

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

In re Application of)	
)	
Texas Educational Broadcasting Co-operative, Inc.)	Facility I.D. No. 65320
)	NAL/Acct. No. MB200741410342
)	FRN: 0008697245
For Renewal of License for)	File No. BRED-20050331BPC
Station KOOP(FM))	
Hornsby, Texas)	

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

Adopted: July 13, 2007

Released: July 16, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission has before it (1) the captioned application of Texas Educational Broadcasting Co-operative, Inc. (the "Licensee") for renewal of its license for noncommercial educational ("NCE") Station KOOP(FM), Hornsby, Texas (the "Station"), and (2) the Informal Objection ("Objection") to the application filed on April 1, 2005, by Mr. James R. Ellinger (the "Objector" or "Ellinger").¹ In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),² by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,³ we find that the Licensee apparently willfully and repeatedly violated Section 73.3527 of the Rules⁴ by failing to retain all required documentation in the KOOP(FM) public inspection file, and we find that the Licensee also violated the alien ownership provisions of Section 310(b)⁵ of the Act. Based upon our review of the facts and circumstances before us, we grant Ellinger's Objection in part; conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000); and we grant the captioned KOOP(FM) renewal application.

II. BACKGROUND

2. Section 73.3527 of the Rules requires a non-commercial broadcast licensee to maintain a public inspection file containing specific types of information related to station operations. The purpose of this requirement is to provide the public with timely information at regular intervals throughout the

¹ Ellinger did not serve the Licensee or its counsel with a copy of the Objection. The Licensee filed an Opposition on September 7, 2005, and a Supplement to its Opposition on September 9, 2005.

² 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

³ See 47 C.F.R. § 0.283.

⁴ See 47 C.F.R. § 73.3527.

⁵ See 47 U.S.C. § 310(b).

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 KOOP(FM) license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3527 has been placed in its station's public inspection file at the appropriate times. The Licensee indicated "No" to that Item, explaining in an exhibit to the application that the issues/programs lists for 1997, 1998, 1999, and 2001 were missing from the public inspection file.⁸ The Licensee states, however, that it created the missing lists from archived materials and later placed them in the public file.⁹ The Licensee notes that the file is now current.¹⁰

4. In his Objection, Ellinger alleges violations by the Licensee of Section 73.3527 of the Rules.¹¹ Ellinger also alleges: (1) foreign control of the license; (2) numerous "illegal" transfers of control of the license; (3) violations of the Commission's underwriting rules; (4) "financial misdeeds;" (5) failure to maintain financial records; (6) character issues; (7) the Licensee has "no idea who is on the air;" (8) fraud, theft and misappropriation of funds; (9) criminal activity in the main studio and offices; and (10) airing of indecent and/or obscene material.¹² Ellinger argues that the KOOP(FM) application for renewal of license should be denied.¹³ In its Opposition, the Licensee argues that the Objection "is without merit."¹⁴

III. DISCUSSION

5. *Ellinger Objection.* Informal objections must, pursuant to Section 309(e) of the Act, provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with Section 309(k) of the Act,¹⁵ which governs our evaluation of an application for license renewal. Specifically, Section 309(k)(1)

⁶ Cf. *Letter to Kathleen N. Benfield from Linda B. Blair, Chief, Audio Services Division*, 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 C.F.R. 73.3527(e)(8).

⁸ See captioned application at Exhibit 11.

⁹ See *id.*

¹⁰ *Id.*

¹¹ Ellinger Objection at 2. Ellinger alleges that "for much of the time," the KOOP(FM) public inspection file has not been available to members of the public [and] has had incomplete and missing sections of required content." *Id.* Ellinger provides no evidence, anecdotal or otherwise, to support the claim that the KOOP(FM) public inspection file was unavailable for viewing by members of the public. He references a civil suit he brought against the licensee, *See Ellinger v. Texas Educational Broadcasting Co-operation, Inc.*, Cause No. 065523, (Small Claims Court, Travis County, Texas), but the material provided by Objector contains no mention of the unavailability of the Station's public inspection file.

