



Federal Communications Commission
Washington, D.C. 20554

March 31, 2006

DA 06-759

In Reply Refer To: 1800B3-JP
NAL/Acct. No.: MB200641410032
FRN: 0004383469
Released: March 31, 2006

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

William M. Rogers
Rogers Communications, Inc.
1410 Highway 411 NE
Cartersville, GA 30121

Charles V. Shiflett, Jr.
Clarion Communications, Inc.
P.O. Box 200399
Cartersville, GA 30120

Marc B. Hershovitz, Esquire
3390 Peachtree Road, Suite 1000
Atlanta, GA 30326

In re: Rogers Communications, Inc.
WYXC(AM), Cartersville, GA
Facility ID No. 19541
File No. BR-20041018ACA(renewal)
File No. BAL-20050328AKL(assignment)

Gentlemen:

We have before us (1) the above captioned application of Rogers Communications, Inc. (“Rogers”) for renewal of license for station WYXC(AM), Cartersville, Georgia; (2) the above captioned application of Rogers for assignment of WYXC(AM)’s license to Clarion Communications, Inc. (“Clarion”)¹; (3) Objection to Renewal Seeking Denial, Objection to Assignment and Complaint (“Objection”) filed by Marc B. Hershovitz (“Hershovitz”) on July 5, 2005; and (4) Petition for Reconsideration and Response to Objection (“Petition”) filed by Rogers on August 15, 2005. The renewal application was granted on June 13, 2005, and Rogers was issued a Notice of Apparent Liability for Forfeiture for failure to timely file a license renewal and for unauthorized operation.² The application for assignment of WYXC(AM)’s license was granted on June 14, 2005. These grants and the Notice of Apparent Liability for Forfeiture were set aside on July 15, 2005.³ For the reasons set forth below, we

¹ Rogers’ renewal application was filed on October 18, 2004 and the application for assignment was filed on March 9, 2005.

² See *Letter to William M. Rogers*, NAL/Acct No. MB20051810068 (MB June 13, 2005).

³ See *Letter to William M. Rogers and Charles V. Shiflett, Jr.*, Reference 1800B3-MFW (MB July 15, 2005).

grant Hershovitz's Objection in part and admonish Rogers for its violation of Sections 73.3526 and 73.1943 of the Commission's rules.⁴ Additionally, we again issue a NOTICE OF APPARENT LIABILITY FOR FORFEITURE to Rogers for its failure to timely file a license renewal application and for unauthorized operation; we also grant Rogers' license renewal application and the application for assignment of WYXC(AM)'s license to Clarion Communications, Inc.

Public file rule allegation. In his Objection, Hershovitz alleges that WYXC(AM) has failed to keep a public file in violation of Section 73.3526 of the Commission's rules, which, among other things, equires a station to maintain a political file pursuant to Section 73.1943 of the Commission's rules. Hershovitz states that Chris Brimer went to inspect WYXC(AM)'s public file on March 30, 2005, and found no political orders, contracts, or invoices.⁵ According to Hershovitz, such information should have been in the file as it was known from several sources that the station had sold airtime to candidates for public office in 2004.⁶

In response, Rogers acknowledges that Mr. Brimer was not given the political file when he visited the station on March 30, 2005, and requested to see the station's public file. In a sworn declaration attached to the Petition, Charles V. Shiflett, President of Clarion Communications, Inc., with which Rogers has a Time Brokerage Agreement to provide programming and other services to WYXC(AM), states that he was at WYXC(AM) at the time of Mr. Brimer's visit on March 30, 2005. He further states that he gave Mr. Brimer portions of the public file – leaving out the political file and portions of the public file which contained technical material such as contour maps – and asked Mr. Brimer if there was anything in particular he wanted to see, to which Mr. Brimer responded “no.” Mr. Shiflett states that, at any time during Mr. Brimer's visit, the political file could have been provided to Mr. Brimer within seconds. Mr. Shiflett explains that he did not provide the political file because “[t]o his knowledge, the political portion of the public file is usually of interest only during campaigns.”⁷ Rogers states that “Mr. Shiflett is correct that the political file requirements are intended to assist candidates during campaigns.” Also attached to the Petition is a sworn declaration from William Rogers, President, Director and sole shareholder of Rogers, in which he states that, at various times during his five year ownership of the station, he has physically examined WYXC (AM)'s public file and noted that the political file was included in the public file.⁸

⁴ 47 C.F.R. §§ 73.3526, 73.1943.

⁵ See Objection at 2 and Exhibit A (Affidavit of Chris Brimer).

