

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

In the Matter of )
) Facility ID No. 63606
SUDBURY SERVICES, INC. )
) NAL/Acct. No. MB20041810100
) File No. BR-20040130BSK
Licensee of Station KLCN(AM) )
) FRN: 0005941430
Blytheville, Arkansas )
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 2011

Released: February 17, 2011

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Audio Division has before it a Petition for Reconsideration ("Petition") filed on August 14, 2008, by Sudbury Services, Inc. ("Sudbury"), licensee of Station KLCN(AM), Blytheville, Arkansas ("Station"). The Petition asks for reconsideration of a July 25, 2008, decision to issue a monetary forfeiture ("Forfeiture Order")<sup>1</sup> in the amount of nine thousand dollars (\$9,000) for its willful and repeated violation of Section 73.3526 of the Commission's Rules ("Rules")<sup>2</sup> by failing to properly maintain a public file for the Station. For the reasons discussed below, we deny the Petition.

II. BACKGROUND

2. On January 30, 2004, Sudbury filed an application to renew the license of the Station. 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 or 73.3527 of the Rules, as applicable, has been placed in the station's public inspection file at the appropriate times. Sudbury indicated "No" to that certification, filing an amended Exhibit explaining that the following issues/programs lists were not in the Station's public files: in 1999, the first and third quarters; in 2000, the first three quarters; in 2001, quarters two and four; in 2002, quarters two and four; and in 2003, the first and second quarters. On December 10, 2004, the staff advised Sudbury of its apparent liability ("NAL")<sup>3</sup> for a forfeiture of \$9,000 for willfully and repeatedly violating Section 73.3526 of the Rules, based on the fact that, by its admission, eleven issues/programs lists were missing from the Stations' public inspection files between 1999 and 2003. In response, Sudbury filed a request for cancellation of the proposed forfeiture ("Request") on January 7, 2005. The Commission rejected the Request in the Forfeiture Order. Sudbury then filed the subject Petition.

<sup>1</sup> Sudbury Services, Inc., Forfeiture Order, 23 FCC Rcd 11232 (MB 2008).

<sup>2</sup> 47 C.F.R. § 73.3526.

<sup>3</sup> Letter to Gary S. Smithwick, Esq. from Peter Doyle, reference 1800B3-SS (MB Dec. 10, 2004).

3. In its Petition, Sudbury repeats several arguments considered and rejected in the NAL, notably that the violations were neither willful<sup>4</sup> nor repeated.<sup>5</sup> Further, Sudbury argues that the forfeiture amount issued in this case is inconsistent with or disproportionate to that issued in similar or more egregious cases.<sup>6</sup> Finally, Sudbury argues for the first time that the Commission failed to comply with the Small Business Regulatory Enforcement and Fairness Act of 1996 (“SBREFA”).<sup>7</sup>

### III. DISCUSSION

4. The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.<sup>8</sup> Sudbury has failed to meet this burden.

5. Sudbury first appears to suggest that, absent supporting federal precedent, the Commission may not enforce its “unsupportable view” that violations resulting from inadvertent error are “willful” violations of the Rules.<sup>9</sup> We disagree. The Commission is entitled to rely on its own published precedent.<sup>10</sup> We thus find that the Forfeiture Order properly relied on Commission precedent in finding that violations resulting from inadvertent error or failure to become familiar with the Commission’s requirements are willful violations.<sup>11</sup> Accordingly, we find this argument to be meritless.

6. Without citing any legal authority, Sudbury next argues that its public file violations were not repeated. This argument was considered and rejected in the NAL. As Sudbury does not raise any new information reflecting changed circumstances, does not present additional facts not known at the time of its Request, and does not attempt to show anything more than a disagreement with the Commission’s finding on this point, we reject without further consideration this unsupported and repetitious argument.

7. Sudbury also argues that the forfeiture amount, for what it refers to as a “minor mistake” and “inadvertent omission,” is unreasonable and unjust when compared to the decision in *Logos Broadcasting Corp.*,<sup>12</sup> in which the Commission admonished a licensee for making false certifications in violation of

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<sup>4</sup> Petition at 5-6.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> *Id.* at 7-8.

<sup>7</sup> *Id.* at 9-10, citing Pub. L. No. 104-121, § 223, 110 Stat. 847, 862 (1996), 5 U.S.C. § 601 Note.

<sup>8</sup> See 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

<sup>9</sup> Petition at 5-6. Sudbury further cites *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008) in questioning the validity of the Commission’s consistent interpretations of the statutory “willfulness” standard in Section 312(f)(1) of the Act. The Supreme Court, however, vacated *CBS Corp.* on May 4, 2009, and remanded the case to the Third Circuit Court of Appeals. 129 S. Ct. 2176 (2009). The opinion, therefore, carries no persuasive value.

