

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

In the Matter of)	
)	
AERCO Broadcasting Corporation)	File No.: EB-FIELDSCR-13-00007129 ¹
)	NAL/Acct. No.: 201232680005
Licensee of Station WSJU-TV,)	FRN No.: 0003732435
San Juan, PR 00927)	Facility ID No.: 4077

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2014

Released: May 16, 2014

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies a Petition for Reconsideration (Petition) filed by AERCO Broadcasting Corporation (AERCO), licensee of Station WSJU-TV in San Juan, Puerto Rico (Station). We reject AERCO's request for cancellation or reduction of the \$4,000 forfeiture imposed by the Enforcement Bureau's South Central Region for operating a studio to transmitter link (STL) on an unauthorized frequency over a nine-month period. Specifically, we find that AERCO failed to provide sufficient evidence supporting its claim that it has an inability to pay the forfeiture. We also find that the South Central Region properly considered a prior Notice of Apparent Liability for Forfeiture (NAL) issued against AERCO in rejecting the licensee's claim that it had a history of compliance with FCC rules.

II. BACKGROUND

2. As noted above, the South Central Region issued a Forfeiture Order finding that AERCO violated Sections 301 of the Communications Act of 1934, as amended (Act),² and Section 1.903(a) of the Commission's rules³ (Rules) by operating an STL on an unauthorized frequency for nine months.⁴ AERCO does not dispute the violations but requests that the Commission further reduce the forfeiture amount.⁵ AERCO states that the Enforcement Bureau "failed to follow the Commission's policy of examining net income of a station" and should have reduced the proposed forfeiture based on inability to pay, because the Station was operating with a net income loss.⁶ AERCO also asserts that it is entitled to a reduction based on history of compliance with the Rules because the Enforcement Bureau improperly considered its prior NAL

¹ The contents of File No. EB-FIELDSCR-12-00000602 have been incorporated into File No. EB-FIELDSCR-13-00007129.

² 47 U.S.C. § 301.

³ 47 C.F.R. §1.903(a).

⁴ See *AERCO Broadcasting Corporation*, Forfeiture Order, 28 FCC Rcd 15804 (Enf. Bur. 2013) (Forfeiture Order).

⁵ See Letter from John A. Borsari, Counsel for AERCO Broadcasting Corporation, to Regional Director, South Central Region, Enforcement Bureau (Dec. 17, 2013) (on file in EB-FIELDSCR-13-00007129) (Petition).

⁶ *Id.* at 4-5.

for violation of the indecency rules.⁷ AERCO alleges that because it requested that the proposed indecency forfeiture be canceled and the Commission did not reach a substantive decision on whether the programming violated the indecency rules, the apparent violations should not have been considered.⁸ Therefore, AERCO asserts the Enforcement Bureau should have granted its forfeiture reduction request based on its otherwise compliant 40-year history.

III. DISCUSSION

3. This Memorandum Opinion and Order is issued pursuant to Section 405 of the Act,⁹ and Section 1.106 of the Rules.¹⁰ Petitions for Reconsideration are granted only in limited circumstances. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order, or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹¹ A Petition for Reconsideration that reiterates arguments that were previously considered and rejected will be denied.¹² As discussed below, we deny AERCO's Petition.

4. Generally, the Commission has found that "a licensee's gross revenues are the best indicator of its ability to pay a forfeiture."¹³ The Commission, citing *PJB Communications*, has also held that "[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."¹⁴ Such is the case here. The Commission does not, as AERCO alleges, have a "policy" of examining net losses, but has in a few isolated cases looked to other factors, including profits and losses, to determine ability to pay. AERCO has failed to demonstrate that it is experiencing a comparable level of financial distress. For example, unlike *First Greenville Corp.* and *Pinnacle*, AERCO has not indicated that it is unable to secure commercial financing and that its owners have personally funded its losses or loaned the Station considerable sums.¹⁵ Moreover, unlike

⁷ See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2002*, Notice of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006).

⁸ Petition at 2–3.

⁹ 47 U.S.C. § 405.

¹⁰ 47 C.F.R. § 1.106.

¹¹ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (Enf. Bur. 2000) (citing *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)); see also *Ely Radio, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 7608, 7610, para. 6 (Enf. Bur. 2012) (providing standard of review for Petitions for Reconsideration).

¹² *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257, para. 2.

¹³ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17106, para. 43 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*) (citing *PBJ Communications*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089, para 8 (1992)). See *Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corp.*, Forfeiture Order, 14 FCC Rcd 3356 (Compl. & Inf. Bur. 1999), *aff'd* by Memorandum Opinion and Order, 15 FCC Rcd 8640 (Enf. Bur. 2000) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

¹⁴ *Forfeiture Policy Statement*, 12 FCC Rcd at 17106, para. 43 (citing *PBJ Communications*, 7 FCC Rcd at 2089, para 8).

¹⁵ Cf. *First Greenville Corp.*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 7399, 7403, para. 13 (1996) (*First Greenville Corp.*) (considering that the station's losses exceeded its income and that the sole shareholder had funded those losses and received no income from the station when reducing proposed forfeiture); *Pinnacle*

Rish, AERCO services San Juan, a city with a population of approximately 374,000.¹⁶ Thus, AERCO's financial situation can be distinguished from the three cases noted by it in which the Commission departed from utilizing gross revenues, and we affirm the Bureau's prior decision to deny a reduction based on inability to pay.

5. We also disagree with AERCO's allegation the Bureau improperly denied its request for a reduction based on its history of compliance. It is undisputed that AERCO was the subject of a prior NAL for broadcasting programming which the Commission determined violated the Act and Rules.¹⁷ The Bureau may rely on the underlying facts of non-final, non-adjudicated forfeiture proceedings to determine history of compliance, even when enforcement action on the basis of those facts is barred by the statute of limitations.¹⁸ Accordingly, we deny the Petition filed by AERCO.

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED**, pursuant to Section 405 of the Communications Act of 1934, as amended,¹⁹ and Section 1.106 of the Commission's rules,²⁰ that the Petition for Reconsideration filed by AERCO Broadcasting Corporation **IS DENIED**.

7. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,²¹ AERCO Broadcasting Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for violation of Section 301 of the Act.²²

8. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Memorandum Opinion and Order.²³ If

Communications, Inc., Memorandum Opinion and Order, 11 FCC Rcd 15496, 15498, para. 7 (1996) (*Pinnacle*) (considering profit and loss statement when two stations were assigned to a third party to avoid foreclosure based on the default of a \$4 million loan. Licensee and its sole shareholder received no cash from the sale, and the licensee still owed the sole shareholder significant sums).

¹⁶ According to 2013 census data, San Juan, Puerto Rico has a population of 374,682. United States Census Bureau, Cumulative Estimates of Resident Population Change and Rankings: April 1, 2010 to July 1, 2013 (Mar. 2014), available at <http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2013/PEPCUMCHG.ST05/0400000US72> (last visited May 15, 2012). Cf. *Benito Rish*, Memorandum Opinion and Order, 10 FCC Rcd 2861, 2862, para. 6 (1995) (considering the station's unprofitable history and the fact that it was a directional daytime-only AM station serving a small community of license with a population of 425 when reducing proposed forfeiture).

¹⁷ See *supra* note 7.

¹⁸ It does not matter that AERCO previously contested the prior notice and the Commission did not make a final determination whether the conduct violated the Act or Rule provisions at issue, because, as the Commission has noted, in such cases, "the licensee will always have the opportunity to present evidence that the underlying facts relied on by the Commission did not constitute a violation." *Forfeiture Policy Statement*, 12 FCC Rcd at 17104, para. 36. That the statute of limitations imposed by Section 503(b)(6) of the Act has run on those apparent violations does not bar our reliance on the facts that provided the basis for the earlier NAL, since we are not imposing a forfeiture based on that conduct, but rather only considering it in evaluating AERCO's mitigation claim here.

¹⁹ 47 U.S.C. § 405.

²⁰ 47 C.F.R. § 1.106.

²¹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²² 47 U.S.C. § 301.

²³ 47 C.F.R. § 1.80.

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 Act.²⁴ AERCO Broadcasting Corporation shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made.

9. 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.²⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- 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.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then 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.

10. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

²⁴ 47 U.S.C. § 504(a).

²⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁶ See 47 C.F.R. § 1.1914.

11. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to AERCO Broadcasting Corporation at 1508 Calle Bori, Urb. Antonsanti, San Juan, PR 00927; and to its attorney, John A. Borsari, Borsari & Assoc., PLC, P.O. Box 100009, Arlington, VA 22210.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Acting Chief, Enforcement Bureau