

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

In the Matter of
Winstar Odessa, Inc.
Licensee of Station KWWT(TV)
Odessa, Texas
Facility ID No. 84410
NAL/Acct. No.: 201641420005
FRN: 0010908440

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 29, 2016

Released: March 29, 2016

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (Act) and Section 1.80 of the Commission's Rules (Rules), we find that Winstar Odessa, Inc. (Licensee), licensee of Station KWWT(TV), Odessa, Texas (Station), apparently willfully and/or repeatedly violated Section 73.3526(e)(11)(iii) of the Rules by failing to file electronically with the Commission in a timely manner its Children's Television Programming Reports (FCC Form 398) for sixteen (16) quarters and Section 73.3514(a) of the Rules for failing to report these violations in its license renewal application. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of twenty thousand dollars (\$20,000).

II. BACKGROUND

2. Section 73.3526 of the Rules requires each commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. As set forth in subsection 73.3526(e)(11)(iii), each commercial television licensee is required to prepare and place in its public inspection file a Children's Television Programming Report for each calendar quarter reflecting, inter alia, the efforts that it made during that quarter to serve the educational and informational needs of children. That subsection also requires licensees to file the reports with the Commission and place them in their public file by the tenth day of the succeeding calendar quarter, as well as publicize the existence and location of the reports.

3. Section 73.3514(a) of the Rules provides that "[e]ach application shall include all information called for by the particular form on which the application is required to be filed. . . ."

1 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

2 47 C.F.R. § 73.3526(e)(11)(iii).

3 47 C.F.R. § 73.3514(a).

4 See generally, 47 C.F.R. § 73.3526.

5 47 C.F.R. § 73.3526(e)(11)(iii).

6 Id.

7 47 C.F.R. § 73.3514(a).

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.”⁸ Section IV, Question 6 of the license renewal 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.⁹

4. On April 1, 2014, the Licensee filed its license renewal application (FCC Form 303-S) for the Station.¹⁰ Although the Licensee did not report the violations in its renewal application, a Commission review of the Station’s online public file (e-pif) revealed that the Station did not file its Children’s Television Programming Reports for sixteen (16) quarters in a timely manner.¹¹ In response to a written inquiry by the Video Division concerning the missing Children’s Television Programming Reports,¹² the Licensee explains that in 2005 the Chief Operating Officer (COO), who was responsible for filing the Children’s Television Programming Reports for the Station, became gravely ill.¹³ Out of necessity, the Licensee states that the COO delegated the responsibility for filing the reports and upon returning to work in mid-2008 he assumed that the quarterly reports were being properly and timely filed electronically with the Commission.¹⁴ The Licensee goes on to explain that while the missing Children’s Television Programming Reports were timely prepared and placed in the Station’s paper public inspection file, it was later discovered by the Station General Manager that they were not electronically filed with the Commission.¹⁵ Licensee ultimately uploaded the “draft” copies of all the missing Children’s Television Programming Reports to the Station’s electronic public file on February 12, 2013.¹⁶

III. DISCUSSION

5. The Licensee’s failure to electronically file the Station’s Children’s Television Programming Reports in a timely manner for sixteen (16) quarters constitutes an apparent willful and/or repeated violation of Section 73.3526(e)(11)(iii) of the Rules.¹⁷ The Licensee’s failure to report these violations constitutes an apparent willful and/or repeated violation of Section 73.3514(a).¹⁸

⁸ FCC Form 303-S available at: <http://transition.fcc.gov/Forms/Form303-S/303s.pdf>.

⁹ *Id.*

¹⁰ File No.BRC DT-20140401AOT.

¹¹ According to Commission records, the Licensee filed its Children’s Television Programming Reports late for sixteen consecutive quarters: the third quarter of 2006 through the second quarter of 2010. Licensee uploaded all of the Reports to its e-pif February 12, 2013.

¹² Letter from Barbara A Kreisman, Chief Video Division, Media Bureau to Winstar Odessa, Inc., Attention James L. Primm, Esq. (Aug. 12, 2014).

¹³ Letter from George R. Borsari, Jr., Counsel for Winstar Odessa, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, 1 (Mar. 7, 2015) (Licensee Letter).

¹⁴ Licensee Letter at 2.

¹⁵ *Id.* at 1-2.

¹⁶ *Id.* at 2. Due to the late nature of the missing Children’s Television Programming Reports, the Licensee was unable to electronically file the Reports. Staff therefore instructed Licensee to upload the Reports to the Station’s e-pif.

¹⁷ 47 C.F.R. § 73.3526(e)(11)(iii).

¹⁸ 47 C.F.R. § 73.3514(a).

6. The Licensee acknowledges that it failed to timely electrically file its Children's Television Programming Reports.¹⁹ We understand, however, that the missing Children's Television Programming Reports were in fact timely prepared and placed in the station's paper public inspection file. Although we are sympathetic to the Licensee's health problems, the Licensee was ultimately responsible for ensuring the Station complied with the relevant Commission Rules.²⁰ We cannot ignore the fact that these violations occurred over a significant period of time, exactly one-half of the Station's license term. In fact, half of the violations appear to have occurred after the COO returned to work.²¹ As determined in the case of *Hope Broadcasting*, "[i]llness of a principal... does not warrant a cancellation or reduction of the forfeiture amount...."²² Although the Station has worked to correct the problem, this does not relieve the Licensee of liability for the violations that have already occurred.²³

7. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, 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.²⁴ 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.²⁵ 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,²⁶ and the Commission has so interpreted the term in the Section 503(b) context.²⁷ 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."²⁸

8. The Commission's *Forfeiture Policy Statement* and the note to Section 1.80(b)(8) of the Rules establishes a base forfeiture amount of \$3,000 for failure to file a required form or information.²⁹ In

¹⁹ Licensee Letter at 1-2.

²⁰ See, e.g., *Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Rcd 2940, 2941-2 (CIB 1999) (responsibility for complying with terms of station license "rests solely and exclusively with the licensee") (citing *Empire Broadcasting Corp.*, Memorandum Opinion and Order, 25 FCC 2d 68 (1970)).

²¹ According to the Licensee, the COO's health issues required him to delegate functions that he normally oversaw to other employees "[d]uring the years 2005 through mid-2008." Licensee Letter at 1. The COO resumed "more active and full duties" with the Licensee in mid-2008. *Id.*, at Declaration of James L. Primm, 4.

²² *Hope Broadcasting, Inc.*, Forfeiture Order, 27 FCC Rcd 1565, 1566 (Aud. Div. 2012) (forfeiture was not cancelled or reduced when a station co-owner had battled heart failure and cancer and illness contributed to the oversight in timely filing the renewal application); see *Bruce MacAfee*, Forfeiture Order, 24 FCC Rcd 13254, 13255 (MB 2010) (holding that the licensee's illness did not excuse a late-filed application); see, e.g., *Claro Communications, Ltd.*, Forfeiture Order, 23 FCC Rcd 359, 361(EB 2008) (holding that a forfeiture reduction was not warranted where the sole principal/owner's illness contributed to the violation).

²³ See *International Broadcasting Corp.*, Memorandum Opinion and Order, 19 FCC 2d 793, 794 (1969) (Permitting mitigation as an excuse based upon corrective action following a violation would "tend to encourage remedial rather than preventive action.").

²⁴ 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(2).

²⁵ 47 U.S.C. § 312(f)(1).

²⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²⁸ 47 U.S.C. § 312(f)(2).

²⁹ 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)(8), note to paragraph (b)(8), Section I.

determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(E) 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.”³⁰

9. Based on our review of the facts and circumstances before us, we find that a forfeiture in the amount of \$17,000 for failing to file its Children’s Television Programming Reports in a timely manner for sixteen (16) quarters is appropriate.³¹ Furthermore, we find that a forfeiture in the amount of \$3,000 for the Licensee’s failure to report the aforementioned violations in its renewal application is warranted. Accordingly, we find that the Licensee is apparently liable in the amount of \$20,000 for its willful and/or repeated violations of Sections 73.3526(e)(11)(iii) and 73.3514(a) of the Rules.³²

10. We also find, pursuant to Section 309(k) of the Act,³³ that the Licensee’s apparent violation does not constitute a “serious violation” warranting designation for evidentiary hearing. Moreover, we find no evidence that the violations, when considered together, evidence a pattern of abuse.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission’s Rules, 47 C.F.R. § 1.80, that Winstar Odessa, Inc., the licensee of Station KWWT(TV), Odessa, Texas, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of twenty thousand dollars (\$20,000) for its apparent willful and/or repeated violations of Sections 73.3526(e)(11)(iii) and 73.3514(a) of the Commission’s Rules, 47 C.F.R. §§ 73.3526(e)(11)(iii) and 73.3514(a).

12. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission’s Rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release date of this *NAL* Winstar Odessa, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payments of the proposed forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁴ When completing the FCC Form

³⁰ 47 U.S.C. § 503(b)(2)(E); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(8); 47 C.F.R. § 1.80(b)(8), note to paragraph (b)(8), Section II.

³¹ Absent the fact that the Licensee timely prepared and placed the Children’s Television Programming Reports at issue into the Station’s paper public file and those reports were available for inspection by the public, we likely would have proposed a higher forfeiture amount. Our proposed forfeiture amount is based solely on the unique facts and circumstances of the case before us.

³² 47 C.F.R. §§ 73.3526(e)(11)(iii) and 73.3514(a).

³³ 47 U.S.C. § 309(k). Section 309(k) of the Act 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. 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, 47 U.S.C. § 309(e)—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.” 47 U.S.C. § 309(k)(2).

³⁴ Payment may be made at the Commission’s online Fee Filer website: <https://www.fcc.gov/encyclopedia/fee-filer>. Payment may also be made by FCC Form 159; detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.³⁵

- 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.

14. 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: Adrienne Y. Denysyk, Attorney-Advisor, Room 2-A820, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

15. 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.³⁶

16. 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, D.C. 20554.³⁷

³⁵ For questions regarding payment procedures, contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 or e-mail at ARINQUIRIES@fcc.gov.

³⁶ See *San Jose State Univ.*, 26 FCC Rcd 5908 (2011) (noting that, “[t]ypically, the Commission uses gross revenue as the primary measuring stick by which it evaluates a licensee’s ability to pay. Other financial indicators may be considered....”).

³⁷ See 47 C.F.R. § 1.1914.

17. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Winstar Odessa, Inc., PO Box 547, Arroyo Grande, CA 93421 and to its counsel George R. Borsari, Jr., Borsari & Paxson, 5335 Wisconsin Avenue, N.W., Suite 440, Washington, DC 20015.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau