

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

In the Matter of)	
)	File No. EB-03-DL-228
SM Radio, Inc.)	
Facility ID No. 60694)	NAL/Acct. No. 200432500002
)	
Licensee of KUOL(AM))	FRN: 0010045532
San Marcos, Texas)	

ORDER ON REVIEW

Adopted: February 6, 2008

Released: February 8, 2008

By the Commission:

I. INTRODUCTION

1. By this *Order on Review* (“*Order*”), we deny the Application for Review, filed by SM Radio, Inc. (“SM Radio”),¹ licensee of AM Radio Station KUOL, San Marcos, Texas, of an Enforcement Bureau (“Bureau”) *Memorandum Opinion and Order* (“*Bureau Order*”) released December 28, 2004.² In affirming its finding that SM Radio failed to maintain a main studio presence within its community of license, in willful and repeated violation of Section 73.1125 of the Commission’s Rules (“Rules”),³ the *Bureau Order* granted and denied in part SM Radio’s petition for reconsideration of a Bureau *Forfeiture Order*,⁴ and reduced the underlying forfeiture amount from \$7,000 to \$5,600. SM Radio has challenged the *Bureau Order*.

II. BACKGROUND

2. On October 28, 2003, an agent from the Commission’s Dallas, Texas Office (“Dallas Office”) attempted to inspect the main studio of Station KUOL. A building located at the station’s tower site appeared to be the station’s studio; however, the building was locked, unattended, and appeared to be abandoned. That same day, the agent spoke with SM Radio’s technical representative, who advised the agent that the building at the tower site was KUOL’s main studio. SM Radio’s technical representative informed the agent that the studio was staffed only by an unpaid station volunteer from a local church who was available to travel to the studio if requested.

3. On December 19, 2003, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to SM Radio in the amount of seven thousand dollars (\$7,000) for the apparent main studio violation.⁵ On April 5, 2004, believing incorrectly that SM Radio had not filed a response to the

¹ SM Radio’s Application for Review (filed on January 27, 2005) (“Application for Review”).

² *SM Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24812 (Enf. Bur. 2004) (“*Bureau Order*”).

³ 47 C.F.R. § 73.1125.

⁴ *SM Radio, Inc.*, Order of Forfeiture, 19 FCC Rcd 6155 (Enf. Bur. 2004) (“*Forfeiture Order*”).

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332500011 (Enf. Bur., Dallas Office, released December 19, 2003). The Bureau issued an erratum on January 9, 2004, amending the *NAL* to reflect that the

NAL, the Bureau issued a *Forfeiture Order* to SM Radio upholding the *NAL*. SM Radio filed a petition for reconsideration of the *Forfeiture Order*, in which it did not contest the violations; instead, SM Radio sought reconsideration of the decision, citing its inability to pay and its history of compliance with the Commission's Rules.

4. The *Bureau Order* upheld the violation of Section 73.1125 of the Rules and the forfeiture, but reduced the forfeiture amount from \$7,000 to \$5,600 on the basis of SM Radio's history of compliance. As noted below, however, the *Bureau Order* did not reduce the forfeiture for inability to pay, given that "there are several affiliated licensee entities whose gross revenues are also relevant to the issue of whether SM Radio can pay the proposed forfeiture because the entities share common ownership with SM Radio."⁶ Commission records at the time the *Bureau Order* was issued reflect that Paulino Bernal was the 100% owner of SM Radio. Commission records further reflect that Mr. Bernal was the 100% owner of other companies licensed to operate other radio stations, specifically, La Radio Cristiana Network, Inc., Paulino Bernal Evangelism, and Consolidated Radio, Inc.⁷

5. In its Application for Review, SM Radio contends that the Bureau's finding that a licensee must submit financial data from "affiliated entities" or "affiliated licensees" is not consistent with precedent.⁸ SM Radio asserts that the term "violation" in Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁹ is, by implication, limited to the holder of a Commission authorization and that Commission precedent has used the term "violation" as a synonym for "licensee."¹⁰ Because it was the licensee, SM Radio, and not any affiliated person or entity, that was found to have violated the main studio rule, SM Radio argues that only its financial condition may be considered in assessing its inability to pay claim. SM Radio argues that it is a novel proposition that all "affiliated entities" may be combined with the actual "violation," and that the Bureau exceeded its delegated authority in stating this proposition. SM Radio further argues that consideration of these other affiliated entities would be tantamount to piercing the corporate veil. SM Radio asserts that the Commission should not pierce the corporate veil in this case, particularly because the licensee is part of a religious ministry conducted by Mr. Bernal.¹¹

6. Finally, SM Radio contends that any requirement that its financial documentation include "donations to Pastor Bernal's ministry" would place an unconstitutional burden on the practice of

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NAL/Acct. No. is "200432500002." *Erratum*, NAL/Acct. No. 200432500002 (Enf. Bur., Dallas Office, released January 9, 2004).

