

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

In re Application of)	
)	
Joule Broadcasting, LLC,)	NAL/Acct. No. MB-201641410021
)	FRN: 0022965420
For Renewal of License for)	Facility ID No. 69835
Station WXJY(FM))	File No. BRH-20110801APN
Georgetown, South Carolina)	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: December 20, 2016

Released: December 20, 2016

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it the application (Application), as amended,¹ of Joule Broadcasting, LLC, (Licensee)² for renewal of license for WXJY(FM), Georgetown, South Carolina (Station).³ In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL)*,⁴ we find that Licensee apparently willfully and repeatedly violated Section 73.3526 of the FCC's rules⁵ by failing to retain all required documentation in the WXJY(FM) public inspection file. Based upon our review of the record before us, we conclude that Licensee is apparently liable for a monetary forfeiture in the amount of twelve thousand dollars (\$12,000). Additionally, we grant the captioned application.

II. BACKGROUND

2. Section 73.3526 of the FCC's rules requires a commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. The purpose

¹ The Application was amended on November 22, 2011, May 28, 2014, and August 18, 2014.

² On September 14, 2011, Lead Application File No. BALH-20110331AJP, the Commission approved an assignment of license from Cumulus Licensing, LLC, the previous licensee, to Volt Radio, LLC as Trustee, in which Volt agreed to "stand in the shoes" of Cumulus *vis-à-vis* pending license renewal applications. *See Existing Shareholders of Cumulus Media, Inc. (Transferors)*, Memorandum Opinion and Order, 26 FCC Rcd 12956, 12959, para. 5 (MB 2011). Volt principal Scott N. Knoblauch subsequently transferred control of Volt to Edward N. Esserman, who changed the trustee's name to Joule. *See* Lead Application No. BTC-20130524AFP, granted on August 20, 2013.

³ The Bureau also has before it the application to assign the licenses of the Station and Station WJXY-FM, Conway, South Carolina, to Colonial Radio Group, Inc. (File Nos. BALH-20160919AAU, BALH-20160919AAV) (Assignment Application).

⁴ This *NAL* is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (Act), and Section 1.80 of the FCC's rules (Rules). *See* 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the FCC's rules. *See* 47 CFR § 0.283.

⁵ *See* 47 CFR § 73.3526.

of this requirement is to provide the public with timely information about the station at regular intervals throughout the license period.⁶ Among the materials required for inclusion in the file are the station's quarterly issues/programs lists, which must be retained until final Commission action on the station's next license renewal application.⁷

3. Section III, Item 3 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 has been placed in the station's public inspection file at the appropriate times. Licensee answered "No" to that certification and attached an Exhibit explaining, in pertinent part:

The Licensee has determined that for certain quarters of the license term the issues/programs lists for Station WXJY were not placed in the public file at the required time. For most of the license term beginning in late 2004 and continuing through 2Q2010 WXJY carried identical programming to that broadcast on two other stations owned by the same licensee in the same market WHSC(AM) and WJXY-FM, both of Conway, SC. As a result of the trimulcast, the issues/programs reports for all three stations are identical and should have been placed in all three files when they were prepared.

However, copies of eight reports from 2004-2009 were not placed in the WXJY file at the required time. This oversight has been corrected. In addition, seven reports from 2008 – 2010 could not be located These reports have been recreated and the WXJY file is complete from 2008 to the present with regard to issues/programs lists.

The Licensee is unable to locate reports for 10 quarters in 2004 – 2007. Unfortunately, due to numerous personnel changes . . . there is no one employed currently at the station . . . who has knowledge of the reports for the early years of the term – prior to 2008. . . . Therefore, the Licensee cannot recreate the 10 missing reports from this early period in the license term.⁸

In a November 2011, amendment, Licensee further detailed the Station's public file deficiencies:

Lists for 3rd Quarter 2004 – 3rd Quarter 2010 (a total of 25 lists) were missing. The lists were determined to be missing on June 7, 2011, during an audit of the public file. Fifteen (15) lists were [later] found or recreated and placed in the public file on July 28, 2011.⁹

Additionally, on May 19, 2014, the Station participated in the South Carolina Broadcasters Association's Alternative Broadcast Inspection Program and received a "Certificate of Compliance."¹⁰

III. DISCUSSION

4. *Proposed Forfeiture.* As Licensee has acknowledged, at the time of the filing of the Station's license renewal application, and during periods within the license term, the Station's public inspection file did not contain many of the items required to be retained in the file by Section 73.3526 of

⁶ Cf. *Letter to Kathleen N. Benfield*, 13 FCC Rcd 4102 (MMB 1997), citing *License Renewal Applications of Certain Commercial Radio Stations*, Memorandum Opinion and Order, 8 FCC Rcd 6400 (MMB 1993).

⁷ See 47 CFR § 73.3526(e)(12).

⁸ Exhibit 12, Application, as originally filed on August 1, 2011.

⁹ Exhibit 1, Application, as amended on November 22, 2011.

¹⁰ Application, as amended on May 28, 2014 and August 18, 2014, Attachment 1.

the Rules. In this regard, where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.¹¹

5. Under Section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹² Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."¹⁶

6. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$10,000 for violation of the public file rule.¹⁷ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "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."¹⁸

7. In this case, although Licensee has admitted to violating Section 73.3526, it did so only in the context of the question contained in its license renewal application that compelled such disclosure. Moreover, the violations were extensive, occurring over nearly the entire license term – from 2004-2010 – and involving at least 25 issues/programs lists. Additionally, Licensee has admitted that the Station's public file is still deficient as it was unable to re-create many of the missing issues/programs lists. Considering the record as a whole, we believe that a \$12,000 forfeiture is appropriate for the Section 73.3526 violations in this case.¹⁹

8. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.²⁰ That Section provides that if, upon

¹¹ See *Padre Serra Commc'ns, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999).

¹² 47 U.S.C. § 503(b)(1)(B). See also 47 CFR 1.80(a)(1).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁵ See *Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991).

¹⁶ 47 U.S.C. § 312(f)(2).

¹⁷ 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 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁸ 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).

¹⁹ See, e.g., *Icicle Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 29 FCC Rcd 2123 (MB 2014) (\$12,000 forfeiture proposed for violation of Section 73.3526 occurring over seven years and involving 24 missing issues/programs lists) (*Icicle*).

²⁰ 47 U.S.C. § 309(k).

consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.²¹ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”²²

9. It is clear to us that Licensee’s conduct has fallen far short of the standard of compliance with the Act and the FCC’s rules that would warrant a routine license renewal. Licensee apparently failed to timely prepare and file 25 issues/programs lists for most of the license period. The issues/programs lists are a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community.²³ The Commission’s public information file rule also safeguards the public’s ability to assess the station’s service and to meaningfully participate in the station’s renewal process, and ensure the station’s accessibility to and nexus with its community, to serve and respond to community programming needs.²⁴ As such, the public information requirements are integral components of a licensee’s obligation to serve the public interest and meet its community service obligations.

10. We believe that Licensee’s apparent violations of Section 73.3526 were serious violations,²⁵ as it denied both the public and the Commission any opportunity to review and comment on the Station’s programming during the past license term. The record here further indicates that Licensee’s willful and repeated violations of Sections 73.3526 at the Station, when considered together, constitutes a pattern of abuse over a period of years by Licensee.²⁶ However, although we are concerned with Licensee’s failure to create and retain quarterly issues/programs lists, we find that Licensee’s violations of the FCC’s rules do not rise to such a level that designation for evidentiary hearing on the issue of whether to deny renewal for the Station is warranted.²⁷

11. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant the Station license renewal below²⁸ conditioned upon the prompt consummation of the Assignment Application and notification to the Commission of such consummation within one day thereof.²⁹ On the facts presented

²¹ 47 U.S.C. § 309(k)(1).

²² 47 U.S.C. §§ 309(k)(2), 309(k)(3).

²³ See *Formulation of Policies and Rules to Broadcast Renewal Applicants*, Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363, 6365, para. 17 (1989).

²⁴ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17104-05, para.39.

²⁵ See 47 U.S.C. § 309(k)(1)(b).

²⁶ See 47 U.S.C. § 309(k)(1)(c).

²⁷ We do not find that Licensee’s operation of the Station “was conducted in an exceedingly careless, inept and negligent manner and that Licensee is either incapable of correcting or unwilling to correct the operating deficiencies.” *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198, para. 6 (1971). Nor do we find on the record here that “the number, nature and extent” of the violations indicate that “the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission’s Rules.” *Id.* at 200, para. 10. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educ. Broad. Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

²⁸ We note that with the consummation of the associated assignment application for the Station, all stations initially placed in the Volt Radio LLC divestiture trust will have been sold. See *supra* n.2.

²⁹ See 47 U.S.C. § 309(k)(2).

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of 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 ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent'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.

17. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³¹

18. IT IS FURTHER ORDERED, that the Application (File No. BRH-20110801APN) for renewal of license for Station WXJY(FM), Georgetown, South Carolina, IS GRANTED, subject to the following conditions:

That the assignment of license covered by BALH-20160919AAU will be consummated within ninety (90) days of the date of grant, and that the Commission will be notified of such consummation within one (1) day thereafter.

Failure to consummate will render the grant null and void and will cause the license renewal application to revert to pending status.

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Edward N. Esserman, Sole Member, Joule Broadcasting, LLC, 205 Marina Drive, St. Simons Island, GA 31522 and to its counsel, Joseph C. Chautin, III, Hardy, Carey, Chautin & Balkin, LLP, 1080 West Causeway Approach, Mandeville, LA 70471.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

³¹ See 47 CFR § 1.1914.

here, the new license term ordinarily would be limited to a period of four years,³⁰ as such a limited renewal period would afford the Commission an opportunity to review the Station's compliance with the Act and the FCC's rules and to take whatever corrective actions, if any, that may be warranted at that time. However, given that the Station's next license renewal application is due on August 1, 2019, a four-year short-term renewal would serve no purpose here.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Joule Broadcasting, LLC, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of twelve thousand dollars (\$12,000) for its apparent willful and repeated violation of Section 73.3526 of the FCC's Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the FCC's Rules, that, within thirty (30) days of the release date of this NAL, Joule Broadcasting, LLC, SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the proposed forfeiture must be made by check or similar instrument, wire transfer or credit card, and must include the NAL/Acct. No. and FRN No. referenced herein. Regardless of the form of payment, a completed FCC Form 159 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). Licensee will also send electronic notification on the date said payment is made to Karen Workeman at Karen.Workeman@fcc.gov and to Kim Varner at Kim.Varner@fcc.gov. Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

³⁰ See, e.g., *Icicle*, 29 FCC Rcd at 2126, para. 11 (MB 2014) (four-year renewal proposed for violation of Section 73.3526 occurring over seven years and involving 24 missing issues/programs lists).