

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

In the Matter of	)	File No. EB-03-DL-229
	)	
Paulino Bernal Evangelism	)	
KBRN(AM)	)	NAL/Acct No. 200432500001
Boerne, Texas	)	FRN 0005733662

**ORDER ON REVIEW**

**Adopted: October 27, 2008**

**Released: October 28, 2008**

By the Commission:

**I. INTRODUCTION**

1. In this *Order on Review* (“*Order*”), we grant in part and deny in part the Application for Review filed by Paulino Bernal Evangelism (“*Evangelism*”), former licensee of AM broadcast station KBRN, Boerne, Texas,<sup>1</sup> of the Enforcement Bureau’s *Memorandum Opinion and Order* released on August 25, 2006.<sup>2</sup> Specifically, we reduce the forfeiture amount from \$25,000 to \$20,000 and deny the application for review in all other respects. In the *Memorandum Opinion and Order*, the Bureau denied Evangelism’s petition for reconsideration of a Bureau *Forfeiture Order*<sup>3</sup> issued to Evangelism on October 19, 2004, in the amount of twenty-five thousand dollars (\$25,000) for willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Commission’s Rules (“*Rules*”).<sup>4</sup> The noted rule violations involve Evangelism’s failure to maintain a main studio in its community of license, failure to install and maintain operational Emergency Alert System (“*EAS*”) equipment during the hours of station operation, and failure to make the station’s public inspection file available.

**II. BACKGROUND**

2. On October 28, 2003, an agent from the Commission’s Dallas, Texas, Field Office (“*Dallas Office*”) inspected station KBRN in Boerne, Texas. The agent could find no local or toll free telephone number for station KBRN and was unable to locate its main studio. The agent did locate KBRN’s transmitter tower and the shed containing its transmitting equipment but found that they were situated on private property behind locked fences and were inaccessible to the public. Subsequently, Evangelism’s technical representative advised the agent that the transmitter shed served as KBRN’s main studio and that the only person working for KBRN in Boerne, Texas, was an unpaid volunteer who would make KBRN’s public inspection file available upon request. The agent contacted the unpaid volunteer and stated he wanted to inspect KBRN’s public inspection file. The volunteer provided access to KBRN’s

<sup>1</sup> The license for KBRN was assigned to Gerald Benavides on June 25, 2004 (*see* File No. BAL-20040322ADY, granted May 10, 2004).

<sup>2</sup> *Paulino Bernal Evangelism, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 9532 (Enf. Bur. 2006) (“*Bureau MO&O*”).

<sup>3</sup> *Paulino Bernal Evangelism, Inc.*, Forfeiture Order, 19 FCC Rcd 19922 (Enf. Bur. 2004) (“*Forfeiture Order*”).

<sup>4</sup> 47 C.F.R. §§ 73.1125, 11.35(a) and 73.3527(c)(1).

transmitter shed but, when asked to provide the station's public inspection file, produced transmitter information and technical manuals, and stated that no other documentation for station KBRN was available.

3. On December 19, 2003, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL"), to Evangelism proposing a monetary forfeiture of \$25,000 for its failure to maintain a main studio in its community of license, its failure to install and maintain operational EAS equipment during the hours of station operation, and its failure to make the station's public inspection file available in apparent willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Rules.<sup>5</sup> In its response to the NAL, Evangelism argued that it did not violate the public inspection file requirement and that the proposed forfeiture should be reduced or cancelled on the basis of its inability to pay and history of overall compliance.<sup>6</sup> In the *Forfeiture Order*, the Bureau rejected these arguments and imposed a monetary forfeiture of \$25,000 for willful and repeated violation of Sections 73.1125, 11.35(a) and 73.3527(c)(1) of the Rules. In its petition for reconsideration, Evangelism argued that it did not violate the main studio and public inspection file requirements; that, if it violated the Rules, there is no evidence that the violations were repeated; that it has a history of overall compliance; that imposition of a forfeiture against Evangelism would be "contrary to Commission policy" because donors would be the ultimate source of payment; and that payment of a forfeiture would limit its "ability to generate programming in the public interest."<sup>7</sup> The *Bureau MO&O* rejected these arguments and affirmed the *Forfeiture Order*. In its application for review, Evangelism argues that it substantially complied with the main studio and public inspection file requirements and that it has a history of overall compliance. Evangelism, however, does not contest the Bureau's determination that Evangelism violated the EAS Rules.

### III. DISCUSSION

#### A. Violation of Section 73.3527(c)(1) of the Rules (Public File Requirement)

##### 1. Background

4. The public file requirements codified in Part 73 of the Rules<sup>8</sup> are rooted in Section 307(b) of the Communications Act of 1934, as amended ("Act").<sup>9</sup> Section 73.3527(a)(2) of the Rules requires that every permittee or licensee of an AM, FM, or TV station operating in the noncommercial educational broadcast services shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(11) and paragraph (e)(12) of that section.<sup>10</sup> Section 73.3527(b) of the Rules requires the public inspection file be maintained at the station's main studio.<sup>11</sup> Section 73.3527(c)(1) of the Rules requires the file be available for public inspection at any time during regular business hours.<sup>12</sup> The Commission has found that reasonable access to the public inspection file serves

<sup>5</sup> *Paulino Bernal Evangelism, Inc.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200432500001 (Enf. Bur., Dallas Office, rel. Dec. 19, 2003).

<sup>6</sup> Letter of January 20, 2004, from Barry D. Wood, Esq., to Marlene H. Dortch, Secretary, Federal Communications Commission.

<sup>7</sup> Petition for Reconsideration at 2-7.

<sup>8</sup> See 47 C.F.R. §§ 73.3526 and 73.3527 for commercial and noncommercial licensees, respectively.

<sup>9</sup> 47 U.S.C. § 307(b). This section requires the Commission to make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same.

<sup>10</sup> 47 C.F.R. § 73.3527(a)(2).

<sup>11</sup> 47 C.F.R. § 73.3527(b).

<sup>12</sup> 47 C.F.R. § 73.3527(c)(1).

the important purpose of facilitating citizen monitoring of a station's operations and public interest performance, and fostering community involvement with local stations, thus helping to ensure that stations are responsive to the needs and interests of their local communities.<sup>13</sup>

## 2. Discussion

5. In its petition for reconsideration of the *Forfeiture Order*, Evangelism argued that there was no public file violation. Evangelism asserted that the KBRN public file was "at all times relevant to this matter . . . available at the KBRN studio"; that Evangelism's unpaid volunteer at KBRN had limited facility in speaking and understanding English, and was nervous and did not understand that the agent had requested the public file; and that the unpaid volunteer would have provided KBRN's public file if the FCC agent remained at the KBRN studio "for a more reasonable period of time" or explained his request for the public file "in a more reasonable fashion."<sup>14</sup> The Bureau rejected these arguments in the *Bureau MO&O*.<sup>15</sup>

6. Evangelism now presents a similar argument -- asserting that it "substantially complied" with the public file requirement. Evangelism claims that the *Bureau MO&O* rejected Evangelism's arguments "in cursory fashion without adequate analysis to support its conclusion"; that its "station manager," an unpaid volunteer, did not comprehend the FCC agent's request for the public file; and that the Bureau's rejection of Evangelism's arguments effectively created, without notice and comment, a new rule requiring that "Spanish language stations must have persons fluent in English present at all times when the main studio is staffed . . . ."<sup>16</sup>