⁶ *Bureau Order*, 19 FCC Rcd at 24813, ¶ 6 (noting specifically that Paulino Bernal was the 100% owner of SM Radio, Inc., Paulino Bernal Evangelism, La Radio Cristiana Network, Inc., and Consolidated Radio, Inc. as well as the individual licensee of several broadcast stations.).

⁷ Personally and through a network of companies, SM Radio's owner controls 19 commercial radio stations, including Station KUOL(AM). SM Radio is owned by Paulino Bernal, who also is the individual licensee for two AM and two FM radio stations in Texas. Mr. Bernal also the 100% owner of La Radio Cristiana Network, Inc., and Consolidated Radio, Inc., which control three AM and three FM radio stations in Texas. Through his company, Paulino Bernal Evangelism, Mr. Bernal and his family control eight additional Texas FM radio stations, as well as 26 noncommercial educational FM translator stations in various locations. *See* Ownership Report For Noncommercial Educational Broadcast Station (FCC Form 323-E) filed by Paulino Bernal Evangelism, April 1, 2005 (File No. BOA-20050401CMR).

⁸ Application for Review at 2.

⁹ 47 U.S.C. § 503(b).

¹⁰ Application for Review at 3.

¹¹ Application for Review at 7.

religion.¹² In this connection, SM Radio states that the programming on its station, and that of the other stations owned by Mr. Bernal, is primarily religious in nature, and that listeners' monetary donations "help defray the costs of station operation and expand the reach of the Bernal ministry."¹³

III. DISCUSSION

7. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹⁴ Section 1.80 of the Rules,¹⁵ and the Commission's *Forfeiture Policy Statement*.¹⁶ In examining SM Radio's Application for Review, Section 503(b) of the Act requires that we "take into account 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."¹⁷

8. As noted above, SM Radio does not deny that it violated Commission rules. Instead, it challenges the Bureau's need for financial information concerning its owner and affiliated companies in order to assess SM Radio's argument that the forfeiture should be reduced because of SM Radio's inability to pay. We conclude that the Bureau properly refused to reduce the forfeiture because the evidence suggests that SM Radio has not provided complete information on the totality of financial resources available to it. We also conclude that the status of SM Radio's owner as a religious broadcaster does not exempt him or his affiliated companies from providing complete information concerning all of the financial support he or his companies provide SM Radio in order to substantiate its inability to pay claim.

A. SM Radio Is Not Entitled To A Reduction Of The Forfeiture Based On Its Professed Inability To Pay

9. SM Radio argues that Section 503 of the Act and Commission rules and precedent limit consideration of a licensee's ability to pay to the revenues of that licensee. According to SM Radio, because it is the violator here, only its financial condition, and not that of its owner or affiliated entities, should be considered in assessing its ability to pay the forfeiture. SM Radio further argues that the forfeiture assessed in this case is excessive in light of SM Radio's revenues and should be reduced or remitted. For the reasons discussed below, we reject SM Radio's inability to pay claim.

10. In order to make a successful claim of inability to pay, a licensee must provide adequate supporting financial documentation.¹⁸ Contrary to SM Radio's claims, we have consistently interpreted Section 503 and our rules as requiring consideration of all financial sources available to that licensee, not just the revenue of that specific licensee. As we stated recently:

¹² *Id.*

¹³ *Id.*

¹⁴ 47 U.S.C. § 503(b).

¹⁵ 47 C.F.R. § 1.80.

¹⁶ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

¹⁷ 47 U.S.C. § 503(b)(2)(E).

¹⁸ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 ¶ 8 (1992) ("*PJB Communications*"); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07 ¶ 43.

[W]hen a violator asserts an inability to pay a forfeiture amount relative to its financial situation, the Commission has the authority to look at the totality of the violator's particular financial circumstances in evaluating that claim. In that regard, the Commission has looked to *potential sources of income available to a violator* when considering a violator's ability to pay a forfeiture.¹⁹

Thus, if a licensee argues an inability to pay, it must provide evidence that it cannot pay the forfeiture as assessed, despite all of the financial resources available to it. Consequently, in assessing a violator's ability to pay, the Commission has reviewed not only the financial condition of the individual station at issue or the portion of its operations relevant to the underlying violation, but also in appropriate circumstances the revenues of affiliated operations of that licensee²⁰ and even parent companies.²¹

11. In support of its inability to pay claim, SM Radio provided a statement from its accountants showing the licensee's revenues and expenses at the time of the violation.²² SM Radio has indicated, however, that it has received significant financial support from outside entities. For example, SM Radio has admitted that its "programmer" defrays the station's operating expenses, such as electric power.²³ Moreover, in describing how it planned to come into compliance with our main studio rule, SM Radio stated it renovated Station KUOL's main studio and secured the services of two additional individuals to staff the studio (one of whom will reside at the studio).²⁴ These expenses are not reflected in the financial information provided by SM Radio, nor has SM Radio identified the sources of funding for these expenses and remedial actions. Nevertheless, SM Radio has refused to provide financial

¹⁹ *Radio X Broadcasting Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 12209, 12216 (2006) ("*Radio X*") (emphasis added); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17158 ¶ 113 ("As for forfeitures that a licensee believes it cannot afford to pay relative to its financial situation, we must look to the totality of the circumstances surrounding the individual case.")

²⁰ *KASA Radio Hogar*, Memorandum Opinion and Order, 17 FCC Rcd 6256, 6258 (2002) ("[I]t is the Commission's general policy to consider the financial condition of a licensee's consolidated operations, not just the financial condition of an individual station or a limited portion of its operations."); *Emery Telephone*, Memorandum Opinion and Order, 13 FCC Rcd 23854, 23859-60 ¶ 13 (1998), *recon. denied*, 15 FCC Rcd 7181 (1999) ("income from other affiliated operations, as well as the financial status of the station(s) in question, can be taken into account" in evaluating an inability to pay claim); *Hinton Telephone Co.*, Memorandum Opinion and Order, 7 FCC Rcd 6643, 6644 (CCB 1992), *review denied*, 8 FCC Rcd 5176 ("We find reviewing the data for consolidated operations rather than financial data for Station WQZ687 more accurately portrays whether a licensee can pay a proposed forfeiture. Our determination of a licensee's ability to pay should reflect whether the licensee in general is financially capable of paying a forfeiture, not whether financial data from a limited portion of its operations can sustain a forfeiture.")

²¹ *Radio X*, 21 FCC Rcd at 12217 (parent company financial statements relevant to evaluate inability to pay reduction request by parent's subsidiary company); *Forfeiture Policy Statement*, 12 FCC Rcd at 17158 ¶ 113 ("[t]he parent company's ability to pay, therefore, is relevant in evaluating the subsidiary company's ability to pay the forfeiture"); *Alpha Broadcasting Corporation*, Memorandum Opinion and Order, 102 FCC 2d 18 ¶ 6 (1984) ("In assessing the solvency of a broadcast licensee for purposes of reducing a forfeiture, the Commission will examine the finances of the parent corporation as well as its subsidiary to determine how the forfeiture will affect the entire corporate financial position.")

²² Petition for Reconsideration at Attachment B. SM Radio has requested confidential treatment of its revenue information; therefore, we do not discuss the specific amounts here. *Id.* at 2-5.

²³ See Petition for Reconsideration at 5, n. See also *id.* at 5 (describing its programmer as "the religious organization that provides the bulk of the programming aired on KUOL"). But see Application for Review at 7 (suggesting the "programmer" is the station owner).

²⁴ See Supplement to Petition for Reconsideration, Declaration of Paulino Bernal. In addition, Commission records indicate that one of the affiliated licensees, La Radio Cristiana Network, Inc., has paid SM Radio's ownership fees. See, e.g., KUOL-AM Station File, Facility ID# 60694, FCC Reference Information Center.

information that would give a complete picture of the resources available to it, instead basing its inability to pay claim solely on SM Radio's financial statements.²⁵

12. SM Radio's position is squarely contradicted by our precedent. In *Radio X*, for example, the licensee cited its limited revenues in support of its inability to pay claim, yet its financial statements indicated that the licensee had received substantial financial support from its parent company. Specifically, Radio X submitted financial statements indicating that its parent company made "all payments" on the licensee's behalf over a two-year period, and was obligated on debt incurred to finance Radio X's operations.²⁶ Notwithstanding the relevance of this information, Radio X refused to submit its parent company's financial documents, arguing that the Commission should examine only the violating licensee's finances. We rejected Radio X's claim, concluding that "we cannot fully evaluate Radio X's ability to pay the forfeiture, including all its potential sources of income, without evaluating the financial condition of its parent company."²⁷

13. Another case contradicting SM Radio's position is *A-O Broadcasting Corporation*,²⁸ in which the licensee claimed limited or no revenues in support of its inability to pay argument, yet a number of circumstances indicated that the licensee had access to additional financial resources. Specifically, despite A-O Broadcasting's claimed inability to pay the forfeiture, the licensee had the financial resources to construct and operate the previously silent station from a new location.²⁹ In taking official notice of financial information provided in another proceeding, we noted that A-O Broadcasting's financial statements indicated that its operations and capital investments were funded primarily by loans from its shareholder and by a foundation whose president was also the owner and president of the licensee. Citing these apparent resources, we rejected A-O Broadcasting's inability to pay claim, concluding that the licensee had failed to "prove that it does not have access to the resources necessary to pay the forfeiture."³⁰

14. Like the licensees in *Radio X* and *A-O Broadcasting*, SM Radio clearly has financial resources beyond those described in its financial statements, yet has failed to provide information about those resources. By SM Radio's own admission, its programmer pays its operating expenses, and its owner or affiliated companies appear to have paid its ownership fees, for renovation of its main studio, and for the hiring of new employees.³¹ As noted in *A-O Broadcasting*, the licensee has the burden of proving that it lacks the financial means to pay a Commission forfeiture. Because SM Radio has not provided financial data concerning all "potential sources of income available to" it, we conclude that the record is insufficient to substantiate SM Radio's inability to pay claim and we therefore affirm the Bureau's order rejecting it.³²

15. With respect to SM Radio's argument that consideration of the revenues of its affiliated entities would be tantamount to piercing the corporate veil, we note that we do not have sufficient

²⁵ Application for Review at 3.

²⁶ *Radio X*, 21 FCC Rcd at 12217, ¶19.

²⁷ *Id.*

²⁸ *A-O Broadcasting Corporation*, Memorandum Opinion and Order, 20 FCC Rcd 756, 761-762 (2005) ("*A-O Broadcasting*").

²⁹ *Id.*, 20 FCC Rcd at 758, 761.

³⁰ *Id.*, 20 FCC Rcd at 762, ¶18.

³¹ See paragraph 11 and note 24 *supra*.

³² In light of our decision here, SM Radio's argument that the Bureau lacked delegated authority is moot.

information at this time to determine whether the corporate veil should be pierced,³³ nor do we seek to do so.³⁴ Rather, our only objective is to evaluate SM Radio's inability to pay claim by looking at all of its financial resources, consistent with precedent and policy.³⁵

B. SM Radio's Gross Revenues Are Appropriately Considered In Assessing Its Inability To Pay

16. SM Radio further argues that the Commission may not seek information about its owner and affiliated companies because those revenues are primarily religious in nature. The Commission typically has relied upon a licensee's documented gross revenue in gauging its ability to pay a forfeiture.³⁶ In reviewing a licensee's financial documentation, the Commission does not consider nor distinguish the sources of a licensee's income.³⁷ Additionally, the Commission does not consider the status of the broadcaster or the nature of the programming.³⁸ In this connection, the Commission has stated that "a religious group, like any other, may buy and operate a licensed radio or television station.... But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'"³⁹ Accordingly, SM Radio, by conducting its ministry through use of a radio license, "has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums" and is subject to the Commission's requirements and policies.⁴⁰ We conclude that SM Radio's status as a religious broadcaster does not shelter it from its obligations to operate in accordance with its responsibilities as a Commission licensee, nor exempt certain sources of income from consideration in gauging its ability to pay.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Section 1.115 of the Rules,⁴¹ SM Radio, Inc.'s Application for Review of the *Memorandum Opinion and Order* IS DENIED and the Enforcement Bureau's *Memorandum Opinion and Order* IS AFFIRMED for the reasons set forth herein.

³³ See *Publix Network Corporation et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, 11504-05 (2002), *consent decree ordered*, 20 FCC Rcd 5857 (2005).

³⁴ See *A-O Broadcasting*, 20 FCC Rcd at 756 n. 23 (noting that a violator's whole financial picture is needed to fully assess its inability to pay claim, and is not an attempt to pierce the corporate veil).

³⁵ *Id.*

³⁶ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07; see also *KASA Radio*, 17 FCC Rcd at 6257; *PJB Communications*, 7 FCC Rcd at 2089.

³⁷ Licensees that wish to claim reduction in forfeiture for inability to pay are instructed to provide: (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 petitioner'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.

³⁸ See, e.g., *Rev. Yvon Louis*, Forfeiture Order, 18 FCC Rcd. 16187 (Enf. Bur. 2003), *recon. denied*, 19 FCC Rcd. 17699 (Enf. Bur. 2004).

³⁹ *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974) (citing *Office of Communication of the United Church of Christ*, 359 F.2d 994, 1003 (D.C. Cir. 1966)).

⁴⁰ *Faith Center, Inc.*, Memorandum Opinion and Order, 82 FCC 2d 1, ¶ 44 (1980).

⁴¹ 47 C.F.R. § 1.115.

18. IT IS FURTHER ORDERED that a copy of this *Order on Review* shall be sent by First Class and Certified Mail Return Receipt Requested to SM Radio, Inc., P.O. Box 252, McAllen, Texas, 78502, and to its counsel, Barry D. Wood, Esq., Wood, Maines & Brown, Chartered, 1827 Jefferson Place, N.W., Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary