

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

In the Matter of)	
)	Facility ID No. 71288
Educational Community Radio, Inc.)	NAL/Acct. No. MB-201341410007
)	FRN: 0003020518
Licensee of Station WOBO(FM),)	File No. BRED-20120529ACA
Batavia, Ohio)	

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

Adopted: April 22, 2013

Released: April 22, 2013

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (“Bureau”) has before it an application (the “Application”) of Educational Community Radio, Inc. (“Licensee”) for renewal of its license for noncommercial educational (“NCE”) FM station WOBO(FM), Batavia, Ohio (“Station”). The Bureau also has an August 6, 2012, Informal Objection (“Objection”) to the Application by a former officer of the Licensee, Donald F. Littman (“Littman”). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”),¹ we find that Licensee apparently willfully and repeatedly violated Sections 73.503(d) of the Commission’s rules (the “Rules”) and Section 399B of the Communications Act of 1934, as amended, (the “Act”) by airing commercial announcements on an NCE station.² Based upon our review of the record before us, we conclude that Licensee is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000) and that this matter does not disqualify it from a renewal of its license.

II. BACKGROUND

2. Several rules and policies are central to the allegations against WOBO(FM). First, NCE broadcasters must provide a noncommercial broadcast service and are prohibited from airing promotional announcements on behalf of for-profit entities in exchange for consideration to the licensee, its principals, or employees.³ However, NCE stations may acknowledge contributions.⁴ Second, federal law prohibits advertising for cigarettes on any medium of mass communication under the Commission’s jurisdiction.⁵

¹ 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.

² See 47 C.F.R. § 73.503(d).

³ *Id.*

⁴ *Id.*

⁵ See 15 U.S.C. § 1335.

Third, broadcasters that have received any financial consideration for airing material must make the public aware of this matter by airing sponsorship announcements.⁶ A station's receipt of payment for airing programming without disclosing the payment is known as "payola."⁷ Finally, broadcasters must air informational programming that responds to issues of importance to their communities of license.⁸

3. Littman states that WOBO(FM) generally complied with all requirements during the first seven and a half years of its license term and knows of only one alleged violation during that period – the airing of old-time music programs without removing commercials for Chesterfield cigarettes that had appeared in the original. Littman alleges, however, that the Station relaxed its policies in late 2011 under new management, resulting in numerous violations during the final months of the license term.⁹ With respect to underwriting, Littman reports three on-air acknowledgements which he considers promotional.¹⁰ One, aired in May 2012, informed listeners that an underwriter was presenting a concert featuring a group "voted Canada's #1 Blue Grass Band."¹¹ The second, aired February 16, 2012 and additional unspecified times, announced that Burch Sheet Metal and Building Supplies offers "custom metal roofing, siding, hardware, trim, insulation, trusses, and perma felt paper."¹² The third, aired on unspecified dates in 2012, stated that Fedders Feed and Seed and Pet Supplies features products and services that include "bulk and bag mulch, peat moss, potting soil, bulk top soil, and decorative borders. . . pickup and delivery."¹³ Littman also alleges that the Licensee's current President, Gary Strong ("Strong") is a vocalist with a band, and self-promotes by airing the band's music on the Station, closely followed by underwriting announcements for the band.¹⁴ Finally, Littman states that during the last five months of the license period, the Station had no issue-responsive programming except for public service announcements ("PSAs") airing between midnight and 5 a.m. Littman states that he brought these concerns to the attention of the Station by attending meetings of the Licensee's Trustees in May 2012 and July 2012.

4. We provided Licensee with an opportunity to respond and it did so in a letter dated October 26, 2012, signed by Strong (the "Opposition"). Licensee acknowledges airing cigarette commercials in old time programs in 2010 and 2011, under prior management, but argues that there was "historical value" to including such material. Licensee states that it requested a clarification from the Commission after receiving the Objection and has been awaiting a response.¹⁵ Licensee argues that its use of the phrase "voted Canada's #1 Blue Grass Band" in underwriting announcements was not promotional because Licensee did not intend to describe the band or concert's quality but rather to convey

⁶ See 47 C.F.R. § 73.1212; 47 U.S.C. § 317.

