

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

In the Matter of:

Indiana Wesleyan University
Licensee of Station WIWU-CD
Marion, Indiana

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FRN: 0013222245
NAL/Acct. No. 201241420007
Facility ID No. 29292

FORFEITURE ORDER

Adopted: April 30, 2013

Released: May 2, 2013

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, issued pursuant to Sections 0.61(f)(1) and 1.80(a)(1) and (2) of the Commission's rules,¹ we find that Indiana Wesleyan University, licensee of Station WIWU-CD, Marion, Indiana, repeatedly violated Section 73.3526(e)(11)(iii) of the Commission's Rules by failing to (i) file electronically with the Commission and (ii) place in its public inspection file the Station's Children's Television Programming Reports (FCC Form 398). Based on our review of the facts and circumstances, we find the Licensee liable for a forfeiture of Ten Thousand Four Hundred Dollars (\$10,400.00).

II. BACKGROUND

2. The Video Division issued a Notice of Apparent Liability ("NAL") for Forfeiture on March 29, 2012.² The NAL notified the Licensee that its failure to file Children's Television Programming Reports for all four quarters in 2009 and 2010 constituted an apparent willful or repeated violation of Section 73.3526(e)(11)(iii) of the Commission's rules³ and that the Station's failure to prepare and upload the files also represented a violation of its obligation to maintain the reports in its public file. The Division concluded that the Licensee was apparently liable for a forfeiture of \$13,000.

3. In responses submitted on April 30 and May 1, 2012, the Licensee admitted that it could not rebut the claimed violations but nonetheless asserted that the proposed forfeiture amount was excessive.⁴

¹ 47 C.F.R. §§ 0.61(f)(1), 1.80(a)(1) & (2).

² *Indiana Wesleyan University*, Notice of Apparent Liability for Forfeiture, DA 12-485 (Mar. 29, 2012).

³ 47 C.F.R. § 73.3526(e)(11)(iii).

⁴ Licensee Response to Notice of Apparent Liability ("Licensee Response") (Apr. 30, 2012) at 2.

III. DISCUSSION

4. The Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. Under section 503(b)(1) of the Act, any person who is determined by the Commission 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.⁵ In order to impose a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.⁶ The Commission will then issue a forfeiture order if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁷ As we set forth in greater detail below, we conclude that the Licensee is liable for a forfeiture for repeated violations of Section 73.3526(e)(11)(iii) of the Commission's rules. We ultimately conclude, however, that the forfeiture amount should be reduced to \$10,400.00.

5. The Community Broadcasters Protection Act requires that Class A television stations comply with all rules applicable to full-power television stations except for those rules that could not apply for technical or other reasons.⁸ The Commission rules establish that Class A licensees must (i) offer informational and educational children's programming; (ii) prepare and place in a public inspection file quarterly Children's Television Programming Reports; and (iii) electronically file those reports with the Commission.⁹

6. The Licensee does not dispute that it failed to file electronically its Children's Television Programming Reports with the Commission for eight consecutive quarters. The Licensee further does not dispute that Children's Television Programming Reports for the eight quarters in question were not available for the public to review in the Station's public file, in violation of the public file maintenance rule. These deficiencies, regardless of the cause, constitute repeated violations of the relevant Commission rules.

7. Commission policy establishes a base forfeiture amount of \$3,000 for failure to file a required form and a base forfeiture amount of \$10,000 for public file violations.¹⁰ In determining the appropriate forfeiture amount, the Commission may adjust the base amount upward or

⁵ 47 U.S.C. § 503(b)(1) (A) & (B); 47 C.F.R. § 1.80(a)(1) & (2). The Commission may assess a forfeiture order for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, (2001) (issuing a Notice of Apparent Liability for a cable television operator's repeated violations of the Commission's signal leakage rules). "Repeated" means that the act was committed or omitted more than once. *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁶ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁷ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

⁸ Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594-1501A-598 (1999), *codified at* 47 U.S.C. § 336(f).

⁹ *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Rcd 6355, 6366 (2000); 47 C.F.R. § 73.3526 (a)(2) & (e)(11)(iii).

¹⁰ *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), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

downward by considering the factors in Section 503(b)(2)(E), which include “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.” In the NAL, the Commission proposed a forfeiture amount of \$13,000. Licensee argues that the forfeiture amount should be reduced or cancelled.

8. The Licensee argues that the Commission’s forfeiture amounts are not rational because another broadcaster was assessed a \$4,000 forfeiture for a violation of another portion of Section 73.3526.¹¹ We retain discretion to determine forfeiture amounts on a case-by-case basis.¹² In *Opus Broadcasting, LLC*, the case cited by the Licensee, the Media Bureau assessed a total forfeiture of \$16,000 against each of a licensee’s four stations for their failure to file quarterly issues/programs lists.¹³ The decision did not elaborate on the Bureau’s reasoning for reducing the standard forfeiture, but that case involved a violation of a distinct requirement under Section 73.3526. Here, we reviewed the relevant factors and found that the standard forfeiture amount for both violations was appropriate.¹⁴

9. The Licensee further argues that it operates noncommercially and does not generate any revenue that can be used to pay the forfeiture.¹⁵ 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 reflects the licensee’s current financial status. Typically, the Commission uses gross revenue as the primary measuring stick by which it evaluates a licensee’s ability to pay.¹⁶ Here, the Licensee has provided no financial documentation whatsoever, and thus the Commission will not consider its request to reduce or cancel the forfeiture on this basis.¹⁷

10. Finally, the Licensee argues that its history of compliance militates favors a reduction in the forfeiture amount. Given the Licensee’s history of compliance and consistent with precedent, we reduce the forfeiture amount to \$10,400.¹⁸

¹¹ Licensee Response at 2 (citing *Opus Broadcasting Tallahassee, LLC*, DA 12-657, DA 12-658, DA 12-659, DA 12-660 (MB 2012)).

¹² See 47 C.F.R. § 1.80(b)(8), Note (“The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.”); see also, e.g., *World Communications*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 837, 841-842 (2004) (noting that, “[a]s provided by the Commission’s rules, the Commission and its staff retain the discretion to issue a higher or lower forfeiture, as permitted by statute”).

¹³ *Opus Broadcasting Tallahassee, LLC*, Forfeiture Order, 27 FCC Rcd 11154, 11115 (2012).

¹⁴ *P.D. Communications, LLC*, 20 FCC Rcd 16557 (2005) (issuing a \$10,000 forfeiture for six missing children’s television programming reports, among other violations); *KHQ, Inc.*, 23 FCC Rcd 6582 (2008) (issuing a \$10,000 forfeiture for ten missing children’s television commercial limits records); *Southern Media Associates, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 3215 (2012) (proposing \$13,000 forfeiture for failure to file and failure to maintain Children’s Television Programming Reports).

¹⁵ Licensee Response at 2.

¹⁶ *San Jose State University*, Memorandum Opinion and Order, 26 FCC Rcd 5908 (2011).

¹⁷ *Lawmate Tech. Co., Ltd.*, Forfeiture Order, 2012 WL 6086200, File No. EB-07-SE-206 (2012).

¹⁸ *Woods Comm. Corp.*, Forfeiture Order, 25 FCC Rcd 5215, 5217 (2010) (reducing forfeiture from \$14,000

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Sections 0.61(f)(1) and 1.80(a)(1)&(2) of the Commission's rules,¹⁹ Indiana Wesleyan University SHALL FORFEIT to the United States the sum of Ten Thousand Four Hundred Dollars (\$10,400) for repeatedly violating Section 47 U.S.C. § 336(f)(2)(A)(ii) and 47 C.F.R. § 73.3526(e)(11)(iii).

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 (h) of the Commission's rules within fifteen (15) calendar days after the release date of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Communications Act of 1934, as amended. The Licensee shall send electronic notification of the payment to Peter Saharko at peter.saharko@fcc.gov on the date payment is made.

13. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the "FORF" in block number 24A (payment type code). Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

14. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to Indiana Wesleyan University, 4201 South Washington Street, Marion, Indiana, 46953-4999, and to its counsel, Peter Tannenwald, Esquire, Fletcher, Heald & Hildreth, 1300 North 17th Street, 11th Floor, Arlington, Virginia 22209.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

to \$11,200 based on history of compliance).

¹⁹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.61(f)(1) & 1.80(a)(1)&(2).