



**Federal Communications Commission
Washington, D.C. 205543**

November 4, 2009

DA 09-2382

In Reply Refer to:

1800B3-CK

NAL/Acct No.: MB200741410132

FRN: 0015199581

Released: November 4, 2009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Richard P. Marburger
1629 Belle Terre
Niles, OH 44446

In re: FM Translator Station W232AI
 Niles, Ohio
 Facility ID: No. 56248
 File No. BRFT-20060628AAQ

Dear Mr. Marburger:

The Chief, Audio Division, has before him a March 9, 2007, Request for Cancellation or Reduction of Proposed Forfeiture (“Request”) filed by Richard P. Marburger (“Licensee”). Licensee requests cancellation of a February 8, 2007, Notice of Apparent Liability for a Forfeiture (“NAL”)¹ in the amount of seven thousand dollars (\$7,000) for violation of Section 73.3539 of the Commission’s Rules (“Rules”) and Section 301 of the Communications Act of 1934, as amended (“Act”),² regarding FM Translator Station W232AI, Niles, Ohio (“Station”). The violations involve Licensee’s failure to file a timely license renewal application for the Station and Licensee’s unauthorized operation of the Station after the license had expired. By this action, we cancel the *NAL* and admonish Licensee for violating Sections 73.3539 of the Rules and 301 of the Act.

Background. As noted in the *NAL*, the Station’s renewal application was due on June 1, 2004, four months prior to the October 1, 2004, license expiration date. According to Commission records, no such application was filed, and the Station’s license expired on October 1, 2004. Subsequently, on June 13, 2006, the staff wrote to Licensee, indicating that the Station’s license had expired and that (1) all authority to operate the Station was terminated; and (2) the Station’s call letters were deleted from the Commission’s data base. Licensee was advised that any further operation of the Station was unauthorized and must cease immediately.³ Licensee then filed a request for Special Temporary Authorization (“STA”) to continue Station operations on June 27, 2006, and filed the captioned license renewal application one day later, on June 28, 2006. The staff granted the STA request on June 29, 2006, and it expired on December 29, 2006. Licensee

¹Richard P. Marburger, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 2374 (MB 2007).

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

³Letter to Wayne Kowalski, Ref. 1800B3-JDB (Chief, Audio Division, Media Bureau, Jun. 13, 2006) (the “License Expiration Letter”).

failed to file to seek extension of the STA or seek an additional STA to continue Station operations. Accordingly, on February 8, 2007, the Bureau issued Licensee a *NAL* in the amount of seven thousand dollars for violating Sections 73.3539 of the Rules and 301 of the Act, and granted the Station's license renewal application.⁴ In response, Licensee filed the subject Request on March 3, 2007.

In support of his Request, Licensee states that his violation of Sections 73.3539 of the Rules and 301 of the Act was not intentional, and that he is financially unable to pay the proposed forfeiture. Licensee asserts that these reasons warrant a cancellation of the assessed forfeiture.

Discussion. 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

Licensee first asserts that these violations were unintentional. Specifically, Licensee states that he was not aware of the expiration of the Station's license until he received the *License Expiration Letter*, and that he did not recall "receiving an expiration notice."⁹ Licensee also states that he failed to extend the STA because he mistakenly assumed that the Commission's approval of the STA request also served as an approval of the captioned license renewal application. As the Commission has held, however, 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 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

Licensee next asserts that he is the sole proprietor of the Station and that he is self-employed and has a limited income. Licensee claims that payment of a \$7,000 forfeiture would cause a "great financial hardship."¹² 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 reflects the

⁴ See n.1, *supra*.

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. We note that the staff does not send out "license expiration notices" or renewal reminders to broadcast licensees.

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 "inadherence ... 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, 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, 2651 (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.

¹² Request at 2.

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.¹³

In general, a licensee's gross revenues (or in the case of a sole proprietorship, gross income)¹⁴ are the best indicator of its ability to pay a forfeiture.¹⁵ 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.¹⁶ In support of his Request, Licensee submits copies of his 2003, 2004, and 2005 personal federal income tax returns, specifying gross revenues in the amounts of \$27,354, \$8,395, and \$1,963, respectively.

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 violated Section 73.3539 of the Commission's Rules and willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended. However, after reviewing Licensee's claim and the supporting documentation, we believe that payment of the \$7,000 forfeiture, or any reduction thereof consistent with Commission precedent,¹⁷ would pose a financial hardship in view of Licensee's documented gross income. Accordingly, we cancel the proposed forfeiture. Nevertheless, we find that it is appropriate to admonish Licensee for his willful violation of Section 73.3539 of the Rules and willful and repeated violation of Section 301 of the Act.

Conclusion. In view of the foregoing, the Notice of Apparent Liability (NAL/Acct. No. MB200741410132) for violation of Sections 73.3539 of the Rules and 301 of the Act is hereby CANCELLED. Licensee is instead hereby ADMONISHED for his willful violation of Section 73.3526 of the Rules and willful and repeated violation of Section 301 of the Act.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

¹³ See *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7441 (2004).

¹⁴ See *William Saunders*, Memorandum Opinion and Order, 21 FCC Rcd 1028, 1030 (EB 2006) (financial documentation, including personal tax returns, considered to determine inability to pay when antenna structure was operated as a sole proprietorship); *Maria L. Salazar*, Memorandum Opinion and Order, 19 FCC Rcd 5050, 5052 (2004) (federal individual tax returns of licensee of radio station considered to determine licensee's ability to pay forfeiture).

¹⁵ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("PJB Communications").

¹⁶ *Id.*

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