



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

November 22, 2010

DA 10-2221

In Reply Refer to:

1800B3-JSP

NAL/Acct No.: MB-200841410007

FRN: 0013286919

Released: November 22, 2010

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

J. Dominic Monahan, Esq.
Luvaas Cobb
P.O. Box 10747
Eugene, OR 97440-2747

In re: KYKV(FM) (formerly KQBE(FM)), Selah, Washington
Peak Communications, Inc. (former licensee)
Facility ID: 52035
File No. BRH-20051003BWN

Dear Mr. Monahan:

We have before us the March 7, 2008, letter,¹ filed on behalf of Peak Communications, Inc. ("Peak"),² former licensee of Station KYKV(FM) (formerly KQBE(FM)), Selah, Washington ("Station").³ The Request seeks cancellation or reduction of the February 6, 2008, Notice of Apparent Liability for Forfeiture ("NAL")⁴ in the amount of ten thousand dollars (\$10,000) for violations of Section 73.3526 of the Commission's Rules (the "Rules")⁵ regarding Peak's failure to maintain the Station's public inspection file. By this action, we cancel the NAL and admonish Peak for violating Section 73.3526 of the Rules.

¹ Response to Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture and Request for Rescission or Mitigation of the Forfeiture, filed by Peak Communications, Inc., on Mar. 7, 2008 ("Request").

² Peak assigned the Station to Educational Media Foundation in 2008. See File No. BALH-20080228ABZ (granted April 24, 2008). The assignment was consummated on June 13, 2008. Despite this assignment, Peak remains liable for forfeiture for those violations occurring when the Station was under its stewardship. See, e.g., *Oberlin College Student Network, Inc.*, Forfeiture Order, 25 FCC Rcd 8240, 8243 n.3 (2010).

³ The Station's community of license was changed to Saleh, Washington from Ellensburg, Washington in 2008. See File No. BPED-20080617ADE (granted October 31, 2008). The new license to cover was granted in 2009. See File No. BLED-20090420ACO (granted May 4, 2009).

⁴ *Peak Communications, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1660 (MB 2008).

⁵ 47 C.F.R. § 73.3526.

Background. On October 3, 2005, Peak filed the above-referenced application to renew the license of the Station (“Application”). 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 of the Rules has been placed in the station’s public inspection file at the appropriate times. Peak indicated “No” to that certification, explaining that it had failed to comply with the public file requirements for the first six years of the Station’s license term, *i.e.*, from 1999 through 2004, by failing to prepare or maintain issues/programs lists for any quarter during that six year period. Peak further stated that, as a result of a change of management, it discovered the public file deficiencies and immediately made efforts to update the file with the required documentation. Peak admitted that it did not recreate issues/programs lists for any quarter prior to January 1, 2005, explaining that the status of the Station’s records rendered it impossible to do so. Peak also admitted that it failed to prepare and insert into the public file the required biennial ownership report for 2003.⁶

On February 6, 2008, the staff advised Peak of its apparent liability for a forfeiture of \$10,000 for willfully and repeatedly violating Section 73.3526 of the Rules, based on the fact that, by its admission, every required issues/programs list was missing from the Station’s public inspection file between 1999 and 2004, as well as the required biennial ownership report for 2003. The staff granted the Application in the order issuing the *NAL*. In its Request, Peak asserts that payment of the proposed forfeiture will cause it financial hardship, and asks for a cancellation or substantial reduction of the proposed forfeiture.⁷

Discussion. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁸ Section 1.80 of the Rules,⁹ and the Commission’s *Forfeiture Policy Statement*.¹⁰ 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.¹¹

Peak contends that payment of the proposed forfeiture would cause it 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.¹² In general, a licensee’s gross revenues are the best indicator of its ability to

⁶ Application at Ex. 11.

⁷ See Request at 2.

⁸ 47 U.S.C. § 503(b).

⁹ 47 C.F.R. § 1.80.

¹⁰ *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).

¹¹ 47 U.S.C. § 503(b)(2)(E).

¹² See *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7441(2004), *modified*, 24 FCC Rcd 2206 (2009).

pay a forfeiture.¹³ However, in some cases, other financial indicators, such as net losses, may also be relevant.¹⁴

In support of its request for cancellation of the forfeiture, Peak submits copies of its 2005, 2006 and 2007 federal income tax returns, specifying gross revenues in the amounts of \$48,849, \$45,624, and \$33,871, respectively, for average yearly gross revenue of \$42,781. The proposed \$10,000 forfeiture represents 23.4% of Peak's average gross revenue for 2005-2007. In considering claims of financial hardship, we have found a forfeiture amount of five percent of average gross revenue reasonable,¹⁵ while the Enforcement Bureau has found that a forfeiture as high as 7.9 percent of average gross revenue was not excessive despite claims of financial hardship.¹⁶ In the absence of extraordinary circumstances, we would reduce the forfeiture to \$2,100, which would represent approximately five percent of average gross revenue. We find such circumstances present here, however. During the same three-year period, Peak experienced cumulative net losses exceeding \$218,600, meaning its losses exceeded its revenue by nearly seventy percent from 2005 through 2007.¹⁷

We have considered Peak's Response in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Peak willfully¹⁸ and repeatedly¹⁹ violated Section 73.3526 of the Rules. However, we believe that payment of the \$10,000 forfeiture, or any reduction thereof, would pose a financial hardship in view of Peak's documented gross income, combined with its net losses.²⁰ Accordingly, we cancel the proposed forfeiture. Nevertheless, we find that it is appropriate to admonish Peak for its willful and repeated violation of Section 73.3526 of the Rules.

¹³ *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*") (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues). See also *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).

¹⁴ *PJB Communications*, 7 FCC Rcd at 2089.

¹⁵ See, e.g., *Grace Baptist Church*, Forfeiture Order, 25 FCC Rcd 7473 (MB 2010) (finding forfeiture representing approximately eleven percent of average gross revenue excessive and reducing to five percent); *CARE Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 1411 (MB 2010) (same).

¹⁶ See *Coleman Enters., Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24389 (EB 2000), *recon. denied*, 16 FCC Rcd. 10023, 10025 (2001).

¹⁷ See *Valley Air, LLC*, Letter, 24 FCC Rcd 5505 (MB 2010) (forfeiture canceled where losses exceeded revenue by nearly fifty percent).

¹⁸ 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 Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*").

¹⁹ 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).

²⁰ See *Valley Air*, 24 FCC Rcd 5505.

Conclusion. In view of the foregoing, the \$10,000 Notice of Apparent Liability (NAL/Acct. No. MB-200841410007) for violations of the public inspection file rule is HEREBY CANCELLED. Peak Communications, Inc., is instead hereby ADMONISHED for its violations of 47 C.F.R. § 73.3526.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Peak Communications, Inc.