

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

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| In the Matter of |) | |
| |) | |
| THE UNIVERSITY OF MONTANA- WESTERN |) | Facility ID No. 93389 |
| |) | NAL/Acct. No. MB20051810071 |
| |) | FRN 0005093695 |
| |) | File No. BRED-20041201BRS |
| Licensee of Noncommercial Educational Station |) | |
| KDWG(FM), Dillon, Montana |) | |

FORFEITURE ORDER

Adopted: March 13, 2009

Released: March 16, 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 nine dollars (\$9,000) to The University of Montana-Western (“Licensee”), licensee of noncommercial educational Station KDWG(FM), Dillon, Montana (the “Station”), for its willful and repeated violation of Section 73.3527 of the Commission’s Rules (“Rules”)¹ by failing to properly maintain a public file for the Station.

II. BACKGROUND

2. On June 24, 2005, 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 “Petition for Cancellation or Reduction of Forfeiture” (“Petition”) on July 25, 2005.

3. 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 73.3527, has been placed in the station’s public inspection file at the appropriate times. Licensee indicated “No” to that certification. Licensee stated in an amended³ Exhibit that, from the January 2001 commencement of Station operations until approximately December 2004, KDWG(FM)’s public inspection file did not contain any quarterly issues/programs lists. The Licensee explained that, because KDWG(FM) is a small noncommercial educational station it believed it was an “exempt station” pursuant to Section 73.3527(e)(8), although it recently was advised by its counsel “that it did not appear that an exemption could be claimed.”⁴ The Licensee argued that, under the circumstances, KDWG(FM) should not be fined for its public file violations because it was “confused” about its exemption status under Section 73.3527(e)(8). Moreover,

¹ 47 C.F.R. § 73.3527.

² *Letter to The University of Montana-Western et al. from Peter Doyle*, reference 1800B3-KV (MB June 24, 2005).

³ Licensee amended its renewal application on May 12, 2005.

⁴ Amended Exhibit 11 of the Application.

Licensee contends, the Commission has provided little guidance on this provision of the Commission's rules. In addition, Licensee asserted, KDWG(FM) is an educational station operated exclusively by part-time students and, hence, it should not receive a harsh sanction "particularly when [the violation] . . . involved only a failure to document and [was] . . . rectified."⁵ Finally, KDWG(FM) argued that its revenue is solely derived from a mandatory student activity fee, assessed by the University, and has been designated for current expenses or equipment replacement. Thus, it contended, "there are no resources to pay a forfeiture other than to eliminate station activities to reduce operating costs, [or] to fail to replace equipment . . . or to dissipate the remaining equipment replacement reserve and leave the station possibly unable to cope with any unexpected equipment failure."⁶

4. On June 24, 2005, the staff rejected Licensee's arguments and advised Licensee of its apparent liability for a forfeiture of \$9,000, for willfully and repeatedly violating Section 73.3527 of the Rules based on the fact that, by its admission, the violations occurred over a period of nearly four years.

5. Licensee then filed its Petition, which requests that the proposed forfeiture be cancelled or substantially reduced. Licensee states that the amount of the forfeiture will impose a serious financial hardship, in that it represents 20% of the station's annual gross revenue, and also substantially exceeds the amounts that have been imposed for "similarly situated stations."⁷ Specifically, Licensee asserts that the Commission has been inconsistent in assessing forfeitures for issues/programs lists violations, and in this case, "among the critical facts" to be considered for purposes of comparison to other cases are that (1) KDWG is a noncommercial station, (2) the omissions occurred for only three years, and (3) all issues/programs lists were successfully reconstructed and placed in the public file.⁸ Citing cases in which the Commission proposed a forfeiture of \$3,000 for issues/programs lists public file violations,⁹ Licensee maintains that "even absent UMW's showing of financial hardship," a forfeiture of more than \$3,000 cannot be justified.¹⁰

6. Additionally, Licensee attributes the deficiency of its file to its "belief" that it was exempt from the issues/programs list requirement, which it contends, must be considered a "good faith mistake."¹¹ In this regard, Licensee attributes the basis of its "belief" on the Commission's "lack of clarity" or failure to explain the definition of "nonexempt," as recited in section 73.3527(e)(8) of the rules.¹²

⁵ *Id.*

⁶ *Id.*

⁷ Petition at 1-2.

⁸ *Id.* at 2-3.

⁹ *Glen Iris Baptist School*, Letter, 19 FCC Rcd 11234 (MB 2004); *KM Radio of Pearson, LLC*, Letter, 19 FCC Rcd 11218 (MB 2004); *Capstar TX Limited Partnership*, Letter, 19 FCC Rcd 2333 (MB 2004); *John Brown University*, Letter, 19 FCC Rcd 11246 (MB 2004); and *Trustees of Davidson College*, Letter, 19 FCC Rcd 19222 (MB 2004).

¹⁰ Petition at 4.

¹¹ *Id.* at 1, 4.

¹² Section 73.3527(e)(8) requires, in pertinent part:

For nonexempt noncommercial educational broadcast stations, every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period.

III. DISCUSSION

7. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,¹³ Section 1.80 of the Rules,¹⁴ and the Commission's *Forfeiture Policy Statement*.¹⁵ 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.¹⁶

8. It is undisputed that Licensee's public file was incomplete during the license term, missing at least 14 issues/programs lists.¹⁷ First, where the Rule is violated, Section 1.80 provides that a monetary forfeiture may be imposed, and there is no exemption or reduction based on the noncommercial status of a station.¹⁸ In the instant case, Licensee willfully and repeatedly violated Section 73.3527 by failing to maintain its public file, thus the proposed forfeiture was appropriate. Secondly, we find no merit in Licensee's assertion that the public file omissions occurred for "only three years." Issues/programs lists "are a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community."¹⁹ The Commission's public information file rule also safeguards the public's ability to assess the station's service and to meaningfully participate in the license renewal process, and helps ensure the station's accessibility to and nexus with its community, and the station's service to the community and responsiveness to community programming needs.²⁰ As such, the public information requirements are integral components of a licensee's obligation to serve the public interest, and meet its community service obligations.²¹ In the *Forfeiture Policy Statement*, the Commission found that the omission of even a single item (the issues/programs list) from the public inspection file is a serious violation because it "diminishes the public's ability to determine and comment on whether the station is serving the community."²² Here, the Station's public file was missing

¹³ 47 U.S.C. § 503(b).

¹⁴ 47 C.F.R. 1.80.

¹⁵ *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*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹⁶ 47 U.S.C. § 503(b)(2)(E).

¹⁷ Petition at 3 ("the omissions occurred for only three years").

¹⁸ *See Lebanon Educational Broadcasting Foundation, Licensee of Noncommercial Station KTTK(FM) Lebanon, Missouri*, Memorandum Opinion and Order, 21 FCC Rcd 1442, 1446 (EB 2006), *citing Main Studio Rule and Local Public Inspection Files*, Report and Order, 13 FCC Rcd 15691, 15700 (all licensees have a duty to comply with public inspection file rules).

¹⁹ *See Normandy Broadcasting Corp. and Lawrence N. Brandt*, Initial Decision, 8 FCC Rcd 1, 14 (ALJ 1992) (*citing Formulation of Policies and Rules to Broadcast Renewal Applicants*, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6365 (1989)).

²⁰ *See Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05 ¶ 39.

²¹ *See* 47 U.S.C. § 307(a).

²² *See Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05 ¶ 39.

at least 14 issues/programs lists. We find that the \$9,000 forfeiture issued was an appropriate sanction for Licensee's violations and is consistent with prior forfeitures for similar violations.²³

9. Furthermore, we reject Licensee's suggestion that its "successful" reconstruction and placement of the issues/programs lists in the public file is a basis for canceling or 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.²⁴

10. Next, Licensee argues that it made a "good faith mistake" in believing that the Station was exempt from the quarterly issues/programs list requirement, which mistake it attributes to the Commission's "lack of clarity" or failure to explain the definition of "nonexempt" in section 73.3527(e)(8) of the Rules. We reject these contentions.

