

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

In re Application of	)	
	)	
<b>Ball State University</b>	)	Facility I.D. No. 47007
	)	NAL/Acct. No. MB-201241410040
For Renewal of License for	)	FRN: 0010119121
Station WWHI(FM)	)	File No. BRED-20120402ALO
Muncie, Indiana	)	

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: August 13, 2012**

**Released: August 13, 2012**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. The Media Bureau (“Bureau”) has before it the application of Ball State University (“Licensee”) for renewal of its license for WWHI(FM), Muncie, Indiana (“Station”). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”),<sup>1</sup> we find that Licensee apparently willfully and repeatedly violated Section 73.3527 of the Rules by failing to retain all required documentation in the WWHI(FM) public inspection file.<sup>2</sup> Based upon our review of the record before us, we conclude that Licensee is apparently liable for a monetary forfeiture in the amount of one thousand dollars (\$1,000).

**II. BACKGROUND**

2. Section 73.3527 of the Rules requires a noncommercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information about the station at regular intervals throughout the license period.<sup>3</sup> 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.<sup>4</sup>

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 answered “No” to that certification and attached an Exhibit explaining that issues/programs lists for the last two quarters of 2004; the first three

<sup>1</sup> This NAL is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (“Act”), and Section 1.80 of the Commission’s rules (“Rules”). See 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80. The Bureau has delegated authority to issue the NAL under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

<sup>2</sup> See 47 C.F.R. § 73.3527.

<sup>3</sup> Cf. *Letter to Kathleen N. Benfield*, Letter, 13 FCC Rcd 4102 (MMB 1997) (citing *License Renewal Applications of Certain Commercial Radio Stations*, Memorandum Opinion and Order, 8 FCC Rcd 6400 (MMB 1993)).

<sup>4</sup> See 47 C.F.R. § 73.3527(e)(8).

quarters of 2007; and the first, third, and fourth quarters of 2009 were missing from the Station's public file.<sup>5</sup> Licensee states that it believes the missing reports were timely prepared, but were apparently discarded during a move of the station's studios in mid-2007. Licensee further believes that the missing 2009 reports were timely prepared, but discarded by student staff in more recent years.

### III. DISCUSSION

4. *Proposed Forfeiture.* As Licensee has acknowledged, during periods within the license term, the Station's public inspection file did not contain many of the items required to be retained in the file by Section 73.3527 of the Rules. In this regard, where lapses occur in maintaining the public file, 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.<sup>6</sup>

5. Under Section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>7</sup> 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.<sup>8</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>9</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>10</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."<sup>11</sup>

6. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of Section 73.3527.<sup>12</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "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."<sup>13</sup>

7. In this case, although Licensee admitted to violating Section 73.3527, it did so only in the context of the question contained in its license renewal application that compelled such disclosure. Moreover, the violations were extensive and involved eight issues/programs lists. However, we credit Licensee's representation that the requisite issues/programs lists for the last two quarters of 2004 and the

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<sup>5</sup> Application, Exhibit 12.

<sup>6</sup> See *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999) (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)); *Surrey Front Range Limited Partnership*, Notice of Apparent Liability, 7 FCC Rcd 6361 (FOB 1992).

<sup>7</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

<sup>8</sup> 47 U.S.C. § 312(f)(1).

<sup>9</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>10</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>11</sup> 47 U.S.C. § 312(f)(2).

<sup>12</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

<sup>13</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

first three quarters of 2007 were generated and timely placed in the Station's public inspection file, although they were apparently later misplaced or discarded during the 2007 move and could not be located or reconstructed. We also credit Licensee's representation that the issues/programs lists for the first, third, and fourth quarters of 2009 were timely prepared, but subsequently discarded by staff. Therefore, the proposed forfeiture will be reduced to \$1,000.<sup>14</sup>

8. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.<sup>15</sup> That section provides that if, upon consideration of the application and pleadings, we find that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.<sup>16</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>17</sup>

9. We find that Licensee's apparent violations of Section 73.3527 of the Rules do not constitute “serious violations” warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.<sup>18</sup> Further, we find that the Station served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violation that would preclude grant of the application.

#### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Ball State University is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of one thousand dollars (\$1,000) for its apparent willful and repeated violation of Section 73.3527 of the Commission's Rules.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Ball State University SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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<sup>14</sup> See *Davidson College*, Forfeiture Order, 20 FCC Rcd 17190 (MB 2005) (reducing a proposed forfeiture of \$9,000 for twelve missing issues/programs lists to \$1,000 because licensee had timely generated lists but subsequently misplaced them during a studio relocation).

<sup>15</sup> 47 U.S.C. § 309(k).

<sup>16</sup> 47 U.S.C. § 309(k)(1).

<sup>17</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>18</sup> For example, we do not find here that Licensee's Station operation “was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies.” See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that “the number, nature and extent” of the violations indicate that “the licensee cannot be relied upon to operate [the Station] in the future in accordance with the requirements of its licenses and the Commission's Rules.” *Id.* at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

12. 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). Licensee will also send electronic notification on the date said payment is made to Penelope.Dade@fcc.gov and Alexander.Sanjenis@fcc.gov.

13. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 reflects the respondent’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.

15. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.<sup>19</sup>

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Ball State University, c/o Barry D. Umansky, 2000 W. University Avenue, Muncie, IN 47306.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>19</sup> See 47 C.F.R. § 1.1914.