⁷ *Id.* at § 73.4180.

⁸ See generally 47 C.F.R. § 73.3527(i).

⁹ Objection at 1.

¹⁰ *Id.* at 1-2. Littman also alleges that a listener told him that some of the Station's announcements have "on occasion" contained a call to action suggesting that listeners "call" a telephone number in an underwriting message. *Id.* at 3. We do not consider this allegation because it is not based on Littman's personal knowledge and the listener has neither filed an informal objection nor provided any identifying information about the announcements.

¹¹ *Id.* at 2.

¹² *Id.* at 1-2.

¹³ *Id.* at 2. The dates are unspecified, but we note that the announcement describes gardening products ordinarily used in Spring or Summer.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 2. Neither the Media Bureau nor the Enforcement Bureau has a record of a request for an advisory opinion from WOBO(FM) concerning the airing of old-time commercials for cigarettes.

“an actual fact determined by the Canadian Country Music Association.”¹⁶ With respect to long listings of items for sale by two underwriters, Licensee states that it took corrective action when it learned that the Commission considers “menu” listings promotional. It rewrote one announcement to mention fewer items and stopped airing the other announcement altogether.¹⁷ Licensee denies that Mr. Strong self-promoted his band or business on-air. According to Licensee, Strong’s band was a paid underwriter of the station’s country and blue grass programming and the station appropriately acknowledged that underwriting. Finally, Licensee states that it has since expanded its presentation of PSAs.

III. DISCUSSION

5. Informal objections to license renewal applications must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act.¹⁸ Specifically, Section 309(k)(1) provides that we are to grant the renewal application 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 Commission’s Rules (the “Rules”); and (3) there have been no other violations which, taken together, constitute a pattern of abuse.¹⁹ 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.”²⁰

6. *Payola.* With respect to Littman’s allegation that the Licensee’s President self-promotes his band on-air, it is undisputed that the Station plays the band’s music, that the President has an interest in his band, and that the band provides money to the Licensee. Such circumstances can lead to payola, but only if hidden from listeners. Because payola is defined in terms of *undisclosed* payments and interests, there can be no violation if the interest is disclosed. Here, with respect to the monies that Strong’s band paid to the Station, there is no violation because it is undisputed that the Station identifies the band’s financial contributions in announcements shortly after airing the music. Accordingly, we find no *prima facie* case of payola.

7. *Issue-Responsive Programming.* We also reject the suggestion that Licensee’s issue-responsive programming over the license term was so deficient as to warrant non-renewal. Licensee’s performance was weak over the last six months of its license term, consisting only of short PSAs at times when the fewest listeners would be awake. Those facts are insufficient, however, to call into question the Licensee’s public service over its entire eight-year license term, the period examined during the license renewal process. There is, for example, no indication that the six months in question is representative of

¹⁶ Opposition at 1.

¹⁷ *Id.*

¹⁸ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁹ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

²⁰ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

the whole license term.²¹ Indeed, Littman's position is that the Station aired public service programming and was fully responsive to community needs for the vast majority of the license term. The Licensee also indicates that it is currently attempting to improve its coverage of community issues and, toward this end, is now scheduling PSAs throughout the entire day and seven days a week.²² We expect that Licensee will continue to pursue improvements. Accordingly, the record does not support a finding that Licensee failed entirely to serve the public interest. Nevertheless, we remain concerned that during the last six months of the license term, and even after initiation of improvements, 100 percent of Licensee's issue-responsive programming was in the form of PSAs. A licensee runs on its record over the entire license period, but recent performance is most predictive of future performance.²³ The Commission has not disqualified licensees whose informational programming consists primarily of PSAs or whose public service programming decreases dramatically near the end of the license term, but the Commission historically has viewed such performance as insufficient for award of a "renewal expectancy" under former renewal standards that were in place for many years.²⁴ Although PSAs can be an effective means of meeting community needs, and may be particularly useful to NCE stations on a limited budget, we have cautioned licensees not to rely on PSAs as the primary method of responding to ascertained needs because they are too brief to address community issues in any depth.²⁵ We shall admonish Licensee for its reliance exclusively on PSAs during the final six months of its license term.