11. The Commission has long held that ignorance of the law is not a defense or mitigating circumstance.²⁵ In this case, the Commission has met its due process obligation under the following standard: "[W]hether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . ." ²⁶ Licensee could have confirmed, by reviewing the Commission's public statements, that the Station did not qualify for the exemption from this public file requirement. By its own admission, however, Licensee never undertook such a review until it became necessary to disclose the violation in its license renewal application.²⁷

12. When the Commission first adopted the public file requirements for NCE stations in 1976, (as Section 1.527 of the Rules), it clearly explained that "exempt licensees include those offering wholly instructional programming and those operating under Class D, 10-watt authorizations."²⁸ Although Licensee is correct that Section 73.3527(e)(8) contains no definition of what is an "exempt" noncommercial educational broadcast station, the Commission has never issued any contrary "public statements" concerning what is an "exempt" licensee. The fact that Section 73.3527 does not define the term did not provide Licensee the discretion to decide *sua sponte* that KDWG(FM) was an "exempt"

²³ See *Colby-Sawyer College*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 21682 (MB 2007) (\$10,000 Notice of Apparent Liability issued for 14 missing issues-programs lists); *Capstar TX Limited Partnership*, 22 FCC Rcd 12715, 12715 (MB 2007) (same).

²⁴ *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)).

²⁵ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California*") (citing *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275, 1277 (1986) and *Fay Neel Eggleston*, Memorandum Opinion and Order, 19 FCC 2d 829 (1969)).

²⁶ *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), and *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

²⁷ See captioned Application, Exhibit 11.

²⁸ *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, Report and Order, 58 FCC Rcd 526, 541-42 and n.14 (1976). See also *In the Matter of Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, Report and Order, 81 FCC 2d 346, 372 (1980) ("exempt licensees include those offering wholly instructional programming and those operating under Class D, 10-watt authorizations").

station without further investigation. Licensee admits that such “further investigation” by counsel subsequently determined that it was not, and Licensee utterly fails to cite any Commission statement that arguably could support a different interpretation. We will not cancel or reduce the amount of the proposed forfeiture on the basis of these arguments.

13. 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.²⁹

14. 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.³⁰ In support of its request for cancellation or reduction of the forfeiture, Licensee states that the amount of the forfeiture will impose a "serious financial hardship" and submits the Station's "sources of revenue" of \$45,183, \$43,502 and \$45,208, during University fiscal years 2003, 2004, and 2005, respectively.³¹

15. 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 the *Station's* "Revenue Sources" for fiscal years 2003, 2004, and 2005, rather than the *Licensee's* gross revenues, therefore, we have no basis on which to analyze its claim. Accordingly, no cancellation or reduction is warranted on the basis of an inability to pay.³²

16. 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 willfully³³ and repeatedly³⁴ violated Section 73.3527 of the Rules at the Station.

²⁹ See *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7441 (2004).

³⁰ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992).

³¹ See *Letter from Susan Briggs, Vice Chancellor for Administration and Finance and University Vice President and Virginia Dale, Director of Business Services, to Peter Tannenwald, Esq.* (Jul. 12, 2005) certifying the Station's "sources of revenue" for the listed fiscal years.

³² See, e.g. *Washington and Lee University*, Forfeiture Order, 23 FCC Rcd 15821, 15824 (MB 2008) (rejecting request for reduction when the licensee "has only provided us with a limited snapshot of the station's budget and has provided us with no information regarding Licensee's finances").

³³ 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.

³⁴ 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

17. 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,³⁵ that The University of Montana-Western, SHALL FORFEIT to the United States the sum of \$9,000 for willfully and repeatedly violating Section 73.3527 of the Commission's Rules at the Station.

18. 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).³⁶

19. 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, The University of Montana-Western, 710 South Atlantic St., Campus Box 119, Dillon, Montana 59725-3598, and to its counsel, Peter Tannenwald, Esq., Fletcher Heald & Hildreth, P.L.C., 130 North 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

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

³⁶ See 47 C.F.R. § 1.1914.