

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

In re Application of
Zuma Beach FM Emergency and
Community Broadcasters, Inc.
For Modification of License for
Station KBUU-LP
Malibu, California
Facility ID No. 195574
NAL/Acct. No. MB-201841410017
FRN: 0023661713
File No. BPL-20170807ABE

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 2019

Released: July 10, 2019

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it a Response<sup>1</sup> from Zuma Beach Emergency Broadcasting, Inc. (Zuma) to a Notice of Apparent Liability (NAL) proposing a six thousand dollar (\$6,000) forfeiture.<sup>2</sup> The NAL found that Zuma violated the Commission’s rules (Rules) and the Communications Act of 1934, as amended (Act) by operating Low Power FM (LPFM) station KBUU-LP, Malibu, California with unauthorized power on an unauthorized channel.<sup>3</sup> Zuma does not dispute the facts in the NAL but seeks a reduction or cancellation of the forfeiture amount. As discussed below, we will cancel the forfeiture for inability to pay and instead admonish Zuma for the violations.

II. BACKGROUND

2. The Commission’s base forfeiture amounts for exceeding power limits and for using an unauthorized frequency are \$4,000 each<sup>4</sup> and, thus, the combined base forfeiture for Zuma’s violation of both provisions is \$8,000. The Bureau reduced the forfeiture to \$3,000 for each violation (\$6,000 total) based upon the specific circumstances and gave Zuma an opportunity to respond. Zuma’s timely Response requests rescission of the forfeiture and substitution of an admonishment.<sup>5</sup> Zuma relies upon

<sup>1</sup> See Zuma Response to Notice of Apparent Liability for Forfeiture (filed Sept. 27, 2018) (Response).

<sup>2</sup> See Zuma Beach FM Emergency & Community Broad., Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 8222 (MB 2018) (NAL).

<sup>3</sup> See 47 U.S.C. § 301; 47 CFR § 73.1745. Specifically, Zuma moved from Channel 248 to Channel 256 and increased effective radiated power (ERP) from 55 watts to 71 watts from November 14, 2017 onward, at a time when it held a permit to construct but not to operate such facilities. Zuma could not receive program test authority until it re-oriented the station’s antenna and filed a covering license application, which Zuma did on December 11, 2017 and December 13, 2017, respectively. Thus, Zuma operated with an unauthorized hybrid of its existing and proposed facilities for about a month. One morning within that period, December 5, 2017, Zuma increased ERP from the already unauthorized 71 watts to 244 watts in response to a wildfire.

<sup>4</sup> 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, Appx. A, Section 1 (1997) (Forfeiture Policy Statement), recon. denied, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(4), note to para. (b)(8), Section I.

<sup>5</sup> Response at 1, 3.

two factors: (1) its belief that the Bureau failed to consider several matters that would arguably warrant a further reduction or retraction of the forfeiture; and (2) Zuma's inability to pay.

### III. DISCUSSION

3. The Bureau may adjust base forfeiture amounts upon considering "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."<sup>6</sup> Zuma argues that the Bureau considered only one such factor, Zuma's history of no other offenses.<sup>7</sup> Zuma acknowledges that the Bureau briefly mentioned other circumstances of record, but contends that the Bureau did not take those matters into account in setting the forfeiture.<sup>8</sup> These factors include: (1) medical and weather issues that prevented Zuma from filing a license application needed to obtain program test authority; (2) Zuma's voluntary acknowledgement of the violations in response to an objector's allegations about a separate matter; and (3) Zuma's claim of good intent when it further increased power during a wildfire.<sup>9</sup> Zuma also argues that the Commission's base forfeiture amounts pre-date the creation of the LPFM service and that LPFM forfeiture standards should be more lenient due to the nature of the service.<sup>10</sup>

4. We reject Zuma's argument that a \$6,000 forfeiture is too large for its violations. The *NAL* reflects that the Bureau was fully aware of the circumstances that Zuma now identifies, and considered "all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*" in reaching the \$6,000 reduced forfeiture amount.<sup>11</sup> The Bureau did not need to discuss each factor individually, and no circumstance before the Bureau warranted a further reduction of the forfeiture. The Commission does not have separate forfeiture standards for different broadcast services, and if Zuma desires new guidelines for LPFM stations, it would more appropriately file a petition for rulemaking. Having determined that a \$6,000 forfeiture is appropriate, we next consider Zuma's claim that it is unable to pay.

