

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

In the Matter of
Texas Educational Broadcasting
Co-operative, Inc.
Licensee of KOOP(FM)
Hornsby, Texas
Facility I.D. No. 65320
NAL/Acct. No. MB200741410342
FRN: 0008697245
File No. BRED-20050331BPC

FORFEITURE ORDER

Adopted: August 10, 2011

Released: August 11, 2011

By the Chief, Audio Division:

I. INTRODUCTION

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of eight thousand, seven hundred dollars (\$8,700) to Texas Educational Broadcasting Co-operative, Inc. ("Licensee"), licensee of noncommercial educational station KOOP(FM), Hornsby, Texas ("Station"), for its willful and repeated violation of Section 73.3527 of the Commission's Rules ("Rules") by failing to retain all required documentation in the Station's public inspection file, and for violating the alien ownership provisions of Section 310(b) of the Communications Act of 1934, as amended ("Act").

II. BACKGROUND

2. On July 16, 2007, the Bureau issued a Notice of Apparent Liability for Forfeiture in the amount of fifteen thousand dollars (\$15,000) to Licensee for failing to retain all required documentation in the Station's public inspection file, and for violating the alien ownership provisions of the Act. As noted in the NAL, Section 73.3527 of the Rules requires a non-commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. Among the materials required for inclusion in the file are the station's quarterly issues/programs lists, which must be retained until final Commission action on the station's next license renewal application. Section III, Item 3 of the Station's license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3527 had been placed in its station's public inspection file at the appropriate times. Licensee indicated "No" to that Item, explaining in an exhibit to the application

1 See 47 C.F.R. § 73.3527.

2 See 47 U.S.C. § 310(b).

3 See Texas Educational Broadcasting Co-operative, Inc., Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 13038 (MB 2007) ("NAL"). The Commission also granted the Station's license renewal application on July 16, 2007. Id. at 13046-47.

4 The purpose of this requirement is to provide the public with timely information at regular intervals throughout the license period. WEZB(FM), New Orleans, LA, Letter, 13 FCC Rcd 4102, 4105 (MMB 1997), citing License Renewal Applications of Certain Commercial Radio Stations, Memorandum Opinion and Order, 8 FCC Rcd 6400 (MMB 1993).

5 See 47 C.F.R. § 73.3527(e)(8).

that the issues/programs lists for 1997, 1998, 1999, and 2001 were missing from the public inspection file.⁶ Licensee stated, however, that it created the missing lists from archived materials and later placed them in the public file,⁷ and noted that the file was current as of March 2005.⁸ In addition, in response to an objection filed against the renewal application, Licensee admitted that for two years prior to filing its renewal application there were two aliens serving on its board, raising its foreign voting interest above the 20 percent benchmark, in violation of Section 310(b) of the Act.⁹ However, as noted in the NAL, Licensee spotted its error and took corrective action *sua sponte* prior to filing the renewal application by removing one of the aliens from the board to comply with the 20 percent benchmark.¹⁰

3. Licensee submitted a response (“Response”) to the NAL on August 15, 2007. In its Response, Licensee asserts that the proposed forfeiture should be cancelled due to its inability to pay the proposed amount. It supplied federal tax returns for the years 2004 and 2005, audited financial statements for 2006, and a profit and loss statement for the first six months of 2007.¹¹ The Response does not contest the NAL’s findings with respect to the violations.

III. DISCUSSION

4. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,¹² Section 1.80 of the Rules,¹³ and the Commission’s *Forfeiture Policy Statement*.¹⁴ 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.¹⁵

5. Licensee argues that the forfeiture should be cancelled because the Station is recovering from the “financial setback” of a 2006 fire which destroyed its main studio.¹⁶ The Commission will not consider reducing or cancelling 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.¹⁷ Any claim of inability to

⁶ See captioned application at Exhibit 11.

⁷ See *id.*

⁸ *Id.*

⁹ 47 U.S.C. § 310(b)(3) (“No broadcast...radio station license shall be granted to or held by any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives...”).

¹⁰ Accordingly, we reduced the proposed forfeiture for Licensee’s apparent violation of Section 310(b) of the Act from the \$8,000 base amount to \$5,000.

¹¹ In the alternative, the Response requests payment by installment plan. Such an option is outlined in paragraph 9 of this order.

¹² 47 U.S.C. § 503(b).

¹³ 47 C.F.R. § 1.80.

¹⁴ *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).

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ Response at 3.