⁶ See Objection Exhibit B containing Campaign Finance Disclosure Reports filed with the State of Georgia by two candidates running for public office in Georgia in 2004 indicating purchases by the campaigns of broadcast time on WYXC(AM) and copies of orders to purchase time on the station from LUC Media, media buyer for two other such candidates.

⁷ See Petition Attachment 3. A sworn declaration from Thomas Young, Secretary of Clarion, is also attached to the Petition. In his declaration, Mr. Young states that he was present at WYXC(AM) when Mr. Brimer visited on March 30, 2005, that he observed Mr. Shiflett give Mr. Brimer portions of the public file, heard Mr. Shiflett tell Mr. Brimer that he could get him the political file if he wanted to see it, and heard Mr. Brimer decline this offer. We note that, in his declaration, Mr. Shiflett does not indicate mentioning the political file to Mr. Brimer.

⁸ See Petition Attachment 5. Rogers states that it should be noted that WYXC(AM) was inspected by the Commission's Atlanta Office on May 1, 2001, and that a Notice of Violation issued in connection with that inspection did not mention a violation of the public file rule. Rogers argues that this fact is evidence that the

Section 73.3526 of the Commission's rules requires broadcast licensees to maintain and make available for public inspection, at the main studio of a station, a public file of information ("public file"), including those political records required by Section 73.1943 of the Commission's rules. Section 73.1943 requires that every licensee maintain and permit public inspection of a political file, which should contain a "complete and orderly record" of all requests for broadcast time made by candidates for public office and the disposition of those requests, and all free time provided to candidates; and that this information be placed in the file as soon as possible and retained for a period of two years. While one of the purposes of the political file is to make available to candidates information relevant to their equal opportunity rights, the political file is part of the public file, to be made available to the public, not just candidates, and at any time, not just during campaign seasons.

Considering the record as a whole in this case, we believe that Rogers should be admonished for violating Sections 73.3526 and 73.1943 of the Commission's rules. The whole public file, including the political file, is required to be made available to the public, upon request. Mr. Shiflett admitted that, on March 30, 2005, he failed to give Mr. Brimer significant portions of the public file, including the political file, when Mr. Brimer asked to see the public file. Neither Mr. Shiflett's asking Mr. Brimer if there was anything in particular he wanted to see nor his willingness to provide all of the file should it have been requested is sufficient to comply with the Commission's rules. Mr. Brimer asked for the public file once; he should not have had to ask for it again to see the complete file. We also caution Rogers to make the whole public file available when it is requested and not just the parts of the file that someone at the station may deem "of interest."

Section 73.3539 violation. Rogers's renewal application for the current WYXC(AM) license term was due on December 1, 2003, four months prior to the April 1, 2004, license expiration date.⁹ The application was not filed until October 18, 2004, more than six months after the station's license had expired. Rogers provides no explanation for the untimely filing of the license renewal application.

Upon the April 1, 2004 expiration of WYXC(AM)'s license, Rogers's operation of WYXC(AM) was unauthorized and should have ceased immediately. Rogers did not seek Special Temporary Authorization to continue operating the station pending action on the license renewal application.

The guidelines contained in the Commission's *Forfeiture Policy Statement*¹⁰ specify a base forfeiture amount of \$3,000 for failure to file a required form. The guidelines also specify a base forfeiture amount of \$10,000 for construction and/or operation without an instrument of authorization for the service. Section 503(b)(2)(D) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to consider "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."¹¹ In this case, Rogers failed to timely file the WYXC(AM) license

political file was in the public file on May 1, 2001. The Objection, however, concerns the different issue of whether the complete public inspection file was provided to Mr. Brimer when he requested to see it on March 30, 2005.

⁹ See 47 C.F.R. §§ 73.1020, 73.3539(a).

¹⁰ *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); see also 47 C.F.R. § 1.80(b).

¹¹ 47 U.S.C. § 503(b)(2)(D).

renewal application and continued station operations for more than six months before filing the appropriate renewal application. Neither did Rogers seek Special Temporary Authorization to continue station operations pending action on the license renewal application. On the other hand, Rogers had previously been licensed to operate station WYXC(AM), so this transgression is not comparable to “pirate” wireless operations, which typically have been subject to forfeitures of approximately \$10,000.¹² Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a full \$3,000 forfeiture for the failure to timely file the renewal application but reduce the proposed forfeiture for the unauthorized operation from \$10,000 to \$4,000, for a total proposed forfeiture of \$7,000.¹³

License renewal application. In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.¹⁴ This section provides that if, upon consideration of the application and pleadings, we find: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations by the licensee of the Act or the Commission’s rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.¹⁵ If, however, the licensee fails to meet this standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act¹⁶ -- or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise provided.”¹⁷

We find that none of Rogers’ established violations constitutes a “serious violation” of the Commission’s rules warranting designation for evidentiary hearing. Moreover, we find that these violations, when considered together, do not evidence a pattern of abuse.¹⁸ Further, we find that station

¹² *Joe L. Ford d/b/a Ford Communications*, 15 FCC Rcd 23721, 23722 (EB 2000) (citing *Jean R. Jonassaint*, 15 FCC Rcd 10422 (EB 2000)).

¹³ See, e.g., *Discussion Radio Inc.*, 19 FCC Rcd 7433, 7438 (2004) and *Gospel Rogers, Inc.*, 19 FCC Rcd 15600 (MB 2004). Although in *Gospel Rogers*, the Bureau imposed an NAL of \$3,000 for unauthorized operation, in that case the applicant sought STA to continue operating. The \$4,000 NAL imposed here is analogous to use of an unauthorized frequency by a land mobile station holding a license for a different frequency. See, e.g., *In the Matter of Dave Mitchell*, 20 FCC Rcd 1366 (EB 2005) and *In the Matter of Joselyn Gordon*, 19 FCC Rcd 23557 (EB 2004).

¹⁴ 47 U.S.C. § 309(k).

¹⁵ 47 U.S.C. § 309(k)(1).

¹⁶ 47 U.S.C. § 309(e).

¹⁷ 47 U.S.C. § 309(k)(2).

¹⁸ 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 Station*, 32 FCC2d 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 Station*, 32 FCC2d at 200. See also *Center for Study and Application of Black Economic Development*, 6 FCC Rcd 4622 (1991) and *Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 (1992).

WYXC(AM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant Rogers's license renewal application below.

License Assignment. We have reviewed the application to assign the license of station WYXC(AM) from Rogers Communications, Inc. to Clarion Communications, Inc. We find that Rogers and Clarion are fully qualified to sell and acquire, respectively, the license for WYXC(AM) and that the grant of the application would further the public interest, convenience and necessity. We will, therefore, grant the application for assignment below.

Conclusion/Actions. ACCORDINGLY, IT IS ORDERED that pursuant to Section 503(b) of the Act,¹⁹ and Sections 0.283 and 1.80 of the Commission's rules,²⁰ Rogers Communications, Inc. is hereby advised of its apparent liability for a forfeiture of \$7,000 for willfully and repeatedly violating Section 73.3539 of the Commission's rules and Section 301 of the Act.²¹

IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the date of this Notice, Rogers SHALL PAY to the United States the full amount of the proposed forfeiture of SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

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 FCC Registration Number ("FRN") (0004383469) and the NAL/Account Number (MB200641410032) referenced in the caption of this document. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

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 FRN (0004383469) and NAL/Account Number (MB200641410032) referenced in the caption of this document.

The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner 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 petitioner'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.

¹⁹ 47 U.S.C. § 503(b).

²⁰ 47 C.F.R. §§ 0.283 and 1.80.

²¹ 47 C.F.R. § 73.3539; 47 U.S.C. § 301.

Requests for payment of the full amount of the proposed forfeiture in this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²²

IT IS FURTHER ORDERED, that Marc B. Hershovitz's Opposition to Renewal Seeking Denial, Objection to Assignment and Complaint IS GRANTED to the extent indicated herein and DENIED in all other respects, and Rogers Communications, Inc. IS ADMONISHED for its apparent violations of Sections 73.3526 and 73.1943 of the Commission's Rules. Finally, IT IS ORDERED, that the application (File No. BR-20041018ACA) of Rogers Communications, Inc. for renewal of license for station WYXC(AM), Cartersville, Georgia, IS GRANTED and the application (File No. BAL-20050328AKL) to assign WYXC(AM)'s license from Rogers Communications, Inc. to Clarion Communications, Inc. ARE GRANTED.

IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to William M. Rogers, Rogers Communications, Inc., 1410 Highway 411 NE, Cartersville, Georgia 30121, Charles V. Shiflett, Jr., Clarion Communications, Inc., P.O. Box 200399, Cartersville, Georgia 30120, and Marc B. Hershovitz, Esquire, 3390 Peachtree Road, Suite 1000, Atlanta, Georgia 30326.

Sincerely,

Donna C. Gregg
Chief, Media Bureau

cc: Alan C. Campbell, Esquire
Jeffrey L. Timmons, Esquire

²² See 47 C.F.R. § 1.1914.