8. *Commercial Advertisements.* We find that the Objection makes a *prima facie* case that the Station has aired advertisements during the last several months of the license term. Advertisements are defined as program material broadcast in exchange for any remuneration and intended to "promote any service, facility, or product" of for-profit entities.²⁶ Although contributors of funds to NCE stations many receive on-air acknowledgments, such acknowledgements may be made for identification purposes only and may not promote the contributor's products, services, or businesses. Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent, or lease. The Commission has stated that announcements containing an excessively detailed "menu listing" of services offered by the underwriter exceed the identification-only purpose of underwriting.²⁷ At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter.²⁸ Consequently, the Commission expects that licensees exercise reasonable, "good faith"

²¹ Compare *Simon Geller*, 90 FCC 2d 250, 264-67 (1982), *recon. denied*, 91 FCC 2d 1253, *aff'd in relevant part sub nom.*, *Committee for Community Access v. FCC*, 737 F.2d 74, 77-8 (D.C. Cir. 1984) (station aired solely public service announcements which did not respond to any ascertained community need).

²² Opposition at 1. PSAs are one of the types of material that a licensee can air to respond to community issues. Such issues may also be addressed in public affairs programs, editorials, free speech messages, community bulletin boards, religious programming. See *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, PA*, 5 FCC Rcd 3847, 3848 (1990). News programming may also be used to meet the requirement, but not primarily. *Id.*

²³ See *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990), *on remand*, *Harriscop of Chicago, Inc.*, Memorandum Opinion and Order, 68 Rad. Reg. 2d 503 (1990) (*subsequent history omitted*).

²⁴ *Id.*; *Reading Broadcasting, Inc.*, Decision, 17 FCC Rcd 14,001, 14,022-23 (2002).

²⁵ See *Public Service Announcements*, Report and Order, 81 FCC 2d 346, 368-69 (1980).

²⁶ See 47 U.S.C. § 399b.

²⁷ *Hispanic Broadcast System, Inc.*, 20 FCC Rcd 2411, 2415 (EB 2005).

²⁸ See *Xavier University*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990) (citing *Noncommercial Nature of Educational Broadcast Stations*, Memorandum Opinion and Order, 90 FCC 2d 895, 911 (1982), *recons.* 97 FCC 2d 255 (1984)).

judgment in this area, and affords some latitude to the judgment of licensees who do so.²⁹

9. Licensee acknowledges airing announcements stating that a band performing in the Years of Farming Blue Grass Show was “voted Canada’s #1 Blue Grass Band.” This announcement aired a total of twelve times over three days.³⁰ We reject Licensee’s position that the statement is not promotional because it conveys a fact readily ascertainable from a music association. It is well settled that the “factuality” or “truth” of the text of an announcement is irrelevant to determining whether the announcement promotes a product, service, or business.³¹ In several instances the Commission has issued forfeitures to NCE stations that referred to underwriters as being “number one,” because such language is comparative.³²

10. Licensee also acknowledges that it aired the announcements which Littman characterizes as containing “menu” listings of two underwriters’ products and services. It aired and repeated announcements that Burch Sheet Metal and Building Supplies sold “custom metal roofing, siding, hardware, trim, insulation, trusses, and perma felt paper.”³³ Licensee also concedes that it aired an unspecified number of announcements for another business that featured “bulk and bag mulch, peat moss, potting soil, bulk top soil, and decorative borders. . . pickup and delivery.”³⁴ We find that these excessively detailed menus of multiple product/service offerings by underwriters exceed the type of information that would enable listeners to identify supporters of noncommercial programming and are similar to promotional broadcasts that have resulted in monetary forfeitures.³⁵ We, therefore, find Licensee to be apparently liable for a forfeiture.

