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Commission's Fine Adjustments Go Both Ways **Scales of justice subject to recalibration**

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As reported in last month's *Memo to Clients*, the fact that an entity happens to be "highly profitable" may result in the doubling of a forfeiture. It's not that the underlying misconduct was somehow more deserving of opprobrium – it's just that the Big Bucks Company can afford to pay more, and therefore, in the view of the Commission, it should.

But there's another side to that coin. Other decisions indicate that the Commission is willing to take the opposite tack as well. In a recent spate of decisions involving the failure of Low Power FM stations (LPFMs) to renew their licenses, the Commission has drastically reduced the amounts owed, apparently just because the entities being fined are LPFM licensees.

In one case, an LPFM station's license renewal application was due on August 1, 2004, with the license set to expire on December 1, 2004. The licensee didn't file its renewal application until December 23, 2004, more than three weeks after the license's expiration. The licensee did not dispute the fact that it failed to timely file its renewal, but did request a reduction or cancellation of its fine. It claimed that payment of the forfeiture would be "devastating," although it failed to provide the FCC any evidence that that was, in fact, the case. Nevertheless, the Media Bureau dropped the forfeiture from \$7,000 to \$500, stating that the decision was "consistent with our recent precedent regarding Low Power FM Stations."

The same day, the Bureau made it clear that its charity was limited to LPFMs. In a decision involving a full-power educational FM licensee, the FCC declined to reduce a \$1,500 forfeiture for a failure to timely file its renewal application. Like the LPFM situation, the full-power NCE's mistake had been inadvertent, and its renewal application had been submitted nearly three months before the license's expiration. Nevertheless, the FCC declined to reduce the forfeiture at all, upholding the full amount.

The precise basis for what appears to be the Bureau's LPFM forfeiture policy is not

entirely clear. As long ago as December, 2007, the Bureau whittled a \$3,000 fine down to \$250 for an LPFM licensee. In so doing, however, it offered virtually no detailed explanation. Since then, that 2007 decision has been cited as the governing precedent – which leaves us all a bit uncertain as to exactly what the operative considerations may be, other than that, if an LPFM station is involved, a reduction in fine to the \$250-\$500 level may be in order.

Ordinarily, when a licensee (in any service) thinks that it should be relieved of a fine because of inability to pay, the licensee is expected to submit: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflect the licensee's current financial status. Generally, in order to justify a reduction (or cancellation) in a fine, the Commission requires that such documentation demonstrate the forfeiture amount either approaches or exceeds the licensee's *gross revenues*. (While some licensees have historically attempted to show that operational losses justify fine reduction, the Commission has most recently – and most emphatically – sought to put the kibosh on such claims. Instead, it has emphasized that a licensee's gross revenues are the primary measure of its ability to pay.)

To sum up, if you're an LPFM station and forget to file your renewal, it's quite possible your forfeiture will be reduced to just \$500 with minimal explanation required. If you are not an LPFM, however, getting a forfeiture reduced will take quite an effort. Even if you're operating at a significant net loss, unless you can demonstrate that your gross revenues would be wiped out by the fine, don't expect any reduction. And as reported last month, if you are one of the lucky few businesses that happens to be "highly profitable," look out. Your fine might be doubled as a "deterrent" to future lapses.