5. As noted in the *NAL*, the Commission will not consider reducing or canceling a forfeiture in response to claimed 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; or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status.<sup>12</sup> The Commission has generally looked to gross revenues as the best indicator of whether a licensee is able to pay an assessed forfeiture.<sup>13</sup> Determining an appropriate forfeiture amount

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<sup>6</sup> 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100, para. 27; 47 CFR § 1.80(b)(4), note to para. (b)(8), Section II (downward adjustment for minor violation; good faith or voluntary disclosure; history of overall compliance; and inability to pay).

<sup>7</sup> Response at 2.

<sup>8</sup> *Id.*, citing *NAL*, nn. 37, 46.

<sup>9</sup> *Id.* at 2. Zuma's Response summarizes these circumstances in detail at pages 8-9 and Exh. 1. To the extent that Zuma devotes a substantial portion of its summary to wildfires, we note that the overpowered operations on December 5, 2017 to address wildfires contributed little to the portion of the forfeiture for excess power, which was based primarily upon overpowered operations over a month-long period.

<sup>10</sup> Response at 6-7.

<sup>11</sup> *See NAL* at paras. 11, 15, n.46.

<sup>12</sup> *See NAL* at para. 21; *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7441, para. 28 (2004), *forfeiture reduced on recon.*, 24 FCC Rcd 2206 (MB 2009) (*Discussion Radio*).

<sup>13</sup> *See Studio 51 Multi Media Prod., Ltd.*, Memorandum Opinion and Order, 30 FCC Rcd 6134, 6134-35, para. 3 (MB 2015) (*Studio 51*).

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that a licensee is able to pay is not strictly mathematical, but the range of forfeitures that the Commission has deemed reasonable generally average about five percent of the violator's gross annual income and have not exceeded eight percent thereof.<sup>14</sup> Where appropriate, the Commission has also considered other, secondary indicators of the licensee's financial circumstances including debt, net losses, and other potential sources of income.<sup>15</sup> In cases of egregious violations, the Commission may impose forfeitures despite evidence of the violator's financial difficulties.<sup>16</sup>

6. Zuma has shown that the proposed \$6,000 forfeiture exceeds its average gross income for 2015-17, and that its income has been insufficient to cover sustained losses. Zuma provides receipts of IRS Form 990-N filings and, because those online receipts do not show exact income numbers, also attests to its gross revenue in a sworn statement from its Secretary.<sup>17</sup> Zuma further submits profit and loss statements, and balance sheets for the same three-year period showing net losses, and liabilities which exceed assets for each year.<sup>18</sup> Specifically, Zuma shows: (a) for 2015, a net loss of \$31,799 on gross receipts of \$100; (b) for 2016, a net loss of \$2,178 on gross receipts of \$6,999; and (c) for 2017, a net loss of \$9,339 on gross receipts of \$2,142.<sup>19</sup> Zuma explains that it has no billable receipts and that its only source of revenue is modest underwriting and funds raised from the sale of coffee cups and bumper

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<sup>14</sup> See, e.g., *PJB Communications of VA, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992) (2.02 percent of violator's gross income); *Aerco Broad. Corp.*, Forfeiture Order, 29 FCC Rcd 9439 (MB 2014), *recon. denied*, 29 FCC Rcd 9683, *review denied*, 29 FCC Rcd 15086, *recon. dismissed*, 31 FCC Rcd 6707 (MB 2016) (.28 percent of gross revenues); *Faith Baptist Church, Inc.*, 26 FCC Rcd 1391 (MB 2011) (four percent of gross revenues); *Grace Baptist Church*, Forfeiture Order, 25 FCC Rcd 7481 (MB 2010) (reducing forfeiture from 11.4 percent to five percent of licensee's average gross revenue based on five percent figure in other cases); *Halifax Community Church, Inc.*, Forfeiture Order, 20 FCC Rcd 2342 (EB 2005) (less than 7.6 percent of gross revenues); *Hoosier Broad. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641 (EB 2002) (7.6 percent of gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (EB 2000) (7.9 percent of gross revenues); *Afton Communications Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6741 (CCB 1992) (3.9 percent of gross revenues).

<sup>15</sup> See *Discussion Radio*, 24 FCC Rcd at 2207, para. 3, n.11 (sustained losses), citing *First Greenville Corp.*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 7399 (1996) (expenses exceeding income, and funding the losses by sole shareholder receiving no remuneration); *South Bay Aviation, Inc.*, Forfeiture Order, 27 FCC Rcd 3013, 3015, para. 7 (EB 2012) (considering debt and potential sources of income). If gross revenues are sufficiently large, the mere fact that a business is operating at a loss does not by itself demonstrate an inability to pay. See *Texas Ed. Broad. Co-op., Inc.*, Forfeiture Order, 26 FCC Rcd 11249, 11251, para. 6 (MB 2011). However, the Commission has cancelled forfeitures when net losses demonstrate extraordinary circumstances, such as when the losses are a very large percentage of average gross revenue. E.g., *KYKV(FM), Selah, WA*, Letter, 25 FCC Rcd 16188 (MB 2010) (*KYKV*) (losses exceeding revenue by nearly seventy percent); *KCSY(FM), Twisp, WA*, Letter Order, 24 FCC Rcd 5505 (MB 2009) (losses exceeding revenue by nearly 50 percent).