11. *Tobacco Advertising.* Finally, we consider the undisputed fact that Licensee aired old-time radio shows in 2010 and 2011 without editing out the original commercials for cigarettes. Littman raised this matter indirectly, not as a complaint but as support for his statement that Licensee otherwise had an unblemished record prior to the recent board change and had a history of self-correction. Had the old-time commercials been limited to products other than cigarettes, little cigars, or smokeless tobacco products, Licensee would not have violated any rule or law. Generally, stations that rebroadcast old-time programs along with the original commercials receive no remuneration, which was paid many years previously to different stations that aired the original broadcasts. In the absence of remuneration (of which there is no record here) old-time commercials on NCE stations do not meet the definition of

²⁹ *Id.*

³⁰ Opposition at 1.

³¹ See *Cayuga Community College*, Forfeiture Order, 25 FCC Rcd 8573, 8576 (EB 2009) and cases cited therein.

³² In another concert promotion, for example, the Commission issued a forfeiture where a station announced that an underwriter was “presenting the number one group in Mexico, Los Bukis,” *Agape Broadcasting Foundation, Inc.*, Letter, 7 FCC Rcd 1709 (MB 1992). See also *Power Radio Corp.*, Notice of Apparent Liability, 24 FCC Rcd 2572 (EB 2009) (underwriter “named America’s number one water park by the Travel Channel . . . filled with cutting edge attractions.”); *Penfold Communications, Inc.*, Letter, 8 FCC Rcd 78 (MB 1992) (“Honda is number one in import loyalty” and Nissan of Temecula is “number one in sales and service in Southern California.”); *J.C. Maxwell Broadcasting, Inc.*, Letter, 7 FCC Rcd 3218 (MB 1992) (underwriter “has been number one salesman for the last 13 years.”).

³³ Opposition at 1-2.

³⁴ *Id.* at 2.

³⁵ E.g., *Hispanic Broadcasting System, Inc.* Notice of Apparent Liability, 20 FCC Rcd 2411, 2415 (EB 2005), *aff’d* Forfeiture Order, 20 FCC Rcd 12008 (EB 2005).

prohibited advertising under current Commission rules.³⁶

12. Littman acknowledges the broadcast of commercials for Chesterfield cigarettes but does not identify the old-time program containing the commercials re-aired on WOBO.³⁷ Prior to adoption of the Public Health Cigarette Smoking Act of 1969,³⁸ commercial stations could advertise cigarettes and the Commission sometimes granted waivers to NCE stations that wished to air unedited old-time music programs sponsored by tobacco companies such as “The Lucky Strike Hit Parade.”³⁹ However, for over 40 years now, no broadcaster – whether commercial or noncommercial – has been permitted to advertise cigarettes, little cigars, or smokeless tobacco products.⁴⁰ The Commission has reminded licensees that Section 1335 of Title 15 of the United States Code, as amended, prohibits advertising such products on any medium of electronic communication subject to the Commission’s jurisdiction, and that the Commission has no authority to waive that statute.⁴¹ The Commission’s role in matters of cigarette advertising is generally limited to providing technical expertise to the Department of Justice (“DOJ”) concerning whether the electronic system used to deliver the message, or any of its component parts, is subject to the Commission’s jurisdiction (and thus covered by the prohibition).⁴² Only the DOJ has the authority and prosecutorial discretion to enforce Section 1335.⁴³ Thus, it is for the DOJ, and ultimately the courts, to determine whether a violation of Section 1335 has occurred.⁴⁴ Based on our finding that the material at issue was aired by means of radio broadcasting, a medium to which Section 1335’s prohibition pertains, we shall provide the Department of Justice with a copy of this decision so that it can consider whether WOBO(FM)’s airing of old-time commercials for Chesterfields violated the statute and, if so, what action, if any, is appropriate. In the absence of a DOJ or court ruling, the cigarette matters in the current record would relate to unadjudicated, non-FCC misconduct – a matter immaterial to license renewal decisions and any character-qualification considerations therein.⁴⁵

³⁶ Prior to inclusion of the remuneration language in the Rules in the early 1980’s, the Commission prohibited old-time commercials on NCE stations. See *Noncommercial Nature of Educational Broadcast Stations*, Second Report and Order, 86 FCC 2d 141, 146 n.6 (1981) (“*Noncommercial Nature*”). The Commission granted some limited waivers allowing NCE broadcasters to rebroadcast formerly popular programs in their entirety based upon historical interest in old radio commercials, but also expressed concern about potential commercial “clutter” on NCE broadcast stations. See *Greater Washington Educational Telecommunications Association, Inc., WETA-FM*, Letter, 49 FCC 2d 948, 950 (1974) (“*WETA-FM*”). In 1989, the Commission’s former Mass Media Bureau issued an unpublished advisory opinion that an NCE station can air old-time radio programs including the original commercials, provided that it receives no remuneration and does not air commercials for cigarettes or other prohibited tobacco products. See *Robert E. Hardy, KAWC-AM*, Letter, Ref. 8210-RS, C11-6 (MMB Nov. 13, 1989).

³⁷ *The Chesterfield Supper Club*, sponsored by the cigarette company, was a long-running musical variety series which originally aired on NBC radio from 1944 through 1950. See www.myoldradio.com/old-radio-shows/chesterfield-supper-club.

³⁸ Pub.L. 91–222, § 2, 84 Stat. 87.

³⁹ Cf. *Noncommercial Nature*, 86 FCC 2d at 146 n.6.

⁴⁰ See *Comprehensive Smokeless Tobacco Health Education Act, codified at* 15 U.S.C. § 4402(c) (extending the prohibition to smokeless tobacco).

⁴¹ See *WETA-FM*, 49 FCC 2d at 950.

⁴² See *Marketing Technologies Group, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 2694, 2694 (1989). Authority for regulation of cigarette advertising in non-electronic media lies with the Federal Trade Commission. See *Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001).

⁴³ *Marketing Technologies Group, Inc.*, 4 FCC Rcd at 2694.

⁴⁴ *Id.*

⁴⁵ E.g., *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8511 (1995). The Commission will not consider unadjudicated, non-FCC matters unless the alleged “nonbroadcast misconduct [is] so
(continued....)

13. *Proposed Forfeiture.* 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.⁴⁶ 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 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,⁴⁸ and the Commission has so interpreted the term in the Section 503(b) context.⁴⁹ 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.”⁵⁰

14. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(5) of the Rules establish a base forfeiture amount of \$2,000 for “[v]iolation of enhanced underwriting requirements.”⁵¹ 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.”⁵²

15. In this case, Licensee aired three promotional underwriting announcements for for-profit organizations for which it received consideration. Each announcement was repeated multiple times, with a combined total of at least 20 broadcasts over several months. Licensee acted to improve its underwriting compliance, but did so only after being alerted of its transgressions by Littman. Licensee does not have a prior record of violations. We believe that a forfeiture is necessary because Licensee violated the Rules with multiple announcements, which were repeated. Nevertheless, we believe that the potential liability if we simply applied the base \$2,000 base amount to each of the apparent violations would be excessive. Considering the record as a whole, and after examining forfeiture actions in other

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egregious as to shock the conscience and evoke almost universal disapprobation.” *Policy Regarding Character Qualifications in Broadcast Licensing*, Report and Order and Policy Statement, 102 FCC 2d 1205, n.60 (1986) (*subsequent history omitted*). Non-FCC misconduct that has been adjudicated is generally material only if it involves: (1) fraudulent statements to government agencies; (2) felony convictions; or (3) mass media-related violations of anti-competitive and antitrust statutes. See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990), *modified*, 6 FCC Rcd 3448 (1991) and 7 FCC Rcd 6564 (1992).

⁴⁶ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

⁴⁷ 47 U.S.C. § 312(f)(1).

⁴⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁴⁹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁵⁰ 47 U.S.C. § 312(f)(2).

⁵¹ 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)(5), Section I.

⁵² 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). To the extent that a party claims that it has taken post-misconduct remedial action, we note that post-facto remedial actions, even if taken, neither excuse nor mitigate a prior Commission rule violation. See *AT&T Wireless Services, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 21866, 21871 (2002); *KVGL, Inc.*, Memorandum Opinion and Order, 42 FCC Rcd 258, 259 (1973); *Capstar TX Limited Partnership (WKSS(FM))*, Notice of Apparent Liability, 20 FCC Rcd 10636 (EB 2005) (forfeiture paid).

underwriting cases, we believe that a \$3,000 forfeiture is appropriate.⁵³

16. *License Renewal Application.* We find that Licensee's apparent violation of Sections 73.503(d) and 73.512(d) of the Rules does not constitute a sufficiently "serious violation" warranting designation for evidentiary hearing under Section 309(k) of the Act. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.⁵⁴ 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

17. Accordingly, in light of the discussion above, IT IS ORDERED, that the August 6, 2012, Informal Objection filed by Donald F. Littman IS GRANTED to the extent indicated and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, that Educational Community Radio, Inc. IS ADMONISHED for reliance solely on public service announcements, primarily during nighttime hours, to respond to community needs during the last six months of its license term.

19. IT IS FURTHER 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,⁵⁵ that Educational Community Radio, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of three thousand dollars (\$3,000) for its apparent willful and repeated violation of Section 73.503(d) of the Commission's Rules.

20. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release of this NAL, Educational Community Radio, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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

⁵³ See *Jones College*, 24 FCC Rcd 231 (EB 2009) (proposed \$5,000 forfeiture for eight advertisements broadcast in single program, aired two days); *Ministerio Radial Cristo Viene Pronto, Inc.*, Notice of Apparent Liability, 24 FCC Rcd 241 (EB 2009) (proposed \$2,500 forfeiture for two announcements rebroadcast a total of 12 times); *Lancaster Educational Broadcasting Foundation*, Notice of Apparent Liability 24 FCC Rcd 1384 (EB 2009) (proposed \$7,500 forfeiture for 20 announcements repeated over two months).

⁵⁴ 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). These conclusions would not have changed had there been before us an adjudicated DOJ or court finding of a Title 15 violation with respect to WOBO(FM)'s self-disclosed 2010-11 airing of old-time cigarette commercials.

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

22. 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.

23. 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 20554.⁵⁶

24. 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.⁵⁷ 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).⁵⁸ Licensee will also send electronic notification on the date said payment is made to Irene. Bleiweiss@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 20554.⁵⁹

25. IT IS FURTHER ORDERED, that a copy of this *NAL* shall be sent by First Class and Certified Mail - Return Receipt Requested, to Educational Community Radio, Inc. P.O. Box 338, Owensville, OH 45160, and to Mr. Donald F. Littman, 5014 Burdsall Road, Williamsburg, OH 45176.

26. IT IS FURTHER ORDERED, that a copy of this *NAL* shall be sent to the U.S. Department of Justice, Civil Division, Consumer Protection Branch, Washington, D.C. 20044-0386 for referral pursuant to 15 U.S.C. Section 1335.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁵⁶ See 47 C.F.R. § 1.1914.

⁵⁷ 47 U.S.C. § 504(a).

⁵⁸ See 47 C.F.R. § 1.1914.

⁵⁹ *Id.*

ATTACHMENT

Underwriting by Birch Sheet Metal and Building Supplies, located at 21 Old Beaver Road, Walton, Kentucky, featuring custom metal roofing, siding, hardware, trim, insulation, trusses, and perma felt paper. Information at BurchSheetMetal.com or at 859 485-1928.

Programming on WOBO is underwritten by Fedders Feed and Seed and Pet Supplies, featuring bulk and bag mulch, peat moss, potting soil, bulk top soil and decorative borders. They also feature pickup and delivery. Fedders Feed and Seed is located at 16th and Russell in Covington, Kentucky. The phone number is 859-432-2622.

Underwriting by Years of Farming Bluegrass Show, featuring the Spinney Brothers, voted Canada's #1 Bluegrass Band, and Black Power Express, on May 6, this coming Sunday, at Simons Middle School, Flemingsburg, Kentucky. Doors open at 1 p.m., show starts at 2 p.m. Phone numbers 606 845-0636 or 606 748-0798.

The exact text of the old-time commercials including advertisements for Chesterfield Cigarettes was not supplied.