7. We concur with the Bureau's findings that it was Evangelism's responsibility to make any necessary arrangements to have the public file available at all times during KBRN's regular business hours<sup>17</sup> and that KBRN's unpaid volunteer did not provide the public file upon the agent's request. Our decision is consistent with Commission precedent that holds, in carrying out its responsibility under Section 73.352(c)(1), a station is obligated to ensure that the public, including an FCC agent, is able to access the public file during regular business hours. That did not happen here. The FCC agent went to considerable lengths in his efforts to obtain KBRN's public file. These efforts included locating KBRN's transmitter shed, determining the identity of Evangelism's local representative through a telephone conversation with Evangelism's technical representative and eventually making arrangements to meet KBRN's local representative, an unpaid volunteer. Moreover, we note that the lack of availability of KBRN's public file involves more than the unpaid volunteer's alleged difficulty with the English language. The general public can hardly be expected to go the same lengths to obtain access to KBRN's public file. Under these circumstances, KBRN's public file was effectively unavailable to the general public at all times. We affirm the Bureau's determination that Evangelism willfully and repeatedly violated Section 73.3527(c)(1) of the Rules.

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<sup>13</sup> *Review of the Commission's Rules regarding the Main Studio Rule and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691, 15700 (1998) ("Main Studio Rule and Public Inspection Files") recon. granted in part; Memorandum Opinion and Order, 14 F.C.C.R. 11113 (1999); see also *Union Broadcasting, Inc.*, Forfeiture Order, 19 FCC Rcd 18588, 185890 (Enf. Bur. 2004); *Lebanon Educational Broadcasting Foundation*, Memorandum Opinion and Order, 21 FCC Rcd 1442, 1444 (Enf. Bur. 2006).

<sup>14</sup> Petition for Reconsideration, at 5.

<sup>15</sup> *Bureau MO&O*, 21 FCC Rcd at 9534.

<sup>16</sup> Application for Review at 6-7.

<sup>17</sup> *Mahoning Valley Broadcasting Corporation*, Memorandum Opinion and Order, 39 FCC 2d 52, 63 (1972) (licensee required to make arrangements to have the public file available for inspection at all times during regular business hours); see also Section 73.3527(c)(1) of the Rules.

## B. Violation of Section 73.1125 of the Rules (Main Studio)

### 1. Background

8. In carrying out the mandate of Section 307(b) of the Act, the Commission has established a regulatory regime for distributing broadcast service in which every radio and television station is assigned to a community of license with a primary obligation to serve that community.<sup>18</sup> A central component of this regulatory regime requires that a broadcast station's main studio be accessible to its community of license.<sup>19</sup>

9. Section 73.1125 of the Rules requires the licensee of a broadcast station to maintain a main studio at one of the following locations: (1) within the station's community of license; (2) at any location within the principal community contour of any AM, FM or TV broadcast station licensed to the station's community of license; or (3) within 25 miles from the reference coordinates of the center of its community of license. In adopting the main studio rule, the Commission stated that the station's main studio must have the capability to serve the needs and interests of the residents of the station's community of license.<sup>20</sup> To fulfill this function, a station, among other things, must maintain a meaningful presence at its main studio.<sup>21</sup> The Commission has defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel.<sup>22</sup> The licensee need not have the same staff person and manager at the studio, as long as there is management and staff presence there during normal business hours.<sup>23</sup> Although management personnel need not be "chained to their desks" during normal business hours, they must "report at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a home base."<sup>24</sup>

### 2. Discussion

10. In its petition for reconsideration of the *Forfeiture Order*, Evangelism argued that it satisfied the main studio requirement because of "the presence of the licensee's representative . . . and of the public file."<sup>25</sup> The *Bureau MO&O* rejected this argument.<sup>26</sup> Now Evangelism claims that it "substantially complied" with the main studio requirements and that the Bureau rejected Evangelism's arguments "in cursory fashion without adequate analysis to support its conclusion."<sup>27</sup> We concur with the Bureau's finding that the minimal presence of KBRN's unpaid volunteer in the community did not satisfy the requirement for a meaningful presence at the main studio.<sup>28</sup> The unpaid volunteer was not present at

<sup>18</sup> *Main Studio and Program Origination Rules*, Report and Order, 2 FCC Rcd 3215, 3215 (1987), *clarified*, 3 FCC Rcd 5024, 5026 (1988).

<sup>19</sup> *Main Studio Rule and Public Inspection Files*, Report and Order, 13 FCC Rcd at 15692.

