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

In re Application of	)	
	)	
TEA-VISZ, Inc.	)	NAL/Acct. No. MB-201741410012
	)	FRN: 0009578824
	)	
For Consent for the Renewal of License for	)	Facility ID. No. 86507
W272AY, Park Falls, Wisconsin	)	File No. BRFT-20120712ABR

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 5, 2017 **Released: December 5, 2017**

By the Chief, Audio Division:

I. INTRODUCTION

1. We have before us the application (Application) of TEA-VISZ, Inc. (TEA) for Commission consent for the renewal of the license for FM translator station W272AY, Park Falls, Wisconsin (Station). We also have before us a Petition to Deny (Petition), filed September 24, 2012, by Heartland Communications Group, LLC and Heartland Comm. License, LLC (Heartland), as well as related pleadings.[1]

2. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (*NAL*),[2] we find that TEA willfully and repeatedly violated Section 74.1231(b) of the Commission's Rules (Rules)[3] by originating its own programming. Based upon our review of the record before us, we conclude that TEA is apparently liable for a monetary forfeiture in the amount of four thousand dollars ($4,000). Finally, for the reasons set forth below, we deny the Petition.

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[1] TEA filed a Motion for Extension of Time on October 11, 2012, and an Opposition to Petition to Deny (Opposition) on November 16, 2012. In response, Heartland filed: (1) Opposition to TEA's Motion for Extension of Time, dated October 19, 2012; (2) Reply, dated December 6, 2012; (3) Request for Leave to Amend Reply, dated December 11, 2012; and (4) Letter, dated May 2, 2014. Finally, in response to these pleadings, TEA filed: (1) Opposition to Heartland's Request for Leave to Amend its Reply, dated December 27, 2012; and (2) Motion for Leave to File Response to Heartland's Letter and Response, each dated May 5, 2014. We grant TEA's Motion for Extension of Time, and therefore, consider its Opposition in order to have a complete record. Heartland's Request for Leave to Amend Reply, as well as all the subsequent filings, are unauthorized pleadings and will not be considered here. *See* 47 CFR § 1.45; *see also New Life Broadcasting*, Letter, 25 FCC Rcd 7293, 7294, n.5 (MB 2010) (declining to consider unauthorized pleadings pursuant to Section 1.45 of the Rules).

[2] 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. 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the Rules. 47 CFR § 0.283.

[3] 47 CFR § 74.1231(b).

II. BACKGROUND

3. TEA filed the subject renewal application on July 12, 2012. Heartland subsequently filed a Petition to Deny the Application, alleging that TEA violated multiple Commission Rules regarding the ownership and operation of an FM translator station. Specifically, Heartland contends that TEA: (1) originated "countless hours of its own programming"[4] in violation of Section 74.1231 of the Rules;[5] (2) failed to notify the Commission on several occasions when the Station went silent for over a month;[6] (3) neglected to notify the Commission that it rebroadcasts the signal of WIMI(FM), Ironwood, Michigan;[7] and (4) failed to terminate a "prohibited business association" between its President, Scott A. Reinhard (Reinhard), and Gerald Hackman (Hackman), a principal of J&J Broadcasting, Inc. (J&J), the licensee of the Station's primary station, WIMI(FM).[8] Heartland asserts that TEA knowingly and willfully violates the FCC's Rules on a regular basis, and therefore, is not qualified to be a Commission licensee. Accordingly, Heartland urges us to dismiss or deny the Application.[9]

III. DISCUSSION

4. *Petition to Deny*. A petition to deny a renewal application must, pursuant to Section 309(d) of the Act,[10] provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,[11] which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1) provides that we are to grant the renewal application 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 by the licensee of the Act or the Rules; and (3) there have been no other violations by the licensee that, taken together, constitute a pattern of abuse.[12] 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(d) of the Act, or grant the application "on terms and

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[4] Petition at 2.

[5] *See* 47 CFR § 74.1231 (limiting the circumstances under which FM translators may originate programming).

[6] *See* 47 CFR § 74.1263(c).

[7] *See* 47 CFR § 73.1284(b).

[8] *See* 47 CFR § 74.1232(e) (prohibiting a FM translator station whose coverage contour extends beyond the protected contour of the commercial primary station from receiving any support, before or after construction, either directly or indirectly, from the commercial primary FM radio station).

[9] Heartland's Petition repeats the allegations, which it raised for the first time in its June 25, 2010, "Complaint and Request for Revocation of Licenses of FM Translator Station W272AY and Primary Station WIMI." The Investigations and Hearings Division (IHD) of the Enforcement Bureau investigated these allegations. On August 6, 2014, IHD closed its investigation, finding that although Heartland "raises credible questions of compliance … the overall circumstances of this matter do not warrant further expenditure of resources." IHD did not sanction or fine TEA, but reminded TEA of its continued obligation to comply with all Part 74 FCC Rules. *See* Letter from Jeff J. Gee, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to TEA-VISZ, Inc. (August 6, 2014).

[10] 47 U.S.C. § 309(d).

[11] 47 U.S.C. § 309(k). *See, e.g., WWOR-TV, Inc.,* Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff'd sub nom. Garden State Broadcasting L.P. v. FCC,* 996 F.2d 386 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 10, 1993).

[12] 47 U.S.C. § 309(k)(1).

conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."[13]

5. *Program Origination*. Section 74.1231(b) of the Rules prohibits FM translator stations from originating programming, except under limited circumstances.[14] Heartland alleges that TEA regularly originates its own programming in violation of Section 74.1231 of the Rules. To support its allegation, Heartland provides evidence of five separate days, between August 23, 2012, and September 10, 2012, when the Station originated its own programming. Specifically, Heartland submits over a dozen sworn listener declarations, stating that each listener heard W272AY broadcasting its own music while the Station's primary station, WIMI(FM), broadcast a Green Bay Packers game.[15]

6. TEA does not deny that the Station broadcasts music separately from the primary station's programming. It, however, asserts that "in truth, this happened only a very few times"[16] and that this isolated transgression was due to its engineer's "error in connecting the remote control switch."[17] Specifically, TEA explains that the Station is unable to rebroadcast WIMI when Green Bay Packers games are on the air because of territorial restrictions. According to TEA, its engineer wanted the Station to be capable of airing emergency announcements during this time. The engineer, therefore, "without the prior knowledge of TEA-VISZ improperly wired [the Station] to air music rather than be silent."[18] TEA submits a statement from its engineer, under penalty of perjury, declaring that "once I realized my error, I immediately disconnected this hookup, and the translator remains silent until the football game is over and it is again able to rebroadcast WIMI-FM."[19]

7. It is uncontroverted that the Station, at times, transmitted original programming in excess of that allowed by the Rules. TEA's attempt to minimize this mistake by emphasizing the limited occurrences and fact that the licensee was unaware of programming originating on the Station, does not absolve it of this transgression or nullify the rule violation. A licensee is fully responsible for all programming broadcast over a station. We, therefore, admonish Reinhard for his apparent lack of full control over Station programming. We also conclude that TEA violated Section 73.1231(b) of the Rules and issue this *NAL* to TEA for this violation.

8. *Off the Air without Notice.* Section 74.1263(c) of the Rules requires an FM translator licensee to notify the Commission of its intent to discontinue operations for 10 or more consecutive days, and Commission approval is required for such discontinued operation beyond 30 days.[20] Heartland claims that the Station went off the air for 30 days in 2008, but failed to notify the Commission and obtain

[13] 47 U.S.C. §§ 309(k)(2) & (3).

[14] 47 CFR § 74.1231(b) ("An FM translator may be used for the purpose of retransmitting the signals of a primary AM or FM radio broadcast station … and originating programming to the extent authorized in paragraphs (f), (g), and (h) of this section.").

[15] Petition at Exhibit 1.

[16] Opposition at 6.

[17] *Id.*

[18] *Id.*

[19] Statement of Ted K. Franz (Franz), dated November 14, 2012, at 2, attached as Exhibit to Opposition.

[20] 47 CFR § 74.1263(c). Notification must be made within 10 days of the date on which the station first discontinues operation, and Commission approval is required for such discontinued operation beyond 30 days.

the necessary authorization, as required by the Rules.[21] To rebut this allegation, TEA provides statements, under penalty of perjury, from Reinhard and Franz, the Station's engineer, affirming that the Station was never silent for more than 30 days at any time during the license term.[22]

9. A station may discontinue operation for a period not exceeding 30 days without approval and silent authority from the Commission. However, a station that is silent for more than ten days, and intends to remain silent for 30 days or more, must still notify the Commission that it has discontinued operation.[23] Accordingly, although TEA was not required to seek the Commission's approval to remain silent for the one month-period in 2008, it nevertheless should have informed the Commission that the station was off the air. We find that this isolated omission does not constitute a material failure to serve the public interest under Section 309(k)(1) of the Act or warrant a fine. We, however, remind TEA of its obligation to comply with the Commission's Rules, including the obligation to notify the Commission when the Station is silent for extended periods of time.

10. *Notification of Primary Station*. Section 74.1284(b) of the Rules requires the licensee of an FM translator to obtain prior consent from the primary FM broadcast station before rebroadcasting its programs.[24] In addition, the licensee must notify the Commission of the call letters of the station rebroadcast and certify that written consent has been received from the licensee of that station.[25] Heartland alleges that TEA changed its primary station to WIMI(FM) in 2009, but failed to notify the Commission that it was rebroadcasting WIMI(FM), in violation of the Rules. Heartland bases its claim on its inability to locate a notification letter from TEA when it searched the Commission's public files in June and July 2010.[26] In response, TEA submits a statement from Reinhard, under penalty of perjury, affirming that he notified the Commission by letter, dated September 22, 2009, that the Station was rebroadcasting WIMI(FM); TEA also provides a copy of the September 2009, letter.[27] Heartland offers no additional evidence to refute Reinhard's sworn statement of compliance. Accordingly, we find that Heartland fails to raise a substantial and material question of fact regarding TEA's compliance with its notification obligations.

11. *Prohibited Business Relationship*. Section 74.1232(e) of the Rules prohibits a FM translator station, whose coverage contour extends beyond the protected contour of the commercial primary station, such as Station W272AY, from receiving any support, either directly or indirectly, from the commercial primary FM station, or from any person or entity having any interest whatsoever, or any connection with, the primary FM station.[28] Similarly Section 74.1232(d) of the Rules dictates that the Commission will not

[21] Petition at 8. In support of its claim, Heartland submits a Declaration from Reinhard, dated July 16, 2010, attached as an Exhibit to TEA's July 16, 2010, Opposition to Complaint (stating "After it stopped broadcasting WJJH, [the Station] went off the air for a month, until August 14, 2008, when it began rebroadcasting WUPM.")

[22] *See* Reinhard Statement, dated November 15, 2012, attached as Exhibit to Opposition; Franz Statement, dated November 4, 2012.

[23] 47 CFR § 73.1263(c).

[24] 47 CFR § 74.1284(b).

[25] *Id.*

[26] Petition at 9.

[27] *See* Reinhard Statement at 3. TEA does not submit a date stamped copy of the letter, and we have not located a copy of this filing in the Commission's Reference Information Center. Accordingly, we cannot consider this probative evidence of the filing.

[28] 47 CFR § 74.1232(e). Interested and connected parties extend to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates.

grant an authorization for such "other area" translator to persons or entities interested in, or connected with, the commercial primary FM station.[29]

12. In September 2009, TEA changed its primary station to WIMI(FM), which is licensed to J&J Broadcasting, Inc. Heartland asserts that TEA's principal Reinhard has an impermissible business relationship with J&J's President, Gerald J. Hackman, in violation of Section 74.1232(e) of the Rules.[30] To support this claim, Heartland references legal agreements, listing Reinhard as counsel for J&J, which were filed with the July 2009, application to assign WIMI(FM) to J&J.[31] Further, Heartland asserts that on August 23, 2012, W272AY identified itself as a J&J station on the air, buttressing its claim of an impermissible relationship between the Station and J&J.[32]

13. To rebut Heartland's allegations, TEA submits Reinhard's statement, under penalty of perjury, declaring that "the translator has no connection with WIMI or J&J Broadcasting, other than permission to rebroadcast its programs."[33] TEA also references Reinhard's July 16, 2010, sworn declaration, stating "I am not Jerry Hackman's local attorney, nor is there a business relationship between Mr. Hackman and myself."[34] Further, TEA asserts that the Station does not identify itself as a J&J station. Rather, TEA explains that its engineer aired one unauthorized station announcement, improperly identifying the translator as a J&J station, and Reinhard immediately removed the reference to J&J from the on-air identification.[35]

14. We rely on TEA's sworn statements, affirming that there has been no prohibited business relationship between Reinhard and primary station licensee J&J in violation of the Commission's Rules. Further, we find that Heartland has failed to provide sufficient evidence to raise a substantial and material question of fact regarding the Station's compliance with Section 73.1232(e) of the Rules. We, however, caution TEA to remain attentive to its Section 73.1232 restrictions and obligations.

15. *Proposed Forfeiture.* 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.[36] 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.[37] The legislative history to Section 312(f)(1) of the Act

[29] 47 CFR § 74.1232(d). The underlying rationale for this prohibition is to prevent FM station licensees from using FM translators as a competitive means for extending their stations' service areas. *See, e.g., Amendment of Part 74 of the Commission's Rules Concerning FM Translator* Stations, Report and Order, 5 FCC Rcd 7212 (1990).

[30] Petition at 10.

[31] *See* FCC File No. BAL-20090717ABC.

[32] Petition at 11.

[33] Reinhard Statement at 2.

[34] *See* July 16, 2010, Reinhard Declaration, attached as an Exhibit to TEA's July 16, 2010, Opposition to Complaint. Reinhard declares that: (1) he does not represent Mr. Hackman; (2) in November 2008, he received an email from an attorney that included a contract that was being negotiated between Hackman and the previous owners of WIMI; (3) another attorney, Stephen Walker, represented J&J in the purchase of WIMI; and (4) he had no knowledge that his name had been inadvertently left on some of the WIMI sales documents as the attorney of record.

[35] Opposition at 8.

[36] 47 U.S.C. § 503(b)(1)(B). *See also* 47 CFR § 1.80(a)(1).

[37] 47 U.S.C. § 312(f)(1).

clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[38] and the Commission has so interpreted the term in the Section 503(b) context.[39] 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."[40]

16. The Commission's *Forfeiture Policy Statement*, Section 1.80 of the Rules, and Section 503(b)(2)(A) of the Act establish Commission guidelines for assessing forfeitures.[41] These guidelines, however, do not enumerate a base forfeiture amount for an FM translator's originating programming in excess of the limits prescribed in Section 74.1231 of the Rules. They do, however, set a base forfeiture amount of $4,000 for "unauthorized emissions."[42] As noted above, it is uncontested that unauthorized programming originated on the Station over several days, apparently without Reinhard's knowledge or control.[43] Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the amount of $4,000.[44]

17. *License Renewal Application.* We have evaluated the Application pursuant to Section 309(k) of the Act, and we find that the TEA's apparent violation of Section 74.1231(b) of the Rules[45] does not constitute a "serious violation" warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, constitute a pattern of abuse.[46] Further, based on our review of the license renewal application, we find that the Station served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violation that would preclude grant of the application.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that TEA-VISZ, Inc. is hereby

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

[39] *See Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991) *recon denied*, 7 FCC Rcd 3454 (1992).

[40] 47 U.S.C. § 312(f)(2).

[41] *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), *recon denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999); 47 CFR § 1.80.

[42] 47 CFR 1.80(b)(6).

[43] As discussed above, we do not find that any of the other alleged violations rise to the level of proposing a forfeiture.

[44] *See, e.g., Juan Alberto Ayala*, 27 FCC Rcd 16033 (2012) (proposing a $4,000 forfeiture to an FM translator station for originating programming in excess of that allowed by the Rules).

[45] 47 CFR § 74.1231(b).

[46] For example, we do not find that TEA's operation "was conducted in an exceedingly careless, inept, and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operation deficiencies." *See Heart of the Black Hills Station*, Decision, 32 FCC 2d 196, 198, para. 6 (1971). Further, 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 station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.* at 200, para. 11. *See also Center for Study and Application of Black Econ. Dev.*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educ. Broad. Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

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 74.1231(b) of the Commission's Rules.

19. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the FCC's rules, that, within thirty (30) days of the release date of this *NAL,* TEA-VISZ, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

20. Payment of the proposed forfeiture must be made by check or similar instrument, wire transfer or credit card, and must include the NAL/Acct. No. and FRN No. referenced herein. Regardless of the form of payment, a completed FCC Form 159 must be submitted. When 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 Karen.Workeman@fcc.gov and Parul.Desai@fcc.gov.

21. Below are additional instructions that should be followed based on the form of payment selected:

- 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.

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

23. 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.

24. 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.[47]

25. IT IS FURTHER ORDERED that the Petition to Deny filed by Heartland Communications

[47] 47 CFR § 1.1914.

Group, LLC and Heartland Comm. License, LLC on September 24, 2012, IS DENIED.

26. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to TEA-VISZ, Inc., 170 North 4th Avenue, Park Falls, WI 54552, and to its counsel, Jerrold Miller, Esq., Miller and Neely, P.C., 6900 Wisconsin Avenue, Suite 704, Bethesda, MD 20815, and to counsel for Heartland Communications Group, LLC, Kevin M. Walsh, Esq., Law Office of Kevin M. Walsh, PLLC, 603 Davis Street, Suite 1009, Austin, TX 78701.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau