

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

In re Application of)	
)	
LKCM Radio Group, LP)	Facility I.D. No. 165950
)	NAL/Acct. Nos. MB201441410010
For Renewal of License for)	FRN: 0007465404
Station KOME-FM)	File No. BRH-20130401AMA
Meridian, Texas)	

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

Adopted: January 31, 2014

Released: February 3, 2014

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (“Bureau”) has before it the application of LKCM Radio Group, LP (“Licensee”) for renewal of license for KOME-FM, Meridian, Texas (“Station”). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”),¹ we find that the Licensee apparently willfully and repeatedly violated Section 73.3526 of the Rules by failing to retain all required documentation in the Station’s public inspection file.² We further find that the Station failed to meet the public service commitment expected of licensees due to its repeated and prolonged periods of silence during the license term. Based upon our review of the record before us, we conclude that Licensee is apparently liable for a monetary forfeiture in the amount of four thousand dollars (\$4,000) and that the captioned license renewal application should be granted for a period of two years instead of a full term of eight years.

II. BACKGROUND

2. Section 73.3526 of the Rules requires a commercial 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.³ 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.⁴ 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 has been placed in each station’s public inspection file at the appropriate times. Licensee answered “No” to that certification

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 and grant a short-term license renewal for the Station under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

² See 47 C.F.R. § 73.3526.

³ Cf. *Letter to Kathleen N. Benfield*, 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).

⁴ See 47 C.F.R. § 73.3526(e)(12).

and attached an Exhibit stating:

In the course of preparing this renewal application, KOME-FM has been unable to locate adequate documentation of quarterly issues-programs lists through 2010. Records exist that demonstrate that ascertainment was conducted and it is believed that programming responsive to the ascertained issues aired, but proper documentation of the programming was missing from file. KOME was forced to remain silent much of 2011 and 2012 (see Exhibit 13 hereto). Since it returned to the air in March 2013, the station has adjusted operating procedures to ensure proper documentation is timely filed and retained going forward.⁵

3. Section 73.1740 of the Rules⁶ requires that stations adhere to minimum operating requirements and, pursuant to Section 73.1740(a)(4) of the Rules, if they are unable to do so for more than 30 days, the licensee must request authorization to remain silent. Section III, Item 4 of the license renewal application form, FCC Form 303-S, requires that the licensee certify that, during the license term, the radio station has not been silent (or operating for less than its prescribed minimum operating hours) for any period of more than 30 days. If the licensee is not able to so certify, then it must submit an exhibit specifying the exact dates on which the station was silent or operating for less than its prescribed hours. Licensee answered “No” to that certification and attached an Exhibit⁷ stating that during its license term, commencing on August 14, 2009,⁸ KOME-FM was silent pursuant to Special Temporary Authority (“STA”) for two periods of nearly a year in each case and collectively almost half of the Station’s license term: March 1, 2011 – February 27, 2012;⁹ and March 27, 2012 – March 20, 2013.¹⁰

III. DISCUSSION

4. *License Renewal Standard.* The Commission’s longstanding policy is to review a station’s service record to determine whether it complied with the Commission’s licensing requirements, including service to the station’s community of license, prior to action on its license renewal application.¹¹ In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹² 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.¹³ If, however, the licensee

⁵ Exhibit 12, Application.

⁶ 47 C.F.R. § 73.1740.

⁷ Exhibit 13, Application.

⁸ See File No. BLH-20090803ACS, granted on August 14, 2009.

⁹ On March 30, 2011, Licensee filed an STA request, File No. BLSTA-20110330AAT stating that the Station ceased operations on March 1, 2011, in order to locate a new transmitter site; the staff granted the STA on October 19, 2011, with an expiration date of March 2, 2012. See *Letter to Michael Margrave*, Ref. No. 1800B3-VM (MB Oct. 19, 2011).

¹⁰ On April 5, 2012, Licensee filed an STA request, File No. BLSTA-20120405ACQ, stating that the Station ceased operations on March 27, 2012, due to interference problems and that it was resuming its efforts to locate a new transmitter site; the staff granted the STA on May 3, 2012, with an expiration date of March 28, 2013. See *Letter to Michael Bornitz*, Ref. No. 1800B3-VM (MB May 3, 2012).

¹¹ See *Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy*, Report and Order, 93 FCC 2d 436, 456 (1983), *recon. denied*, 56 RR 2d 835 (1984).

¹² 47 U.S.C. § 309(k).

¹³ 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)*

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.”¹⁴

5. *Public File Violations.* As Licensee has acknowledged, at the time of the filing of the Station’s license renewal application, and 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 files by Section 73.3526 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.¹⁵

6. 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.¹⁶ 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.¹⁷ 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,¹⁸ and the Commission has so interpreted the term in the Section 503(b) context.¹⁹ 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.”²⁰

7. 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 73.3526.²¹ 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.”²²

8. In this case, although Licensee has admitted to violating Section 73.3526, 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, occurring over a period of nearly two years and involving at least 6 issues/programs lists. Considering the record as a whole and all of the factors required by Section

and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), Order, 11 FCC Rcd 6363 (1996).

¹⁴ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁵ 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*, Letter, 7 FCC Rcd 6361 (FOB 1992).

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

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) *recon. denied*, 7 FCC Rcd 3454 (1992).

²⁰ 47 U.S.C. § 312(f)(2).

²¹ 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.

²² 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).

503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we find that \$4,000 is an appropriate forfeiture amount for the admitted public file violations at the Station.²³

9. We find that Licensee's apparent violations of Section 73.3526 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.²⁴ We will therefore grant the license renewal application, as limited below, by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violations that would preclude grant of the application.

10. *Station Silence*. Section 312(g) of the Act, which Congress added in 1996 and amended in 2004, provides in relevant part:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.²⁵

11. The policy against allowing extended periods of silence by licensed stations is to ensure "that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public."²⁶ In addition to its enforcement of Section 312(g), the Commission has stressed its interest in promoting efficient use of radio broadcast spectrum for the benefit of the public in several different contexts since the enactment of Section 312(g).²⁷

12. Section 312(g) has relieved the Commission from the need to conduct revocation proceedings, with their lengthy procedural requirements, including evidentiary hearings, for stations that remain silent for a consecutive 12-month period.²⁸ However, in response to Section 312(g), some

²³ See, e.g., *Davidson Media*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8492 (MB 2006) (proposing a \$4,000 forfeiture for six missing issues and programs lists).

²⁴ In the license renewal application, Licensee correctly disclosed the Station's periods of silence, which were authorized by STAs. For the periods in which the Station operated, we do not find that the Station operations "[were] 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 stations] 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).

²⁵ 47 U.S.C. § 312(g); see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Consolidated Appropriations Act, 1995, Pub. L. No. 108-447, 118 Stat. 2809 (2004); see also *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009).

²⁶ *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395, 15397 (MB 2008).

²⁷ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642, 17645 (2011) (citing the Commission's "fundamental interest" in expediting new radio service and preventing "warehousing" of scarce spectrum); *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23090-93 (1998), on reconsideration, 14 FCC Rcd 17525, 17539 (1999); *Lieberman Broadcasting of Dallas License LLC*, Letter, 25 FCC Rcd 4765, 4768 (MB 2010).

²⁸ See *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d at 545.

licensees of silent stations have adopted a practice of resuming operation for a short period of time, in some cases as little as a day, before the 12-month limit in Section 312(g) applies. In this case, the Station had two periods of silence that each lasted nearly 12 months, with a period of less than 30 days of operation in between. These periods of silence occurred for slightly less than half of the Station's license term, which was from August 9, 2009 to July 31, 2013.

13. These practices raise a question as to whether the licenses for such stations should be renewed pursuant to Section 309(k) of the Act.²⁹ Silence instead of licensed operation is a fundamental failure to serve station's community of license, because a silent station offers that community no public service programming such as news, public affairs, weather information, and Emergency Alert System notifications.³⁰ Moreover, brief periods of station operation sandwiched between prolonged periods of silence are of little value because the local audience is not accustomed to tuning into the station's frequency.

14. In 2001, the Commission cautioned "all licensees that . . . a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term."³¹ The Commission acknowledged that the agency's longstanding policy had been to encourage stations to resume broadcast operations. However, the Commission noted that Section 309(k)(1) applies a "backwards-looking standard" that does not give any weight to efforts to return a station to full-time operation in the future.³² The Commission held that denial of the renewal application of the station in question in *Birach* would be fundamentally unfair because the Commission had not provided sufficient notice of the effect the Section 309(k)(1) standard would have on silent stations.³³ Since the issuance of the *Birach* decision in 2001, licensees have been on notice as to how Section 309(k)(1) applies to silent stations.