<sup>20</sup> *Id.* at 15693; *see also Main Studio and Program Origination Rules*, 2 FCC Rcd at 3217-3218.

<sup>21</sup> *Main Studio and Program Origination Rules*, 2 FCC Rcd at 3217-3218.

<sup>22</sup> *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615, 3616 (1991), *clarified*, Memorandum Opinion and Order, 7 FCC Rcd 6800 (1992) ("*Jones Eastern*").

<sup>23</sup> *Id.*, 6 FCC Rcd at 3616 n.2; 7 FCC Rcd at 6800 n.4.

<sup>24</sup> *Jones Eastern*, 7 FCC Rcd at 6802.

<sup>25</sup> Petition for Reconsideration at 5.

<sup>26</sup> *Bureau MO&O*, 21 FCC Rcd at 9534.

<sup>27</sup> Application for Review at 6-7.

<sup>28</sup> *See, e.g., Pilgrim Communications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 14314, 14315 (Enf. Bur. 2004) (main studio rule violation found where licensee failed to establish that there was a management level person employed at the station at the time of the inspection).

Evangelism's transmitter shed which serves as its main studio when the FCC agent initially attempted to inspect it, and came to the transmitter shed only after the agent contacted him.<sup>29</sup> Furthermore, Evangelism has presented no evidence indicating that the unpaid volunteer had a meaningful presence at the main studio during normal business hours, which would include reporting there on a daily basis, spending a substantial amount of time there and using it as a home base.<sup>30</sup> Since he was not present at the main studio, we need not address whether the unpaid volunteer was managerial personnel. We affirm, therefore, the Bureau's determination that Evangelism willfully and repeatedly violated Section 73.1125 of the Rules.

### C. History of Overall Compliance Argument

#### 1. Background

11. The *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules<sup>31</sup> permit downward adjustment of forfeitures on the basis of a minor violation, good faith or voluntary disclosure, history of overall compliance or inability pay as well as other factors within the discretion of the Commission and its staff.

#### 2. Discussion

12. Evangelism again claims that it has a history of overall compliance. The Bureau rejected this claim in the *Forfeiture Order* because, in addition to the violations involving KBRN, the Bureau noted a violation involving station KUOL(AM), San Marco, Texas, which is licensed to SM Radio, Inc. ("SM"), a company the Bureau found to be under the same ownership as Evangelism.<sup>32</sup> In its petition for reconsideration of the *Forfeiture Order*, Evangelism argued that SM's violation should not be considered in determining whether Evangelism has a history of overall compliance for the following reasons: Paulino Bernal, although the 100 percent owner of SM, did not own Evangelism; SM and Evangelism are distinct entities; SM's violation occurred nearly simultaneously with Evangelism's offenses and, therefore, was not a "prior offense"; and there has been no final determination in *SM Radio, Inc.*<sup>33</sup> The Bureau rejected these arguments and affirmed the Bureau's determination that Evangelism did not present a history of overall compliance. Specifically, the Bureau found that (1) the ownership report on file at the time of Evangelism's violations indicates that Paulino Bernal owned 100 percent of Evangelism; (2) SM and Evangelism were so closely related that it is appropriate to consider SM's violations in determining whether Evangelism has a history of overall compliance; (3) offenses need not be "prior" to be considered in determining whether there is a history of overall compliance; and (4) it can consider violations occurring in cases where there has been no final determination.<sup>34</sup>

13. Evangelism argues in its application for review that SM's violation should not be considered in determining whether Evangelism has a history of overall compliance.<sup>35</sup> Evangelism asserts that the ownership report on file at the time of Evangelism's violations, which stated that Paulino Bernal

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<sup>29</sup> See *NAL*, ¶¶ 3, 4.

<sup>30</sup> *Jones Eastern*, 7 FCC Rcd at 6802.

<sup>31</sup> 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II, Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment Criteria.

<sup>32</sup> See *SM Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24812(Enf. Bur. 2004) ("*SM Radio, Inc.*"); *application for review denied*, Order On Review, 23 FCC Rcd 2429 (2008).

<sup>33</sup> Petition for Reconsideration at 2-4.

<sup>34</sup> *Bureau MO&O*, 21 FCC Rcd at 9536.

<sup>35</sup> Application for review at 3-6.

owned 100 percent of Evangelism, was incorrect. Specifically, Evangelism states that, in fact, Paulino Bernal was a director of Evangelism but owned no stock in Evangelism, a non-stock corporation, and did not control it.<sup>36</sup> In view of this information, we find that Paulino Bernal was not the 100% owner of Paulino Bernal Evangelism.<sup>37</sup> We find accordingly that Evangelism has a history of overall compliance and that the forfeiture amount should be reduced to \$20,000 on this basis. In light of this determination, we need not consider Evangelism's other arguments for a reduction on the basis of a history of overall compliance.

14. We have considered the forfeiture amount and we have examined Evangelism's application for review pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act<sup>38</sup> and Section 1.80 of the Rules and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*<sup>39</sup> as well. As a result of our review, we find that cancellation of the monetary forfeiture is not appropriate but a reduction of the forfeiture amount to \$20,000 is warranted.

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115 of the Rules,<sup>40</sup> Evangelism's application for review of the Bureau's *Memorandum Opinion and Order* **IS GRANTED** to the extent that the forfeiture amount is reduced to \$20,000 and **IS DENIED** in all other respects.

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<sup>36</sup> Evangelism explained that the electronic form used for the 2003 ownership report required a percentage to be entered in the "Percent of interest held" field and that "an incorrect figure was inadvertently entered in that field." Application for Review at 4. We remind Evangelism that it is required to use due diligence in providing correct and non-misleading information to the Commission, including taking steps to determine the truthfulness of what is being submitted. See 47 C.F.R. §§ 73.1015 and 1.17. We caution Evangelism that a failure to submit truthful and accurate statements to the Commission pursuant to Section 73.1015 of the Rules, 47 C.F.R. § 73.1015, could lead to the imposition of a monetary forfeiture pursuant to 47 U.S.C. § 503(b), license revocation pursuant to 47 U.S.C. § 312 and/or criminal sanctions under 18 U.S.C. § 1001.

<sup>37</sup> In relying on factual information that the Bureau did not have an opportunity to consider, we note that Section 1.115(c) of the Rules, 47 § C.F.R. 1.115(c), provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." The accompanying Note specifies that, "[s]ubject to the requirements of Section 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration." However, we find good cause for a waiver in the circumstances of this case. In particular, it is clear from Evangelism's application for review that it was only after the *Bureau M&O* that Evangelism appreciated the potential relevance of pointing out the error in its 2003 ownership report. Given that the Bureau's *Forfeiture Order*, did not cite the 2003 ownership report in denying Evangelism's request for a reduction, we do not believe that dismissing this aspect of Evangelism's application for review on procedural grounds would serve the public interest. See *Pan-Am Sat Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 18495, 18598, n.11 (2004) (finding good cause to waive Section 1.115(c) where applicant could not have appreciated potential relevance of information until after Office of Managing Director's decision); *Lunenburg County Public Schools*, Order, 17 FCC Rcd 24179, 24184 (2001) (finding good cause to waive section 1.115(c) where the applicant could not have reasonably known the significance of addressing the issue at the time of the designated authority's decision); and *Mercury PCS II, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 9654, 9660 n.52 (2000) (public interest is a basis to waive Section 1.115(c)). In the future, however, we urge applicants to present new arguments to the Bureau in a petition for reconsideration in the first instance. We caution that similar situations may not rise to the level of good cause justifying waiver of our rules.

<sup>38</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>39</sup> Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>40</sup> 47 C.F.R. § 1.115.

16. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) 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). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Evangelism will also send electronic notification on the date said payment is made to Thomas.Fitz-Gibbon@fcc.gov.

17. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Evangelism’s counsel, Barry D. Wood, Esq., Wood, Maines & Brown, Chartered, 1827 Jefferson Place, N.W., Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary