apr. 16, 2004).

¹⁷ *PJB Communications*, 7 FCC Rcd at 2089.

\$300,000 for each year, and operating expenses that show a small profit for 2003 and a small loss in 2004. Based on Licensee's financial documentation, we note that a \$12,000 forfeiture is 3.5 percent of the Stations' 2003 total gross revenues of \$337,762, and 3.6 percent of the Stations' 2004 gross revenues of \$329,635.¹⁸ Therefore, we reject Licensee's claim of financial hardship.

10. 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 willfully¹⁹ and repeatedly²⁰ violated Section 73.3539 of the Rules and Section 301 of the Act,²¹ and that no mitigating circumstances warrant cancellation or further reduction of the proposed forfeiture amount.

IV. ORDERING CLAUSES

11. 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,²² that MFR, Inc., SHALL FORFEIT the sum of twelve thousand dollars (\$12,000) to the United States for willfully and repeatedly violating Section 73.3539 of the Commission's Rules and Section 301 of the Communications Act of 1934, as amended.

12. 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.²³ 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).²⁴

¹⁸ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641 (EB 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6741 (CCB 1992) (forfeiture not deemed excessive where it represented approximately 3.9 percent of the violator's gross revenues).

¹⁹ 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.

²⁰ 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).

²¹ 47 U.S.C. § 301.

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

²³ 47 U.S.C. § 504(a).

²⁴ See 47 C.F.R. § 1.1914.

13. IT IS FURTHER ORDERED, that a copy of this Forfeiture Order shall be sent by Certified Mail Return, Receipt Requested, and by First Class Mail to: MFR, Inc., P.O. Box 569, Marianna, Florida, and to its counsel, Kathleen A. Kirby, Esq., Wiley Rein & Fielding, LLP, 1776 K Street, N.W. Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau