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

In the Matter of:	)	
	)	Facility ID No. 35091
KM LPTV of Milwaukee, LLC	)	NAL/Acct. No.: 201341420066
Licensee of Station WMKE-CA	)	FRN: 0005014725
Milwaukee, Wisconsin	)	
	)	

To: Office of the Secretary
Attention: The Commission

PETITION FOR RECONSIDERATION

KM LPTV of Milwaukee, LLC ("KM") seeks reconsideration of the Commission's October 20, 2014 Memorandum Opinion and Order ("MO&O"), FCC 14-168. In support, KM respectfully submits the following:

The MO&O dismissed in part and otherwise denied KM's June 25, 2014 Application for Review ("AFR"). The predicate was the denial by the Media Bureau of reconsideration of a forfeiture order relating to violations of Sections 73.3526(e)(11)(i)&(iii) of the Commission's rules for failure to file issues/programs lists and Children's Television Programming Reports and of Section 73.3514(a) of the Rules for failure to report some of those violations in its license renewal application for the Station. The Bureau also rejected KM's request that the forfeiture amount should be decreased due to KM's inability to pay.

KM in its Application for Review raised three (3) issues:

(1) The Bureau should not have combined its revenues with those of KM of Chicago-13, LLC in its analysis of its inability to pay contention;

(2) The Bureau did not provide a reasoned basis for its use of gross revenues as the primary means by which to evaluate KM's inability to pay the forfeiture; and

(3) That the Bureau did not provide a reasoned explanation for denying a reduction in the forfeiture amount based on KM's documented inability to pay.

The Commission, in footnote 3, states:

> "Because KM of Milwaukee failed to raise this contention before the Bureau, depriving the Bureau of the opportunity to pass on the argument, it may not introduce it here. Accordingly, to the extent that it contains this argument, we dismiss the AFR. *See* 47 C.F.R. § 1.115(g)."

At the outset, it is submitted that the dismissal pursuant to § 1.115(g) is the type of argument made when the Commission does not have a substantive answer. Furthermore, it is odd that the Commission would not at least attempt to address the issue on the merits. In the event of a judicial appeal, there would be a *trial de novo* and the Commission could then not avail itself of the argument that it did not have the opportunity to address the issue.

With respect to the other issues raised, the Commission merely states that they were properly decided by the Bureau. KM disagrees.

DISCUSSION

The Division does not justify combining the revenues of two separate and independent limited liability companies in determining each company's ability to pay a separate forfeiture issued to it.[1] The cases cited by the Division are inapposite. They deal with the general proposition that is reasonable to look at the totality of the circumstances and that subsidiary and

[1] KM LPTV of Chicago – 13, LLC and KM LPTV of Milwaukee, LLC.

parent company's financial information are both relevant to the Commission's evaluation of a subsidiary's inability to pay claim. The Division, however, fails to acknowledge that this case does not concern parent and subsidiary companies. The two entities are separate and independent.

The Division does not have unlimited discretion in looking at potential sources of funds. The Division cannot unreasonably pick and choose who will be selected to pay based on who has the most resources. As previously stated, neither of the companies in question are either a parent or a subsidiary of the other. The companies have different FRN's and should be treated as separate entities.

The Commission has stated that gross revenues are the best indication of a licensee's ability to pay a forfeiture, see *Eg. Local Long Distance, Inc.*, 15 FCC Rcd 24385 (2000); *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992); *Matoon Broadcasting Company*, DA 14-377 (Enf. Bur. March, 20 2014); *Bruno Goodworth Network, Inc.*, 28 FCC Rcd 10230 (Vid. Div. 2013); *Michael W. Perry*, 27 FCC Rcd 2281, 2284 (Enf. Bur. 2012); *Whisler Fleurinor*, 26 FCC Rcd. 14437 (Enf. Bur. 2011); *Agape Church, Inc.*, 22 FCC Rcd. 3732,3734 (Vid. Div. 2010); *Hoosier Broadcasting Corporation*, 13 FCC Rcd. 8640, 8641 (Enf. Bur. 2002). However, the Commission has never explained why gross revenues should be considered the primary measuring stick in assessing a licensee's ability to pay its forfeiture.

The Division has failed to provide a reasoned basis for its decision to rely on gross revenues, just as a Commission has never articulated a reasoned basis for its undue reliance on gross revenues when assessing the amount of a forfeiture. The Division is required to examine relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choices made." [2] Here, the Division (and the Commission and other FCC offices issuing forfeitures) barely articulate, much less explain the basis for their conclusion to rely on "gross revenues as the best indication of an ability to pay a forfeiture." [3]

The Division is very economical in its explanation for refusing to reduce the forfeiture of KM Milwaukee. All it states is that it has combined the revenues of the two companies and that previous cases assessed forfeitures which were not deemed excessive based on a percentage of gross revenues. Explaining its conclusion in the most cursory fashion hardly constitutes reasoned decision-making. In this case, the Division's explanation has crossed the line from "the tolerably terse to the intolerably mute."[4] The perfunctory character of the Division's decision clearly demonstrates that it does not measure up to the minimum standards of decision-making.

In fact, the Division has failed to identify any reasoning in support of its conclusion. KM is entitled to a fuller explanation before being commanded to pay $20,000. The Division must be prepared to explain and justify its policy of relying on "gross revenues," especially since no justification has been previously articulated. The Commission "must respond to challenges and be ready to consider "the underlying validity of [its] policy itself.""[5] The FCC must always stand ready "to hear new argument" and "to reexamine the basic propositions" undergirding a policy.[6]

Moreover, a review of earlier cases considering claims of inability to pay a forfeiture shows that the policy cited by the Division has not always been the regulatory course followed

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[2] *United Video v. FCC*, 890 F.2d 1173 (DC Cir. 1989), *quoting Motor Vehicle Manufacturer's Association v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).
[3] *L. Stanley Wall*, 29 FCC Rcd 125 (Enf. Bur. 2014).
[4] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (DC Cir. 1970), cert. denied, 403 U.S. 923 (1971).
[5] *Betchel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), *quoting Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 39 (D.C. Cir. 1974).
[6] *Id. quoting McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1998).

by the Commission. In *Universal Broadcasting Co. of Minneapolis-St. Paul, Inc.*[7], the Commission, in reducing the amount of a forfeiture, considered the station's entire financial condition, prominently, its net income and payments to principals. Historically, the Commission has given heavy consideration to net income after subtracting payments to principals and depreciation and amortization.[8] As part of its financial showing, in *WMAX, Inc.*,[9] the licensee had to furnish a profit and loss statement including income from broadcast operations, expenses and payments to principals. In *Group Six Communications, Inc.*,[10] the licensee claiming financial inability to pay its forfeiture had to provide documentation, including a profit and loss statement including income from broadcast operations, expenses from broadcast operations (including non-cash expenses, such as amortization and depreciation costs) and payments to principals.

Moreover, not only has the Division failed to engage in reasoned decision-making in applying the "gross revenues" policy to determine the amount of the forfeiture which it has assessed, that policy, as applied in practice, is arbitrary and capricious. The Division and the Commission, in most forfeitures, cite to a few prior decisions where a forfeiture was assessed as a percentage of the licensee's gross revenues and was not deemed excessive. in *PJB Communications of Virginia, Inc.*, a forfeiture was not deemed excessive where it represented approximately 2.02% of the violator's gross revenues. In *Hoosier Broadcasting Corp.*, a forfeiture was not deemed excessive where it represented approximately 7.7% of the violator's

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[7] 36 RR2d 1551 (1976).
[8] *See Farr Communications, Inc.* 12 FCC Rcd 10733 (1997); *Southern California Broadcasting Co.*, 7 FCC Rcd 3454 (1992) (in assessing financial hardship argument, the Commission reviews documentation consisting of statement of income minus payments to principals plus the company's net as well as gross revenues); *Group Six Communications, Inc.* 7 FCC Rcd 1815 (1992) (licensee's submission of documentation supporting claim of financial hardship is inadequate because licensee did not include payments to principals and the amount of depreciation shown on its statement of income showed funds were not available to cover the forfeiture).
[9] 10 FCC Rcd 9399 (1995).
[10] 8 FCC Rcd 3111 (1993).

gross revenues. In *Local Long Distance, Inc.*, a forfeiture was not deemed excessive where it represented approximately 7.9% of the violator's gross revenues. In *Afton Communications Corp.*,[11] a forfeiture was not deemed excessive when it represented approximately 3.9% of gross revenue.

While the Commission cites these cases as if they are all consistent, how can an FCC decision concluding that a forfeiture of almost 8% of revenues is reasonable be considered fair when it is compared to another Commission case, where a forfeiture representing 2% of revenues has been assessed, a percentage only one-quarter as much as is in the first decision? This policy only need be applied hypothetically to show how arbitrary it is in practice.

In *Michael W. Perry*,[12] the Enforcement Bureau reduced a forfeiture from $10,000 to $450 while citing *PJB Communications*, *Hoosier Broadcasting* and *Local Long Distance* in support of its action. The Bureau did not state what the licensee's gross income was nor what percentage of gross revenues it used in assessing the amount of the forfeiture. However, if the Bureau used *Local Long Distance* as the basis for its assessment of the $450 forfeiture, then the gross revenues of the licensee would have been approximately $5,625. On the other hand, if the Bureau used *PJB Communications of Virginia* as the basis for the assessed forfeiture, then the licensee's gross revenues would have been approximately $2,250. These number do not compute. If forfeitures of such disparity as $2,250 and $5,625 can both be considered "not excessive," then that term does not mean very much.

[11] 7 FCC Rcd 6741 (Com. Car Bur. 1992).
[12] 27 FCC Rcd 2281 (Enf. Bur. 2012).

It is as if the Commission independently judges what amount it will assess and then puts its finger into the wind to determine whether the amount of the forfeiture seems excessive. This is not an example of reasoned decision-making. Rather, it is arbitrary and capricious.

The Video Division's reliance on gross revenues on the definitive determining tactics is inconsistent with the Commision's methodology utilized by the Division in ruling on failing station waivers. There the Division looks at cash flow. See *Colins Broadcasting Corporation*, 28 FCC Rcd 01282 (2013); *Venture Technologies Group*, LLC, 28 FCC Rcd 07992 (2013); *Hispanic Keys Broadcasting, Inc.*, 19 FCC Rcd 4603 (2004); *Counterpoint Communications*, Inc., 16 FCC Rcd 15044 (2001); and *Shareholders of Tribune Co. and Sam Zell,* 22 FCC Rcd 21266 (2007). It is impossible to reconcile these two (2) separate approaches.

The Division may cling to its desire to use "gross revenues" as determinative of whether a forfeiture is just. However, on the ground, KM, as a licensee, must operate its station every day. Since the Division does not consider net income or losses a relevant determinant when assessing the amount of a forfeiture, a serious question may be asked as to what expenses are the Division asking KM to cut in order to pay a $20,000 forfeiture to the Commission. KM already does not pay anything to its principals. Should its station cease paying its employees, fail to pay for tower space or broadcast 24 hours of repetitive programming because it cannot afford to acquire new programming? While the Commission would have KM steal from another company to pay its obligation, that is clearly not a suitable answer.

In view of the foregoing, the Division's determination should be overruled and the forfeiture cancelled or significantly reduced.

Respectfully submitted,

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