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

In the Matter of:	)	
	)	
	)	
Unity Broadcasting, Inc.	)	FRN: 0004318853
Licensee of Station W39CA	)	NAL/Acct. No. 201341420044
Adamsville, Tennessee	)	Facility ID No. 68911

FORFEITURE ORDER

Adopted: February 24, 2014 **Released: February 24, 2014**

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 Unity Broadcasting, Inc., licensee of Station W39CA, repeatedly violated Sections 73.3514(a) and 73.3526(e) of the Commission's rules by failing to provide all information called for in an application and by failing to file timely 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 Fifteen Thousand Dollars ($15,000).

II. BACKGROUND

2. In March 2011, the Video Division, Media Bureau, issued a letter to the Licensee ("Letter"), stating that Commission records indicated that the Licensee failed to file required Children's Television Programming Reports for W39CA for the second, third, and fourth quarters of 2007 and all four quarters of 2008, 2009, and 2010. The Letter required the Licensee to provide information identifying the quarters for which a Children's Television Programming Report was prepared and placed in the Stations' public inspection files, and the location of the files.

3. On April 15, 2011, the Licensee responded to the letter and admitted that it failed to file the forms electronically with the Commission in a timely manner. In addition, the Licensee continued its pattern of late filings thereafter. In fact, from the first quarter of 2009 through the first quarter of 2013, the Licensee filed its Children's Television Programming Reports late 15 times out of 17 quarters.

4. On March 20, 2013, the Licensee filed its license renewal application (FCC Form 303-S) for the Station (the "Application").[2] Significantly, the Licensee did not report its admitted violations of Section 73.3526 in its application. Nor did the Licensee report those late-filed reports after April 11, 2011. In timely responses dated August 8 and September 25, 2013, the

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

[2] File No. BRTTA-20130129AFA.

Licensee did not attempt to rebut the claimed violations but nonetheless asserted that the proposed forfeiture amount should be reduced.[3]

III. DISCUSSION

5. 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.[4] 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.[5] 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.[6] As we set forth in greater detail below, we conclude that the Licensee is liable for a forfeiture for repeated violations of Sections 73.3514 and 73.3526(e)(11)(iii) and of the Commission's rules. We ultimately conclude that the forfeiture amount should not be reduced.

6. 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 cannot apply for technical or other reasons.[7] 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 the reports with the Commission.[8]

7. Commission rules require that "[e]ach application shall include all information called for by the particular form on which the application is required to be filed. . . ."[9] Section IV, Question 3 of the Form 303-S license renewal application requires licensees to certify "that the documentation, required by 47 C.F.R. Section 73.3526 . . . has been placed in the station's public inspection file at the appropriate times." Section IV, Question 6 of the license renewal

[3] The Division issued three NALs to the Licensee's stations. The Licensee filed two responses to the NALs. Licensee Response to Notice of Apparent Liability (Aug. 9, 2013) ("Licensee First Response"); Licensee Response to Notice of Apparent Liability (Sept. 25, 2013) ("Licensee Second Response"). The Licensee requested, and the Division agreed, to consider the arguments raised in both responses in evaluating the forfeiture to each station.

[4] 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).

[5] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

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

[7] 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).

[8] 47 C.F.R. 73.3526(e)(11)(iii).

[9] 47 C.F.R. § 73.3514(a).

application requires licensees to certify that it has filed with the Commission its Children's Television Programming Reports according to the requirements of Section 73.3526 of the Commission's rules and requires the Licensee to submit a statement of explanation as an exhibit if the Licensee has failed to do so.

8. As stated previously, the Licensee does not dispute that it failed to file electronically its Children's Television Programming Reports with the Commission in a timely manner for 28 quarters. These deficiencies, regardless of the cause, constitute willful and/or repeated violations of the relevant Commission rules.[10]

9. Commission policy establishes a base forfeiture amount of $3,000 for failure to file a required form or information.[11] In determining the appropriate forfeiture amount, the Commission may adjust the base amount upward or 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 $15,000. Licensee argues that the forfeiture amount should be reduced or cancelled.

10. Initially, we reject Licensee's assertions that its rule violations were neither willful nor repeated.[12] Licensee states its actions were innocent mistakes and should not be defined as "willful" because willfulness should only apply when an actor patently disrespects the regulatory scheme.[13] Licensee argues that it is arbitrary and capricious to equate "willful" with "repeated" in determining a forfeiture.[14]

11. We disagree with Licensee's assertions. As explained in the NAL, 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.[15] 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.[16] The Commission has so interpreted the term in the Section 503(b) context.[17] "Willful" does not require a finding that the rule violation was intentional in the context of a forfeiture action.[18] Instead, willful "means that the violator knew that it was taking (or in this case, not taking) the action in question, irrespective of any intent to violate the Rules."[19]

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[10] 47 C.F.R. § 73.3526(e)(11)(iii).

[11] *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).

[12] Licensee First Response at 4-5.

[13] *Id.* at 4.

[14] *Id.*

[15] 47 U.S.C. § 312(f)(1).

[16] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982)

[17] *See Rocky Mountain Broadcasting Co.,* Forfeiture Order, 25 FCC Rcd 5210, 5212 (Vid. Div. 2010); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992)("*Southern California").*

[18] *Rocky Mountain Broadcasting Co.*, 25 FCC Rcd at 5212.

[19] *Id.* at 5212 (citing *See Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd

12. We conclude that the Licensee's actions were willful because it is expected to comply with Commission rules and it certified compliance with those Rules.[20] Moreover, even after the Licensee was put on explicit notice of the relevant violations when it received the 2011 letter from the Video Division, the violations continued unabated. Licensee's failure to report the violations in the renewal application was equally willful, as the Licensee certified that no such violations had occurred.[21] Further, the Licensee's conduct was repeated. The Act and our rules require that conduct be either willful or repeated.[22]

13. Licensee argues that the late filing of the Children's Television Programming Reports was not "repeated" because the late filings should be viewed as a single transaction or occurrence.[23] We disagree. 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."[24] The Licensee failed to file a report in a timely manner in 28 separate quarters. Indeed, after the Video Division's 2011 letter put the Licensee on explicit notice of these repeated deficiencies, the Licensee's pattern of failing to file the reports timely continued for an additional six quarters. Failing to file a report in 28 separate quarters constitutes the commission or omission of an act more than once.

14. Licensee also argues that the forfeiture amount is excessive.[25] The Licensee violated the rule regarding the timely reporting of Children's Television Programming Reports in 28 quarters. This forfeiture is appropriate given how often the violation was repeated and is consistent with forfeitures issued to full power and Class A television stations that have committed similar violations.[26] Licensee's analogy to the base forfeiture amount for a single violation of the commercial limits in children's programming[27] or other base forfeiture amounts[28] is inapposite. As the Licensee acknowledges, "[t]he Commission has granted the staff a wide discretion to apply its

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2649, 2651 (EB 2008) (declining to reduce or cancel forfeiture for late-filed renewal based on licensee's administrative error); *Southern California*, 6 FCC Rcd at 4387.

[20] File No. 20010711ADW.

[21] File No. BRDTA-20130320ACU, Section IV, Question 3. The Licensee even admits that "it would have been preferable to answer 'no' and provide an exhibit" regarding Section IV, Question 3.

[22] 47 U.S.C. § 503(b), 47 C.F.R. § 1.80(a); *Southern California*, 6 FCC Rcd at 4388.

[23] Licensee First Response at 4.

[24] 47 U.S.C. § 312(f)(2); *see also Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 (2001).

[25] Licensee First Response at 5.

[26] *Pentecostal Revival Association, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 10077 (Vid. Div. Jul. 11, 2013) (assessing $15,000 forfeiture for failure to file reports in a timely manner and failure to report violations in renewal application); *Rebecca L. White*, Notice of Apparent Liability for Forfeiture, DA 13-1996 (Vid. Div. Sept. 27, 2013) (assessing $15,000 forfeiture for late filed Children's reports and failure to report the violations on the renewal application); *Teleadoracion Christian Network, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 11742 (Vid. Div. Aug. 7, 2013) (assessing $14,000 forfeiture for violations of Section 73.3526 of the Rules).

[27] Licensee Second Response at 4.

[28] Licensee First Response at 5.

guidelines with appropriate attention to fairness and common sense."[29]

15. Although Licensee incorrectly claims that the Video Division is issuing forfeitures in order to pressure Class A licensees into giving up that status,[30] the staff uses the same procedures in evaluating the compliance of Class A and full power television stations. At the time of renewal, the staff reviews the compliance history of both Class A and full power television stations using the same standards and applying the same forfeiture guidelines when violations are found. Further, the option to revert to low power television status provides the Licensee an alternative if it believes it can no longer fulfill the requirements of Class A television status.

16. As to the allegations of disparate fines,[31] Stations W34DV and W39CA had more late filings during the license period than W18BL, which is why the forfeiture amount for those stations is higher than the amount for W18BL.[32] Further, in *San-Lee Community Broadcasting, Inc.*,[33] after receiving our letter of inquiry, the station filed all but one of its reports for WBFT-CA in a timely manner. In contrast, after receiving its own letter of inquiry, Station W39CA continued its pattern of late filings and filed six reports late, including as recently as the first quarter of 2013.