<sup>16</sup> E.g., *Net One Int'l, Inc.*, Forfeiture Order, 31 FCC Rcd 2367, 2380, paras. 38-39 (2016). We find, however, that Zuma's violations are not egregious.

<sup>17</sup> IRS Form 990-N is an annual electronic notice that tax-exempt organizations with gross receipts of \$50,000 or less can elect to file instead of more detailed forms required of larger organizations. See <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. Zuma's receipts for its IRS filings reflect that Zuma's gross revenue is under \$50,000, but do not include the actual numbers that Zuma reported online. Zuma, therefore, provides a sworn statement with the actual income amounts it submitted with each Form 990-N. See Response, Exh. 1.

<sup>18</sup> *Id.* at 5, Exh. 1, Att. 2, 3. These submissions reflect loans Zuma has received from its board members, and show negative equity for each year. *Id.*, Exh. 1, Att. 3. Compare *KSQA(TA), Topeka, KS*, Memorandum Opinion and Order, 33 FCC Rcd 226, 228-29, paras. 6-7 (MB 2018) (rejecting claim of inability to pay where board members who provided loans retained large amounts of equity sufficient to cover the forfeiture).

<sup>19</sup> See Response at 4.

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stickers.<sup>20</sup> Zuma states that it operates with an all-volunteer staff, and spends its limited revenues on operating expenses such as music rights, insurance, software, and maintenance.<sup>21</sup> Zuma further states that its board members have provided facilities and utilities at no cost to Zuma, as well as interest-free loans.<sup>22</sup> Zuma argues that the \$6,000 proposed forfeiture would “cripple Zuma’s ability to provide the local news, emergency information and volunteer programming to its community.”<sup>23</sup>

7. We accept Zuma’s showing that payment of the proposed forfeiture would create a financial hardship. A \$6,000 forfeiture would be 195 percent of Zuma’s average gross income. We would ordinarily reduce the forfeiture to bring it within an acceptable range, but find that Zuma’s unusual financial circumstances warrant cancelling the forfeiture in its entirety. Not only is Zuma’s gross income very small but it has sustained average losses that are over 200 percent of that income despite its “shoe string” operation, solely with volunteers, from facilities made available without charge. Zuma’s existence depends almost entirely upon loans, in-kind donations, and cash infusions from Zuma’s board, which is not retaining equity from which it might satisfy the forfeitures. These circumstances are comparable to or exceed those in which the Commission has cancelled forfeitures for inability to pay.<sup>24</sup> Although we will cancel the proposed forfeiture, we find that it is appropriate to admonish Zuma for its willful and repeated violation of Sections 73.1745 of the Rules and of Section 301 of the Act.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the \$6,000 Notice of Apparent Liability (NAL/Acct. No. MB-201841410017) for operation on an unauthorized channel with greater than authorized power in violation of 47 CFR § 73.1745 and 47 U.S.C. § 301. IS HEREBY CANCELLED and that Zuma Beach Emergency Broadcasting, Inc. is instead HEREBY ADMONISHED for those violations.

9. IT IS FURTHER ORDERED that a copy of this *Order* shall be sent, by First Class and Certified Mail-Return Receipt Requested, to Mr. Hans Laetz, General Manager, Zuma Beach FM Emergency and Community Broadcasters, Inc., 6402 Surfside Way, Malibu, CA 90265, and its attorney, Mark Van Bergh, Esq., 1625 S. Nelson St., Arlington, VA 22204.

#### FEDERAL COMMUNICATIONS COMMISSION

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 3, 5.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> *See, e.g., A-O Broad. Corp.*, Order, 23 FCC Rcd 11296, 11300, para. 11-12 (EB 2008) (cancelling forfeiture and substituting admonishment where licensee had no revenues and its only significant sources of cash were loans from its shareholder); *KYKV*, 25 FCC Rcd at 16190 (cancelling forfeiture where losses exceeded revenue by 50 percent); *Todd Steiner, Esq.*, Letter Order, 23 FCC Rcd 13935 (MB 2008) (cancelling \$6,000 forfeiture amounting to 83.5 percent of violator’s gross revenue). *See also Studio 51*, 30 FCC Rcd at 6135, n.5 and cases cited therein (severe financial distress with owners and employees having to personally guarantee loans to keep station running).