<sup>10</sup> 47 C.F.R. § 0.445(e). Pursuant to Section 0.445(e) of the Rules, interpretations designed to have general applicability and legal effect that are published in the FCC Record “may be relied upon, used or cited as precedent by the Commission” in any manner.

<sup>11</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (stating that “inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”).

<sup>12</sup> *Letter to Dan Alpert, Esq., et al., from Peter Doyle*, 23 FCC Rcd 10202 (MB June 30, 2008).

Section 1.17 of the Rules. Sudbury, however, neglects to mention the reason for the Commission's seemingly light treatment for what we agree is a serious Rule violation – that issuance of a forfeiture was barred by the statute of limitations.<sup>13</sup> As such, the decision in *Logos* carries no persuasive weight.

8. Next, Sudbury argues that the forfeiture amount is inconsistent with several Media Bureau decisions involving public file violations in which we assessed a \$3,000 forfeiture.<sup>14</sup> Again, we disagree. As an initial matter, as stated in the NAL, the *Mel Wheeler Cases* involved forfeitures of \$3,000 for the licensee's public file Rule violations, where the public files in each case were missing a total of three issues/programs lists. By contrast, Sudbury's public files were missing eleven issues/programs lists. We therefore find these cases distinguishable and unpersuasive. The other cases cited by Sudbury are also distinguishable from the instant case. In *Towson University*, for instance, the Bureau acknowledged that the \$3,000 amount assessed was inconsistent with prevailing precedent.<sup>15</sup> *Bay Broadcasting* is also distinguishable because, unlike here, the violations there continued "for an indiscernible period of time."<sup>16</sup> Finally, the *Capstar* case is distinguishable because, while certain quarterly issues/programs lists were missing, the station managers did keep "letters of thanks" regarding station support of community events and awareness campaigns."<sup>17</sup> Conversely, there is ample precedent to support the issuance of a \$9,000 forfeiture in this case.<sup>18</sup>

9. Lastly, Sudbury argues for the first time that the Commission has not complied with its obligations under SBREFA. Sudbury argues that until the Commission adopts a policy or program for reducing or waiving civil penalties for violations by small entities, the Commission lacks the legal authority to impose penalties on small entities, such as Sudbury.<sup>19</sup> We disagree with this argument. When the Commission adopted the forfeiture guidelines, it expressly held that they comply with Section

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<sup>13</sup> *Id.*

<sup>14</sup> See *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20215 (MB 2003)(issuing a forfeiture of \$3,000 for the licensee's public file Rule violations, where the public files were missing a total of three issues/program lists); *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20211 (MB 2003)(same)(collectively, "*Mel Wheeler Cases*"); *Capstar TX Limited Partnership*, Letter, 18 FCC Rcd 20195 (MB 2003)("Capstar")(issuing a forfeiture for \$3,000 for keeping "letters of thanks" regarding station support of community events and awareness campaigns rather than quarterly radio issues/programs lists); *Bay Broadcasting Corp.*, Letter, 18 FCC Rcd 20207 (MB 2003)("Bay Broadcasting")(issuing a forfeiture of \$3,000 for keeping incomplete issues/programs lists in its public inspection file); and *Towson University*, Letter, 18 FCC Rcd 20223 (MB 2003)(issuing a forfeiture of \$3,000 for not updating its quarterly issues/programs lists in a timely fashion).

<sup>15</sup> *Towson University*, Forfeiture Order, 23 FCC Rcd 8747 (MB 2008) (declining to reduce the forfeiture amount, noting that the \$3,000 forfeiture issued in the NAL for ten missing issues/programs lists was inconsistent with precedent).

<sup>16</sup> *Bay Broadcasting*, 18 FCC Rcd at 20208.

<sup>17</sup> *Capstar*, 18 FCC Rcd at 20195.

<sup>18</sup> See *Faith Baptist Church, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9146 (MB 2007) (\$10,000 forfeiture issued for eleven missing issues/programs lists); *Geneva Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10642 (MB 2006) (same); *South Atlanta Broadcasting, Inc.* Memorandum Opinion and Order and Notice of Apparent Liability, 21 FCC Rcd 8471 (MB 2006) (\$10,000 forfeiture assessed for nine missing issues/programs lists); *Emerson College*, Memorandum Opinion and Order and Notice of Apparent Liability, 21 FCC Rcd 8488 (MB 2006)(\$10,000 forfeiture assessed for fifteen missing issues/programs lists).

<sup>19</sup> Petition at 9.

223 of SBREFA because they provide for reduction or waiver of forfeitures imposed on small entities pursuant to its specified downward adjustment factors.<sup>20</sup>

#### IV. CONCLUSION

10. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petition for Reconsideration filed by Sudbury Services, Inc. on August 14, 2008, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>20</sup> *Forfeiture Policy Statement*, at 17109, ¶¶ 51, 52.