

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

**In the Matter of**

WGUL-FM, Inc.  
Inverness, Florida

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**File No. EB-98-TP-241**

**NAL/Acct. No. 815TP0004**

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 29, 2000**

**Released: December 5, 2000**

By the Commission:

1. In this Order, we grant in part and deny in part the May 19, 2000 application for review filed by WGUL-FM, Inc., licensee of Station WINV(AM), of the *Memorandum Opinion and Order*<sup>1</sup> issued by the Enforcement Bureau in this proceeding. Pursuant to Section 503(b) of the Communications Act of 1934, as amended ("the Act")<sup>2</sup> and Section 1.80 of the Commission's Rules ("the Rules")<sup>3</sup> the former Compliance and Information Bureau ("CIB") found WGUL-FM, Inc. liable for a monetary forfeiture in the amount of \$7,000 for willful and continuous violation of rule sections 11.52(d)<sup>4</sup> (EAS code and attention signal monitoring requirements), 11.61(a)<sup>5</sup> (tests of EAS procedures), and 73.3526(c)<sup>6</sup> (availability of public inspection file for public inspection). For the reasons discussed below, we lower the forfeiture to \$5,000.

**BACKGROUND**

2. In response to a complaint concerning unintentional emissions, the Tampa Florida Field Office ("Field Office") inspected WINV(AM)'s operating facilities. The inspection revealed the aforementioned violations. On March 31, 1998, the Field Office issued an Official Notice of Violation ("NOV") for the violations. On April 14, 1998, the Field Office received a written response to the NOV from Carl J. Marcocci, Chairman and CEO of WGUL-FM, Inc. Mr. Marcocci acknowledged the technical and operational deficiencies that led to the violations.

3. On June 1, 1998, the District Director of the Tampa Field Office issued a Notice of Apparent Liability ("NAL") to WGUL-FM, Inc. in the amount of \$10,000 for willful and continuous violation of Sections 11.52(d), 11.61(a), 73.1590(a)(6)<sup>7</sup> and 73.3526(c) of the Rules. WGUL-FM, Inc.

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<sup>1</sup> 15 FCC Rcd 11,163 (Enf. Bur. 2000).

<sup>2</sup> 47 U.S.C. § 503(b).

<sup>3</sup> 47 C.F.R. § 1.80.

<sup>4</sup> 47 C.F.R. § 11.52(d).

<sup>5</sup> 47 C.F.R. § 11.61(a).

<sup>6</sup> 47 C.F.R. § 73.3526(c).

<sup>7</sup> 47 C.F.R. § 73.1590(a)(6).

filed a Request for Remission or Reduction of Forfeiture. CIB issued a *Forfeiture Order*<sup>8</sup> for three of the violations and ruled that the forfeiture attributable to the Section 73.1590(a)(6) violation for equipment performance measurements should be eliminated. Therefore, the *Forfeiture Order* reduced the forfeiture amount to \$7,000 instead of the originally proposed \$10,000. A *Memorandum Opinion and Order* released on April 21, 2000 affirmed the forfeiture on reconsideration.

4. In its application for review, WGUL-FM, Inc. again argues that the forfeiture should be remitted or further reduced. Regarding the violation of Section 11.52(d), WGUL-FM, Inc. argues that, although one of its required EAS sources located in Gainesville, Florida was not being monitored, there was no risk to the listeners of WINV(AM) because it was monitoring the National Weather Service. WGUL-FM, Inc. further relies on a news release issued by CIB on November 30, 1998 that stated that the FCC would not begin its [EAS] inspection program until February 1, 1999.<sup>9</sup> Consequently, it claims there should be no forfeiture for violation of Section 11.52(d) of the Rules. It also contends that by rejecting WGUL-FM, Inc.'s reliance upon the news release, the Enforcement Bureau approved a scheme by which stations were given two months to come into compliance with EAS standards, except for those stations which were caught violating the rules before the warning was given. This, states WGUL-FM, Inc., contravenes the "equal treatment" requirement of *Melody Music, Inc. v. FCC*.<sup>10</sup> Finally, WGUL-FM, Inc. argues that the portion of the forfeiture assessed for not having the public file available for inspection should be rescinded because the owner of the Citrus Hearing Center, the establishment that housed the file, inexplicably decided to close the afternoon of the inspection and ignored a request by WINV(AM)'s licensee to return in order to allow inspection of the file.<sup>11</sup> WGUL-FM, Inc. asserts that because this was a one-time violation and because it promptly moved the public inspection file to the public library, reduction or remission is warranted.

5. WGUL-FM, Inc. requests the Commission to consider its history with WINV(AM). WGUL-FM, Inc. had been operating WINV(AM) pursuant to a local marketing agreement prior to becoming the licensee and was responsible for its resumption of operation one day before the license would have expired by operation of Section 312(g) of the Act.<sup>12</sup> Through the efforts of WGUL-FM, Inc., WINV(AM) obtained special temporary authority to operate with a temporary tower lower than that authorized, filed a late-filed application for renewal of its license, filed an application for assignment of license to WGUL-FM, Inc., and filed an application for change in city of license. Finally, WGUL-FM, Inc. points out that it had only been the licensee for about two months prior to the inspection,<sup>13</sup> and even then

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<sup>8</sup> 14 FCC Rcd 6106 (Compl. & Inf. Bur. 1999).

<sup>9</sup> News Release, FCC to Increase Enforcement of EAS Regulations, Report No. CI 98-26, released November 30, 1998.