¹² *Id.* at 1-3.

¹³ *Id.* at 3.

¹⁴ Licensee Opposition at 9.

¹⁵ See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *affirmed sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

provides that we are to grant the renewal application if, upon 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.¹⁶ 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.”¹⁷

6. The Objection, as described above, contains a number of conclusory allegations unsubstantiated by any extrinsic evidence. In many instances, the Objection also fails to invoke any provision of the Act or the Rules. For example, Ellinger states that “for years the Station has violated the Commission’s rules on ‘calls to action’ . . . to spend money with local businesses” and has provided “excessive product/service descriptions, and endorsements, in exchange for money and other forms of support.”¹⁸ Ellinger fails to provide any specific evidence regarding announcements that would arguably violate the Commission’s underwriting rules for NCE stations. Ellinger also states that “[t]here have been numerous accusations of serious crimes against a number of programmers and board members at the station” and that “threats, thefts, and intimidation are reportedly a common problem at the station.”¹⁹ Ellinger also alleges that station “programmers” have failed to maintain control of the station, having “willed” their programs to other, unknown individuals and that “the station has on a number of occasions, had no idea who is on the air.” Moreover, Ellinger states that “there have been numerous accusations of financial improprieties at KOOP Radio.”²⁰ Ellinger provides no specific instances of these charges or misconduct, nor does he show that these issues relate to the Station’s compliance with the Act and the Rules. Additionally, Ellinger states that the Station has failed to maintain or disclose its financial records. Although he raises this contention in connection with a proceeding he brought against the Licensee for the collection of money he claimed to be due and owed to him,²¹ it is unclear what, if any, provisions of the Act or the Rules are implicated in this charge. These unsupported or irrelevant allegations will receive no further consideration. We thus turn our attention to allegations that are properly supported, acknowledged by the Licensee, or otherwise warrant deliberation.

¹⁶ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

¹⁷ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

¹⁸ Objection at 1.

¹⁹ *Id.* at 2. Regarding crimes committed against Station personnel, the Licensee correctly argues that the Objector “does not specify theft of what property or what . . . threats [were made] by what parties against any other parties, or how that reflects adversely on the character of the licensee.” Opposition at 6.

²⁰ Objection at 2. As part of his claim of financial improprieties at KOOP(FM), Ellinger also alleges that “[t]he station has failed to provide timely and accurate financial information to the Internal Revenue Service.” *Id.* Again, Ellinger provides no factual basis for this contention.

²¹ See *Ellinger v. Texas Educational Broadcasting Co-operation, Inc.*, *supra*, Plaintiff’s First Amended Petition, appended to Objection as an unnumbered Exhibit. This dispute between the parties over finances and access to records is contractual and private in nature. As such, it is beyond the Commission’s authority and is appropriately left for a determination by a court of competent jurisdiction. See *John F. Runner, Receiver (KIBF)*, Memorandum Opinion and Order, 36 RR2d 773 (1976). For instance, the Commission has repeatedly “held that private contractual disputes are more appropriately resolved by local courts of competent jurisdiction, because the Commission usually lacks the expertise, the resources, and the jurisdiction to adjudicate such matters fully.” See, e.g., *O.D.T. International*, Memorandum Opinion and Order, 9 FCC Rcd 2575, 2576 ¶ 9 (1994). Accordingly, to the extent that Objector points to *Ellinger v. Texas Educational Broadcasting Co-operation, Inc.* as evidence of actionable financial misconduct at the Station, we reject that contention.

7. Foreign Board Member. The Objector asserts that on at least one occasion, at least one member of the Licensee's Board of Trustees was a "foreign national."²² Ellinger does not identify that person or indicate how that person's presence on the board violated any provision of the Act. In response, the Licensee states that at the time it filed the captioned application there was one alien on the board representing 16.7 per cent of the voting control, which is within the limits set by the foreign ownership restrictions of Section 310 of the Act.²³

8. We agree with the Licensee that Ellinger has not raised a substantial and material question of fact calling for further inquiry regarding the licensee's compliance with Section 310(b) of the Act. Non-profit, non-stock, NCE broadcast licensees such as the Licensee here are subject to the statutory requirements of Section 310(b) of the Act, which prohibits foreign entities from owning or voting more than 20 per cent of the capital stock of a broadcast licensee.²⁴ The specific citizenship requirements of Section 310(b) reflect a deliberate judgment on the part of Congress to prevent undue foreign influence in broadcasting.²⁵ Thus, for the purpose of determining whether a non-stock NCE applicant or licensee complies with the statutory foreign ownership requirements, we first consider the citizenship of those individuals who would have the ability, comparable to that of a traditional owner, to influence or control the licensee. Foreign parties may act as officers or directors of corporate licensees,²⁶ and the presence of one alien on the Licensee's six-member board does not violate Section 310(b) of the Act.

9. However, in this case, the Licensee admits that for two years prior to filing its application for renewal there were *two* aliens serving on its board, raising the Licensee's foreign voting interest above the 20 per cent benchmark.²⁷ We find this to be an apparently willful and repeated violation of Section 310(b)(3) of the Act. While we recognize that non-stock, non-profit NCE entities such as the Licensee do not have "owners" in the traditional sense, the record indicates that for a period of time during the license period, the individuals who controlled the Licensee exceeded the foreign ownership limits as set by

²² Ellinger Objection at 1.

²³ Licensee Opposition at 3; *see also* 47 U.S.C. § 310.

²⁴ 47 U.S.C. § 310(b)(3). If either the foreign ownership or voting interest in an applicant or licensee exceeds the 20 per cent benchmark, we are required by law to revoke the license or refuse to grant the license application. *In the Matter of Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, Declaratory Ruling*, 103 FCC 2d 511, 517-18, ¶ 12 & n.33, 520, ¶ 16 (1983) (*Wilner and Scheiner I*), clarified upon reconsideration, 1 FCC Rcd 12 (1986). The Commission has applied the strictures of Section 310(b) to a variety of non-corporate entities, including unincorporated associations and partnerships. *Id.* at 514-15, ¶ 7, 516, ¶ 10.

²⁵ *Wilner and Scheiner I*, 103 FCC2d at 517, ¶ 11.

²⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(k), 110 Stat. 56 (1996); *In the Matter of Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 13072 (1996) (*Citizenship Requirements Order*). Prior to enactment of the Telecommunications Act of 1996, Section 310(b)(3) precluded a license from being granted to a corporation with any foreign officers or directors, and Section 310(b)(4) provided that the Commission could deny an application or revoke a license where any officer of the parent corporation is a foreign party. *Citizenship Requirements*, Order, 11 FCC Rcd at 13073, ¶ 2.

²⁷ Opposition at 3, n.5. *See* KOOP(FM)'s 2003 Biennial Ownership Report (File No. BOA-20030327AHH) reporting two aliens on its board for the period between September 2002 and January 2004 and between April 2004 and October 2004. Licensee states that the issue was spotted and corrected by the Licensee by the removal of one alien board member in October 2004. *See* File No. BOS-20050502AAA.

Congress. We believe that a forfeiture, rather than designation for evidentiary hearing, is the appropriate sanction for this violation of Section 310(b) of the Act.²⁸

10. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission 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.²⁹ 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.³⁰ 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,³¹ and the Commission has so interpreted the term in the Section 503(b) context.³² 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.”³³

11. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for an alien ownership violation.³⁴ In determining the appropriate forfeiture amount, we may adjust the 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.”³⁵ Because the Licensee spotted its error and took corrective action *sua sponte*, we will reduce the proposed forfeiture for its apparent violation of Section 310(b) of the Act from the \$8,000 base amount to \$5,000.³⁶

12. Election Fraud/Unauthorized Transfer of Control. The Objector also argues that “through a series of election frauds” KOOP(FM)’s license “was illegally transferred among a number of individuals a number of times.”³⁷ In opposition, the Licensee states that its board members serve two-year terms and that the Commission recognizes that non-profit boards experience transfers of control over

²⁸ See *Mario Laredo*, Order to Show Cause and Notice of Apparent Liability, 11 FCC Rcd 18010, 18011 (1996) and *KOZN FM Stereo 99*, Order to Show Cause and Notice of Apparent Liability, 59 RR2d 628 (1986) (notices of apparent liability issued for willful and repeated violations of Section 310(b) of the Act).

²⁹ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

³⁰ 47 U.S.C. § 312(f)(1).

³¹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³² See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³³ 47 U.S.C. § 312(f)(2).

³⁴ 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 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

³⁵ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

³⁶ See *Mario Laredo* and *KOZN FM Stereo 99*, *supra*; see also *The Seven Hills Television Company*, Memorandum Opinion and Order, 3 FCC Rcd 826 (1988) (renewal application granted, subject to several conditions intended to ensure future compliance with alien ownership statute). Because the Licensee’s ownership report revealed KOOP(FM)’s improper foreign voting interest and because the Licensee recognized that it violated the Act and took steps to correct matters, we do not think that the imposition of “conditions” in addition to the forfeiture amount is warranted in this case.

³⁷ Ellinger Objection at 1. Ellinger references the allegations of election fraud made in a civil lawsuit, *Zakes v. Texas Educational Broadcasting Co-Operative, Inc.*, Cause No. 98-13691, Travis (Texas) County District Court (1998).

time.³⁸ It also argues that it followed procedures established by the Commission to deal with incremental board changes at NCE licensees. We agree with the Licensee. The Commission has recognized that board changes in a non-stock organization will not necessarily change the nature of the organization or break continuity of control, especially if the changes occur gradually as individuals serve out established terms of office.³⁹ In this case, on April 15, 2005, the staff granted an application for an insubstantial transfer of control of the Station due to a gradual board change in the Licensee.⁴⁰ Accordingly, we find that the Objector has failed to raise a substantial and material question of fact on this issue.

13. Moreover, the “election fraud” to which Ellinger refers was raised in civil litigation. The Commission refrains from making decisions based on mere allegations of misconduct, where those allegations are in the process of being adjudicated by another agency or court.⁴¹ We find that the ongoing civil dispute involving the Licensee and other parties is properly addressed by the state court and is not within the scope of this proceeding.⁴² Furthermore, as the Licensee reveals, the court case was dismissed on May 21, 2001, for lack of prosecution.⁴³ Thus, there is no outstanding adverse adjudication against the Licensee on “election fraud” and that allegation requires no further discussion.

14. Character and Criminal Issues. The Objector alleges “criminal activity on the premises” of the Station, for which Ellinger provides no details,⁴⁴ and that a former company officer had been accused of sexual assault.⁴⁵ The Licensee acknowledges that the Station, as police reports verify, was the victim of criminal activity in the form of burglaries and thefts.⁴⁶ We find the fact that the Station was robbed or vandalized is not relevant to the issue of the Licensee’s qualifications.

15. With respect to the charge that a former officer of the Licensee had been accused of a serious crime, both the Objector and the Licensee acknowledge that no formal charges were brought, and accordingly “there [was] no conviction.”⁴⁷ Ellinger has failed to provide evidence that any officer,

³⁸ Licensee Opposition at 3.

³⁹ See *Non-Stock Corporations*, Notice of Inquiry, 4 FCC Rcd 3403, 3405-07 (1989).

⁴⁰ See File No. BTCED-20050331BNW; see also at Exhibit 4.

⁴¹ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252-53 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991) (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1204-05 (1986) (“*Character Policy Statement*”). Non-FCC misconduct is considered to have been “adjudicated” when the “ultimate trier of fact” renders its decision. Generally, the “ultimate trier of fact” is that tribunal whose factual findings are not subject to review *de novo*. *Id.* at n. 62. See also *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3254 n.6 (1990), and *GAF Broadcasting Company, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 5496, 5499 (2003).

⁴² See, e.g., *Kidd Communications*, Memorandum Opinion and Order, 19 FCC Rcd 13584, 13589 (2004).

⁴³ See Licensee Opposition at 4 and Exhibit 5.

⁴⁴ Objection at 2. Ellinger states that “there has been [a] considerable amount of criminal activity, over many years, at the KOOP Office/Studios. It is not uncommon to hear Austin residents say they would not feel comfortable or safe at the KOOP office/studios.” *Id.*

⁴⁵ *Id.* Ellinger states that an Austin resident “publicly accused Eduardo Vera, who was then claiming to be ‘President’ of KOOP, of sexual assault.” *Id.* The Licensee indicates that Mr. Vera became its President after the incident allegedly occurred on November 26, 1995, but has not held that office since January 2004. Opposition at 8.

⁴⁶ Opposition at 6, 7.

⁴⁷ *Id.* at 8.

director or board member of the Licensee was convicted of a felony⁴⁸ by a final adjudication order, which is generally required by the Commission's *Character Policy Statement* for a felony to be considered relevant to Commission licensing proceedings.⁴⁹ The allegations against the Licensee on this matter will be given no further consideration in this proceeding.⁵⁰

16. Indecent/Obscene Material. Ellinger argues that the Station has "aired recorded and spoken material that contains obscene and/or indecent language."⁵¹ In particular, Ellinger states that the Station airs an unspecified but allegedly "obscene" Madonna song to introduce the Station's weekly program, "Outspoken."⁵² In opposition, the Licensee argues that the Objector's claim lacks specificity and is baseless because an "edited" version of the Madonna song in question, removing a potentially offending word, is aired each week.⁵³

17. The role of the Commission in overseeing program content is limited. The First Amendment to the United States Constitution and Section 326 of the Act, prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.⁵⁴ The Commission does regulate broadcast content where federal statutes direct it to do so. For example, Title 18 of the United States Code, Section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."⁵⁵ The Commission is responsible for enforcing the statutory and regulatory provisions restricting obscenity, indecency and profanity.⁵⁶ Consistent with a subsequent statute and court case,⁵⁷ Section 73.3999 of the Rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m.

⁴⁸ Ellinger submits a statement, not made under penalty of perjury, by a woman who claims that she was sexually assaulted by KOOP(FM) board member Eduardo Vera, but the woman admits that she "never filed charges." See Statement of Patricia Moore dated December 10, 2001.

⁴⁹ *Character Policy Statement*, 102 FCC 2d at 1205 (subsequent history omitted).

⁵⁰ Because the alleged conduct occurred more than 10 years ago, we would not likely consider it even if the officer in question was still affiliated with the Station or the Licensee. See *Character Policy Statement*, 102 FCC 2d at 1229 (10-year limit applies even to past conduct indicating a flagrant disregard of the Commission's regulations and policies).

⁵¹ Ellinger Objection at 3.

⁵² *Id.*

⁵³ The song is entitled "Human Nature." In its Supplement, the Licensee attaches a CD copy of the "edited" version of the Madonna song used to introduce its weekly "Outspoken" program. The Supplement supports an affidavit from KOOP(FM)'s Promotions Director Lonny Stern that the "Hip-Hop" remix of the song actually used at the beginning of "Outspoken" was edited with the potentially indecent term removed and replaced with a "hammer" sound effect. Licensee Opposition at 8; see also Declaration under penalty of perjury by KOOP(FM) Promotions Director Lonny Stern at Exhibit 7.

⁵⁴ U.S. CONST., amend. I; 47 U.S.C. § 326.

⁵⁵ 18 U.S.C. § 1464.

⁵⁶ Federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well the Commission's interpretation and implementation of the governing statute. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), cert. denied, 503 U.S. 914 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) ("*ACT III*").

⁵⁷ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), as modified by *ACT III*, 58 F.3d 654.

through 10 p.m.⁵⁸ The Commission may impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Act,⁵⁹ upon a finding that a licensee has broadcast obscene, indecent or profane material in violation of Section 1464 of the United States Criminal Code⁶⁰ and Section 73.3999 of the Rules. Thus, any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment, and demands that we proceed cautiously and with appropriate restraint when considering enforcement action in such matters.⁶¹ In this case, Ellinger has not provided us with sufficient information regarding the details of what allegedly “indecent” material the Station broadcast and its context, and his allegation is adequately rebutted by the Licensee’s submission of a recording of the song used, supported by an affidavit from the station employee charged with overseeing the project. We reject Ellinger’s allegation that the Station broadcast indecent material.

18. Public Inspection File Rule Violation. The Objector has charged, and the Licensee has acknowledged, that 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 73.3527 of 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.⁶²

19. 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.⁶³ In determining the appropriate forfeiture amount, as stated earlier, we may adjust the 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.”⁶⁴

20. In this case, although the Licensee has admitted to the violations, 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 a four-year period and involving at least 16 missing issues/programs lists. Even if the lists were eventually created and tardily placed in the public file, as the Licensee contends, the record is clear that the public could not view issues/programming lists for half the license period. Considering the record as a whole, we believe that a \$10,000 forfeiture, rather than designation of the Station’s license renewal application for evidentiary hearing, is appropriate for the violations in this case. Accordingly, we will grant Ellinger’s objection in part and find that the Licensee

⁵⁸ See 47 C.F.R. § 73.3999.

⁵⁹ See 47 U.S.C. § 503(b)(1). See also 47 U.S.C. § 312(a)(6) (authorizing license revocation for indecency violations).

⁶⁰ 18 U.S.C. § 1464.

⁶¹ *ACT I*, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”); *id.* at 1340 n.14 (“The potentially chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

⁶² See *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (MMB 1999)(citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) and *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 706 (1962)); *Surrey Front Range Limited Partnership*, Letter, 7 FCC Rcd 6361 (FOB 1992).

⁶³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17113-15; 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

⁶⁴ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

is apparently liable for a forfeiture in the amount of \$10,000 for its apparent willful and repeated violation of Section 73.3527.

21. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.⁶⁵ That Section provides that if, upon 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.⁶⁶ 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.”⁶⁷

22. We find that the Licensee's violations of Section 310(b) of the Act and Section 73.3527 of the Rules do not constitute “serious violations” warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.⁶⁸ Further, we find that NCE Station KOOP(FM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.

IV. ORDERING CLAUSES

23. 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 Texas Educational Broadcasting Co-operative, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars (\$15,000) for its apparent willful and repeated violation of Section 73.3527 of the Commission's Rules and of Section 310(b) of the Communications Act of 1934, as amended.

24. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Texas Educational Broadcasting Co-operative, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

25. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal

⁶⁵ 47 U.S.C. § 309(k).

⁶⁶ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

⁶⁷ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁶⁸ For example, we do not find here that the Licensee's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (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." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

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

27. 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.

28. 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, D.C. 20554.⁶⁹

29. Accordingly, IT IS ORDERED that the March 29, 2004, informal objection filed by Mr. James R. Ellinger against the captioned application of Texas Educational Broadcasting Co-operative, Inc. IS GRANTED to the extent indicted and IS DENIED in all other respects.

30. IT IS FURTHER ORDERED pursuant to Section 309(k) of the Communications Act of 1934, as amended, that the license renewal application of Texas Educational Broadcasting Co-operative, Inc. for NCE Station KOOP(FM), Hornsby, Texas (File No. BRED-20050331BPC) IS GRANTED.

31. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Texas Educational Broadcasting Co-operative, Inc., P.O. Box 2116, Austin, Texas 78768, and to its counsel, Melodie A. Virtue, Esquire, Garvey, Schubert, Barer, 1000 Potomac Street, N.W., Fifth Floor, Washington, DC 20007, and to Mr. James R. Ellinger, P.O. Box 49492, Austin, Texas 78765.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁶⁹ See 47 C.F.R. § 1.1914.