

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Lancaster Educational Broadcasting Foundation |) | EB-06-IH-5642 |
| |) | Facility ID No. 36478 |
| |) | NAL/Account No. 200932080028 |
| Licensee of Noncommercial Educational Station |) | FRN 0003018645 |
| WFCO(FM), Lancaster, Ohio |) | |

FORFEITURE ORDER

Adopted: July 8, 2009

Released: July 8, 2009

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we impose a monetary forfeiture of \$6,000 against Lancaster Educational Broadcasting Foundation (“Lancaster” or “Licensee”), licensee of noncommercial educational Station WFCO(FM), Lancaster, Ohio, for violating Section 399B of the Communications Act of 1934, as amended (the “Act”),¹ and Section 73.503(d) of the Commission’s rules² by broadcasting prohibited advertisements over the Station.

II. BACKGROUND

2. This case arises from a complaint made to the Commission alleging that noncommercial educational Station WFCO(FM) broadcast prohibited underwriting announcements during its broadcast of Capital University college football games during the 2006 season.³ Thereafter, the Bureau inquired of the licensee concerning the allegations contained in the complaint.⁴ Lancaster responded to the *LOI* on September 14, 2007.⁵

3. On February 10, 2009, the Bureau issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”),⁶ finding that the Licensee had apparently violated the pertinent statute and Commission rules,

¹ See 47 U.S.C. § 399b.

² See 47 C.F.R. § 73.503(d).

³ See Letters from Complainant to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated September 15, 2006, and March 1, 2007 (collectively the “*Complaint*”).

⁴ See Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Lancaster, dated August 20, 2007 (“*LOI*”).

⁵ See Letter from Steve Rauch, President, Lancaster Educational Broadcasting Foundation, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated September 14, 2007 (“*LOI Response*”).

⁶ See *Lancaster Educational Broadcasting Foundation*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1384 (Enf. Bur., Investigations & Hearings Div., 2009) (“*NAL*”).

and proposing a monetary forfeiture of \$7,500. On March 20, 2009, Lancaster responded to the *NAL*, stating that the Station has taken remedial actions.⁷ Lancaster also urges the Commission to cancel or substantially reduce the *NAL*'s proposed forfeiture amount asserting that it is unable to pay that amount and that the forfeiture amount should reflect its history of compliance with the Commission's rules.⁸

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,⁹ Section 1.80 of the Commission's Rules,¹⁰ and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹¹ In assessing forfeitures, Section 503(b) 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 other matters as justice may require.¹² As discussed further below, we have examined Lancaster's response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find that cancellation or reduction of the forfeiture on the basis of inability to pay is not appropriate in this case. We find, however, that a reduction is warranted based on Lancaster's prior history of compliance with Commission rules.

5. In its *NAL Response*, Lancaster does not dispute the *NAL*'s finding that the twenty announcements violated the Commission's underwriting rules and so we will adopt the *NAL*'s apparent conclusion concerning those announcements. Instead, Lancaster claims that due to its strained financial condition, it cannot satisfy the forfeiture amount and argues that cancellation or reduction is therefore warranted.¹³ Lancaster also urges the Commission to consider the remedial actions that it undertook prior to the initiation of the Bureau's investigation as well as its good compliance history as factors supporting forfeiture rescission or reduction.¹⁴

6. In support of its inability to pay claim, Lancaster has provided financial documentation for 2006, 2007, 2008, and part of 2009.¹⁵ Lancaster asserts that the proposed forfeiture amount is many times more than its net income for the last four years.¹⁶ Lancaster also claims that it had losses and low net income

⁷ See Letter from Coe W. Ramsey, attorney for Lancaster Educational Broadcasting Foundation, to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, filed March 20, 2009 ("*NAL Response*").

⁸ See *NAL Response* at 2-3.

⁹ See 47 U.S.C. § 503(b).

¹⁰ See 47 C.F.R. § 1.80.