<sup>10</sup> 345 F.2d 730 (DC Cir. 1965).

<sup>11</sup> At the time of the inspection, licensees were permitted to have the main studio located at any accessible place within the community of license. With the public inspection file rule change, effective October 30, 1998, licensees are now required to keep the public inspection file at the station's main studio.

<sup>12</sup> If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary. 47 U.S.C. § 312(g).

<sup>13</sup> The assignment to WGUL-FM, Inc. was consummated on January 9, 1998, approximately two months before the inspection.

was the licensee subject to an outstanding appeal of the grant of the assignment and renewal applications.<sup>14</sup>

## DISCUSSION

6. Section 73.3526(c) of the Rules requires the public inspection file to be made available for public inspection at any time during regular business hours. In this case, while the file was not available at the time of inspection, and thus the licensee violated the rule, we conclude that the forfeiture should be lowered to reflect the licensee's good faith efforts to comply with the rule. We have no reason to disbelieve the licensee's statement that the closure of the building housing the public file on the day at issue was "[i]nexplicable" or that it promptly attempted to get the building open. We believe it is appropriate to lower the overall forfeiture by \$2,000 to reflect the licensee's good faith efforts to comply.<sup>15</sup>

7. Pursuant to the State of Florida EAS Operational Plan, WINV(AM) is required to monitor WRUF(AM/FM) and WOGK-FM. At the time of the inspection, neither was being monitored. This was a violation of Section 11.52(d) of the Rules. As the Enforcement Bureau determined, WINV(AM)'s monitoring of other sources and the licensee's opinion regarding potential risk to listeners resulting from its failure to monitor the assigned sources is not a basis for lowering the forfeiture.

8. WGUL-FM, Inc.'s reliance upon the November 30, 1998 news release to support its position that its forfeiture should be remitted is unpersuasive. Agents from the Tampa Office inspected WINV(AM) as a result of a complaint about unintentional emissions. The inspection took place on March 25, 1998, approximately eight months before the news release. Although the news release says that no EAS inspections would take place between November 30, 1998 and February 1, 1999, nothing in the news release suggested that EAS violations discovered prior to February 1, 1999 (let alone, as here, prior to November 30, 1998) would be overlooked if they were found during an inspection conducted for some other purpose, as was the case here. The EAS inspection program discussed in the news release was prospective. It was intended to warn licensees of upcoming EAS inspections, and provided a two-month window for licensees then in non-compliance to come into compliance. It never mentioned licensees who had already been inspected, nor did it imply that other types of inspections would not be done or that previous violations would be waived.

9. Further, WGUL-FM, Inc. argues that the "equal treatment" requirement of *Melody Music* was violated because it was treated differently than other licensees who were warned of the upcoming EAS inspections. This is not the case. WGUL-FM, Inc. was warned of the upcoming EAS inspections, just like all other licensees. It, like all other licensees, was told that the EAS inspections would not begin until February 1, 1999 and from the date of the news release through February 1, 1999, WGUL-FM, Inc. was not inspected. Thus, it was treated the same as all other licensees. That it was inspected eight months before the news release as a result of a complaint unrelated to EAS and EAS violations were discovered means that WGUL-FM is not similarly situated with licensees who had not been sanctioned for EAS violations during an amnesty period taking place in the future. For the "equal treatment" requirement of

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<sup>14</sup> The applications for renewal and assignment, as well as the application for change in city of license, were contested by Dickerson Broadcasting, Inc., licensee of Station WEAG-FM, Starke, Florida. Dickerson's application for review was dismissed on December 14, 1998. See 14 FCC Rcd 2032 (1998).

<sup>15</sup> See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, at 17100-17101 (1997), *recon. denied*, 13 FCC Rcd 303 (1999), released December 28, 1999 (factors for downward adjustments).

*Melody Music* to be applicable, all relevant licensees have to be similarly situated. WGUL-FM, Inc. is different than other licensees receiving the EAS compliance warning because it had already been found to be in violation of the EAS rules. It could not have relied, and did not rely, on the subsequent public notice. Thus, *Melody Music* does not require the portion of the forfeiture attributable to the EAS violations to be rescinded.

10. Finally, WGUL-FM Inc.'s efforts to bring WINV(AM) into compliance with various Commission rules prior to becoming WINV(AM)'s licensee are not a basis for reducing the forfeiture assessed for violations discovered after WGUL-FM, Inc. became the licensee.

### ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 1.115(c) of the Rules, 47 C.F.R. § 1.115(c), WGUL-FM, Inc.'s application for review of the *Memorandum Opinion and Order* for NAL No. 815TP0004 **IS GRANTED IN PART AND DENIED IN PART**.

12. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, WGUL-FM, Inc. must pay the amount of five thousand dollars (\$5,000) within thirty (30) days of the release date of this Order. Payment may be made by check or money order, drawn on a U.S. financial institution, payable to the Federal Communications Commission.<sup>16</sup> The remittance should be marked "NAL Acct. No. 815TP0004" and mailed to the following address:

Federal Communications Commission  
P.O. Box 73482  
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days will be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

13. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by certified mail, return-receipt requested, to WGUL-FM, Inc. in care of its counsel of record, Koerner & Olender, P.C., 3 Bethesda Metro Center, Suite 640, Bethesda, MD 20814.

### FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>16</sup> Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Requests for installment plans should be mailed to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554.