15. In this case, the Station's periods of silence under Licensee's supervision do not quite involve "most or all of the prior license term."³⁴ However, it is clear to us that Licensee's conduct has fallen far short of that which would warrant routine license renewal. Licensee's stewardship of the Station fails to meet the public service commitment which licensees are expected to provide to their communities of license on a daily basis because the Station was silent for nearly half of its license term.

16. On the facts presented here, we conclude that a short-term license renewal is the appropriate

²⁹ See ¶ 4 *supra*.

³⁰ In some cases, stations have operated with minimal power (as low as five Watts) instead of remaining completely silent. If the power level is too low to provide the minimum signal level required under the Rules for service to a station's community of license, this type of operation is the functional equivalent of silence.

³¹ See *Birach Broadcasting Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020 (2001) ("*Birach*").

³² *Id.* ("[C]onsideration of post-term developments is fundamentally at odds with this backwards-looking standard.").

³³ In *Birach*, the station was silent for the entire period (approximately two and one-half years) in which the license renewal applicant (*Birach*) held the license. Section 312(g) of the Act took effect during that period, and *Birach* returned the station to operation before that provision would have applied. The Commission stated: "The fact that *Birach* resumed WDMV operations only when faced with the potential license cancellation is not lost on us. Although we have concluded that *Birach* is qualified to be a licensee and that grant of the renewal application was proper, it is equally clear to us that *Birach*'s conduct as a licensee upon acquiring WDMV fell far short of the service commitment which most licensees fulfill to their communities of license on a daily basis." *Id.*, 16 FCC Rcd at 2021.

³⁴ See ¶ 14 *supra*. Had the silence occurred for more than half of the license term, we would have designated this case for an evidentiary hearing pursuant to Section 309(e) and (k)(3) of the Act to determine whether the license renewal application should be denied under the Section 309(k)(1) standard. See 47 U.S.C. § 309(e), (k)(1)-(3).

sanction. Although Licensee sought Commission authorization pursuant to Section 73.1740 of the Rules for each of the Station's periods of silence, we cannot find that the Station served the public interest, convenience and necessity during the license term due to the extended periods of non-operation. Additionally, although the Station has resumed operations and is currently broadcasting, we believe that additional measures are necessary in order to ensure that Licensee endeavors in the future to provide the broadcast service it is licensed to provide. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant the Station a short-term license renewal by separate action upon the conclusion of this forfeiture proceeding, if there are no issues other than the apparent violation that would preclude such a grant of the application.³⁵ The new license term will be limited to a period of two years.³⁶ This limited renewal period will afford the Commission an opportunity to review the Station's compliance with the Act and the Rules and to take whatever corrective actions, if any, that may be warranted at that time.

IV. ORDERING CLAUSES

17. 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 LKCM Radio Group, LP, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for its apparent willful and repeated violation of Section 73.3526 of the Commission's Rules.

18. 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*, LKCM Radio Group, LP SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

19. 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 Kim.Varner@fcc.gov.

20. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio

³⁵ See 47 U.S.C. § 309(k)(2).

³⁶ See, e.g., *Visionary Related Entertainment, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 1392 (MB 2012) (one-year renewal granted based on Licensee's willful and repeated violations of the Commission's radiofrequency radiation exposure guidelines at two stations); *South Seas Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal granted, *NAL* issued, for willfully and repeatedly violating 47 C.F.R § 73.1350 by engaging in operation of the station at an unauthorized site and willfully and repeatedly violating 47 C.F.R § 73.1740 by leaving the station silent without the proper authorization); *Enid Public Radio Association*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 9138, 9144 (MB 2010) (six-year renewal granted, *NAL* issued, after finding a pattern of abuse where "'the number, nature and extent' of the violations on the record, coupled with the licensee's apparent disregard for a prior admonition regarding those violations and refusal to address the allegations, 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'").

Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

21. 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, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³⁷

16. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to LKCM Radio Group, LP, 301 Commerce Street, Suite 1600, Fort Worth, TX 76102 and to its counsel, Marnie Sarver, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³⁷ See 47 C.F.R. § 1.1914.