¹¹ See *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), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

¹² See 47 U.S.C. § 503(b)(2)(E).

¹³ See *NAL Response* at 2-3.

¹⁴ See *id.* at 2-4.

¹⁵ See *id.* at Attachment C. Lancaster cites to *San Jose Navigation, Inc.* for the types of financial documentation accepted by the Commission to establish an inability to pay claim. See *San Jose Navigation, Inc.*, Forfeiture Order, 22 FCC Rcd 1040, 1043 (2007).

¹⁶ See *NAL Response* at 3.

during the past four years,¹⁷ and that, if required to pay, it will most likely have to cease operations.¹⁸ Lancaster requests that we rescind or reduce the forfeiture in the instant case.

7. The Commission has determined that a licensee's gross revenues are the best yardsticks for determining its ability to pay,¹⁹ and that the net-loss experience does not, in the absence of other mitigating factors, demonstrate a licensee's inability to pay.²⁰ In its *NAL Response*, Lancaster erroneously compares itself to the licensee in *Discussion Radio, Inc.*²¹ In *Discussion Radio*, the Commission did reduce the forfeiture based on inability to pay, but only after first considering the gross revenues of the licensee.²² Although the Commission in *Discussion Radio* did also evaluate the licensee's losses and modest income, the Commission reduced the forfeiture because it held that the forfeiture amount either approached or exceeded the licensee's gross revenues.²³

8. In contrast, in this case, the forfeiture proposed by the *NAL* does not exceed or even approach the gross revenues of Lancaster;²⁴ it falls well within the percentage range that our precedents have found acceptable.²⁵ While Lancaster has also cited its net losses and low net income, the Commission has held that "other financial indicators such as net losses, may be relevant [but,] [i]f gross revenues are sufficiently great, the mere fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture."²⁶ In this case, we find that Lancaster's gross revenues are sufficient to sustain the forfeiture.

9. Lancaster also points to its low cash reserves and claims that if it is required to pay the forfeiture amount it will "most likely have to cease operations."²⁷ Upon providing proper documentation, however, Lancaster may request an installment payment plan option to lessen the immediate impact of the forfeiture. For this reason, the full forfeiture amount need not be satisfied by existing cash reserves and need not drive the Station out of business. We note also that the Commission has considered arguments in the past concerning potential cessation of operations, but only where such cessation would result in the entire

¹⁷ See *id.*

¹⁸ See *id.* at 2.

¹⁹ *PJB Communications of Virginia, Inc.* Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992) ("*PJB Communications*").

²⁰ See *Independent Communications Inc.*, Memorandum Opinion and Order and Forfeiture Order, 14 FCC Rcd 9605, 9610 (1999); *PJB Communications*, 7 FCC Rcd at 2089.

²¹ See *NAL Response* at 3 citing *Discussion Radio, Inc.*, Memorandum Opinion and Order and Forfeiture Order, 24 FCC Rcd 2206 (Media Bureau 2009) ("*Discussion Radio*").

²² See *Discussion Radio*, 24 FCC Rcd at 2207.

²³ See *id.* at 2207.

²⁴ See *NAL*, 24 FCC Rcd at 1384 (proposing a forfeiture of \$7,500).

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); *Local Long Distance, Inc.*, 16 FCC Rcd 24385, 24389 (2000), *recons. denied*, 16 FCC Rcd 10023, 10025 (2001) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues). In this case, the forfeiture represents a percentage within the range of *PJB Communications of Virginia, Inc.*, *Local Long Distance, Inc.*, and *Hoosier Broadcasting Corp.*

²⁶ *PJB Communications*, 7 FCC Rcd at 2089.

²⁷ See *NAL Response* at 2.

community of license losing broadcast service.²⁸ While the Station's assertion that it might go out of business concerns us greatly, our precedent requires that in forfeiture proceedings such defenses be evaluated with respect to the public impact of that eventuality on the entire composition of broadcasters in the community, in this case in Lancaster, Ohio. We note that Lancaster is not the only broadcaster serving this community.²⁹ Finally, based on our precedent, we believe the gross revenue information the Licensee provided demonstrates that Lancaster has sufficient resources to pay the forfeiture imposed without jeopardizing the Station's ability to continue to serve its community. Therefore, after considering the entire record, and in light of pertinent Commission precedents, we do not find that rescission or reduction is appropriate in this case based on inability to pay.

10. We also do not find Lancaster's post-facto remedial actions to be mitigating.³⁰ We have repeatedly stated that remedial actions taken to correct a violation are not mitigating factors warranting forfeiture reduction.³¹

11. Finally, Lancaster asks that we consider reducing the forfeiture based on its overall record of compliance with the Commission's rules.³² We have reviewed our records and find no other violations against the Licensee. Under similar circumstances, we have reduced proposed forfeitures, and find that doing so in this case is appropriate.³³ Consequently, we reduce Lancaster's forfeiture amount from \$7,500 to \$6,000.

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's rules,³⁴ Lancaster Educational Broadcasting Foundation, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$6,000 for willfully and repeatedly violating Section 399B of the Act, as amended, and Section 73.503 (d) of the Commission's Rules.³⁵

²⁸ See, e.g., *First Greenville Corporation*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 7399 (1996).

²⁹ Station WHOK-FM, licensed to the Wilks License Company-Columbus, L.L.C. and Station WLOH (AM), licensed to WLOH Radio Company, also currently hold licenses for Lancaster, Ohio. See Federal Communications Commission, Media Bureau, CDBS Public Access available at http://fjallfoss.fcc.gov/cgi-bin/ws.exe/prod/cdb/publicacc/prod/sta_list.pl (last visited July 2, 2009).

³⁰ See, e.g., *Capstar TX Limited Partnership (WKSS(FM))*, Notice of Apparent Liability, 20 FCC Rcd 10636 (Enf. Bur. 2005) (forfeiture paid); *AT&T Wireless Services, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 21866, 21871 (2002); *KVGL, Inc.*, Memorandum Opinion and Order, 42 FCC Rcd 258, 259 (1973). While Lancaster's alleged remedial actions may have pre-dated the Bureau's investigation, its actions were taken after the Complaint was filed. Therefore, we still do not find their remedial actions mitigating. See, e.g., *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4072, 4075 (Enf. Bur., Investigations & Hearings Div., 2006) (forfeiture paid) (finding that during a licensee-conducted contest, where the licensee engaged in remedial actions after receiving complaints about the manner in which it conducted the drawing for the contest, but prior to Commission investigation, such action was not considered mitigating) ("Clear Channel").

³¹ See *Clear Channel*, 21 FCC Rcd at 4075.

³² See *NAL Response* at 3-4.

³³ See, e.g., *WMGO Broadcasting Corp., Inc.*, Forfeiture Order, 23 FCC Rcd 3754 (Enf. Bur., Investigations & Hearings Div., 2008).

³⁴ See 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

³⁵ See 47 U.S.C. § 399b; 47 C.F.R. § 73.503(d).

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules³⁶ within thirty (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.³⁷ 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 No. and FRN No. 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 24A (payment type code). Lancaster will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anita.Patankar-Stoll@fcc.gov. 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.

14. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent, by Certified Mail/Return Receipt Requested, to Lancaster Educational Broadcasting Foundation, 201 South Broad Street, Suite 301, Lancaster, Ohio 43140, and by regular mail to its counsel, Coe W. Ramsey, Esq., Brooks, Pierce, McLendon, Humphrey, & Leonard, L.L.P., Wachovia Capitol Center, Suite 1600, 150 Fayetteville Street, Post Office Box 1800, Raleigh, North Carolina 27602.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

³⁶ See 47 C.F.R. § 1.80.

³⁷ See 47 U.S.C. § 504(a).