¹⁷ NAL, 22 FCC Rcd at 13047.

pay must specifically identify the basis for the claim by reference to the financial documentation submitted.¹⁸

6. In general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.¹⁹ In some cases, other financial indicators such as net losses may also be relevant,²⁰ but if gross revenues are sufficiently great, the mere fact that a business is operating at a loss does not by itself mean it cannot afford to pay.²¹ In 2004 and 2005, Licensee reported gross revenues of \$105,656 and \$105,668, respectively. The audited financial statement for 2006 reveals gross revenues of \$313,947.²² Thus, the proposed \$15,000 forfeiture amount represents approximately nine percent of the Licensee's average gross revenue for 2004-06. In considering claims of financial hardship, we have found a forfeiture amount of five percent of gross revenue reasonable,²³ and the Enforcement Bureau has found that a forfeiture as high as 7.9 percent of the violator's gross revenue was not excessive despite claims of financial hardship.²⁴ Recognizing the financial burden of the proposed \$15,000 forfeiture, we reduce the amount of the forfeiture to \$8,700, or approximately five percent of Licensee's average gross revenues for the three-year period prior to issuance of the NAL.²⁵

7. We have considered Licensee's response and the record of this case in light of the above statutory factors, our Rules, and the Forfeiture Policy Statement. We conclude that Licensee willfully²⁶

¹⁸ See *Discussion Radio, Inc.*, Memorandum Opinion and Forfeiture Order, 24 FCC Rcd 2206 (MB 2009) (reducing forfeiture amount after review of submitted federal tax returns demonstrated a financial hardship).

¹⁹ *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992).

²⁰ *Id.*

²¹ *Id.*

²² Licensee asks that we take into account that its inflated 2006 revenue is due to receipt of insurance and emergency federal grant money related to the fire. Setting aside these contributions, the Station experienced a net loss of \$14,652 in 2006, partly due to the higher cost of rent at its temporary main studio. Response at 2. We do not consider this 'operating at a loss,' but even if we did, Licensee would not qualify for further forfeiture reduction. As stated above, if gross revenues are sufficiently great, the mere fact that a business is operating at a loss does not by itself mean it cannot afford to pay. Commission precedent has only accounted for net losses in extraordinary circumstances, when the losses constituted a much larger percentage of the average gross revenue. See *KYKV(FM)* (formerly *KQBE(FM)*), *Selah, Washington*, Letter, 25 FCC Rcd 16188 (MB 2010) (cancelling forfeiture because Licensee's losses exceeded its revenue by nearly seventy percent from 2005 through 2007); *KCSY(FM)* (formerly *KVLR(FM)*), *Twisp, Washington Valley Air, LLC* (former licensee), Letter, 24 FCC Rcd 5505 (MB 2009) (cancelling forfeiture because Licensee's losses exceeded its revenue by nearly 50 percent from 2003 to 2005). Here, Licensee's losses are approximately eight percent of average gross revenue, a much smaller percentage that does not constitute extraordinary circumstances. Accordingly, we do not consider this argument further.

²³ See *CARE Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 1411 (MB 2010) (reducing amount of forfeiture to five percent where the proposed forfeiture amount would have constituted approximately 11 percent of Licensee's average gross revenues) ("*CARE*").

²⁴ See *Coleman Enterprises, Inc.*, Order of Forfeiture, 15 FCC 24385, 24389 (EB 2000), *recon. denied*, 16 FCC Rcd 10023, 10025 (2001).

²⁵ See *CARE*, *supra* note 23; *Grace Baptist Church*, Forfeiture Order, 25 FCC Rcd 7481 (MB 2010) (forfeiture reduced from 11.4 percent of licensee's average total revenue to five percent based on licensee's ability to pay).

²⁶ 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.*, 6 FCC Rcd 4387, 4387-88 (1991) *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*").

and repeatedly²⁷ violated Section 73.3527 of the Rules²⁸ and violated Section 310(b) of the Act.²⁹ However, for the reasons set forth above, we find that reducing the forfeiture to eight thousand, seven hundred dollars (\$8,700) is warranted.

IV. ORDERING CLAUSES

8. 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,³⁰ that Texas Educational Broadcasting Co-operative, Inc. SHALL FORFEIT to the United States the sum of eight thousand, seven hundred dollars (\$8,700) for willfully violating Section 73.3527 of the Rules³¹ and Section 310(b)³² of the Act.

9. 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.³³ 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/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).³⁴ Licensee will also send electronic notification on the date said payment is made to Kelly.Donohue@fcc.gov and Maureen.McCarthy@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director-Financial Operations, Room 1-A625, 445 12th Street, S.W., Washington, DC 20554.³⁵

²⁷ Section 312(f)(2) 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)(2). *See also Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

²⁸ 47 C.F.R. § 73.3527.

²⁹ 47 U.S.C. § 310(b).

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

³¹ 47 C.F.R. § 73.3527.

³² *See* 47 U.S.C. § 310(b).

³³ 47 U.S.C. § 504(a).

³⁴ *See* 47 C.F.R. § 1.1914.

³⁵ *Id.*

10. 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 Texas Educational Broadcasting Co-operative, Inc., P.O. Box 2116, Austin, TX 78768, and to its counsel, Melodie A. Virtue, Esq., Garvey, Schubert, Barer, 1000 Potomac Street, N.W., Fifth Floor, Washington, DC 20007.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division