17. Contrary to Licensee's assertions,[34] the number of violations may be a factor considered in upward forfeiture adjustments. Further, Licensee's lack of knowledge of the electronic filing requirements[35] and history of non-compliance after Commission notice of the violation do not support a downward adjustment.

18. The Licensee also claims an inability to pay the forfeiture amount. The Commission will not consider reducing or canceling a forfeiture in response to a claimed 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. Here, the Licensee provided financial documentation in an effort to support its argument that it cannot pay the forfeiture amount.[36]

19. The Licensee argues that we should take into account operating losses and the size of the community of license of the station in question in determining the station's ability to

[29] Licensee First Response at 3.

[30] *Id.* at 6.

[31] *Id.*

[32] Licensee Second Response at 2 n.2. Licensee acknowledges this explanation in a footnote. Any increase over the base forfeiture amount with respect to late Children's Television Programming Reports is initially determined applying a uniform formula that takes into account (i) the number of quarters in which a Licensee filed a late report and (ii) how late the report in question was filed. Moreover, stations that were reviewed as part of the 2011-2012 audit were assessed an identical $3,000 forfeiture covering all deficient quarters identified in the inquiry. We conclude the staff's methodology for applying forfeitures for repeated violations are fair and consistent and were applied fairly and consistently in this case.

[33] *San-Lee Community Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, DA 13-1553 (Vid. Div. Jul. 12, 2013).

[34] Licensee Second Response at 2.

[35] *Id.* at 3.

[36] Licensee First Response at 7-8; Declaration of Mitzi Phillips at 2-3.

pay the forfeiture.[37] Typically, the Commission uses gross revenue as the primary measure by which it evaluates a licensee's ability to pay.[38] Indeed, "[i]f gross revenues are sufficiently great . . . the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture."[39]

20. Here, the Licensee's documented gross revenues are sufficient and a forfeiture reduction is not supported by the demonstrated operating losses.[40] This position is consistent with Commission precedent where losses have only been considered in cases of severe financial distress.[41] For example, unlike the entities in *First Greenville Corporation*, the Licensee here has not indicated that it is facing foreclosure, that it is unable to secure funding to cover its losses, or that its owners have personally guaranteed loans on its behalf.[42] Moreover, unlike in *Benito Rish* the station here is not a daytime-only, directional radio station facing "inherently low station value."[43] In contrast, Station W39CA is a Class A television station which is part of a broadcasting corporation which earned substantial gross revenues per year over the past three years.

21. In the NAL, the Video Division proposed a forfeiture amount of $15,000. Having carefully considered the Licensee's arguments and reviewed the Licensee's submitted documentation, we conclude the forfeiture amount should not be reduced and is in line with previous forfeitures the Commission has determined are not excessive relative to the Licensee's ability to pay.[44]

IV. ORDERING CLAUSES

22. 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,[45] Unity Broadcasting, Inc. SHALL FORFEIT to the United States the sum of $15,000 for repeatedly violating Section 47 U.S.C. § 336(f)(2)(A)(ii) and 47 C.F.R. § 73.3526(e)(11)(iii).

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[37] Licensee First Response at 7-8.

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

[39] *Forfeiture Policy Statement*, 12 FCC Rcd at 17106 (citing *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992)).

[40] *Ayustar Corp.*, Memorandum Opinion and Order, 25 FCC Rcd 16249 (EB 2010).

[41] Licensee First Response at 8 (citing *First Greenville Corporation*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 7399 (1996), *Benito Rish*, Memorandum Opinion and Order, 10 FCC Rcd 2861 (1995)).

[42] *Id.* at 16250 (citing *First Greenville Corporation*, 11 FCC Rcd 7399 (considered that the station's losses exceeded its income and that the sole shareholder funded those losses and received no income from the station when reducing proposed forfeiture)).

[43] *WLVV, Inc.*, Forfeiture Order, 24 FCC Rcd 7715, 7717 (Aud. Div. 2009) (citing *Benito Rish*, 10 FCC Rcd at 2862)).

[44] *Hoosier Broadcasting Corporation,* Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641 (EB 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Bruno Goodworth Network, Inc.*, Forfeiture Order, DA 13-1585, 2013 WL 3777827 (Vid. Div. Jul. 18, 2013) (forfeiture amount reduced to approximately 7 percent of the violator's gross revenues).

[45] 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.61(f)(1) & 1.80(a)(1)&(2).

23. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 (h) of the Commission's rules within thirty (30) 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.

24. 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.

25. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail Return Receipt Requested to Unity Broadcasting, Inc., P.O. Box 790, Booneville, Mississippi, 38829, and to its counsel, Michael Couzens, 6536 Telegraph Avenue, Suite B201, Oakland, California, 94609.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau