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

SEP 21 4 43 PM '05

FCC 05M-42  
04698

DISTRICT

In The Matter of	)	MB Docket No. 04-191
	)	
San Francisco Unified School District	)	
	)	
For Renewal of License for Station	)	Facility ID No. 58830
KALW(FM), San Francisco, California	)	File No. BRED-19970801YA

**ORDER**

**Issued:** September 15, 2005

**Released:** September 16, 2005

**Stipulations**

Stipulations filed and dated August 31, 2005, by San Francisco Unified School District ("SFUSD") and the Enforcement Bureau ("EB") ARE HEREBY ACCEPTED as reliable and truthful evidence of the following:

SFUSD and EB stipulate that the evidence in the record of this proceeding establishes that KALW provided meritorious service during the periods of November 3, 1996 to November 3, 1997, and July 16, 2003 to July 16, 2004.

SFUSD and EB further agree that SFUSD Exhibit No. 79 contains hundreds of public comments that are favorable to KALW's programming, and favorable to KALW's contributions to the San Francisco community.

**Limited Meritorious Service Evidence**

On Motion to Enlarge Issues filed by SFUSD, over objection by EB, the Presiding Judge added an issue to receive evidence on meritorious service for limited purposes. See *Memorandum Opinion and Order*, FCC 04M-31, released October 8, 2004. The following issue was added:

Under the circumstances, SFUSD will be permitted to introduce evidence on meritorious service. But such evidence will be limited in scope to one year of programming prior to the filing of the petition to deny (November 3, 1996 to November 3, 1997), and one year of programming prior to release of the HDO (July 16, 2003 to July 16, 2004).

*Id.* The Bureau argued against receiving meritorious service evidence in this case because the issues set under the *HDO* include *false certification and misrepresentation/lack of candor*. See *HDO* at Para. 24. In objecting, the Bureau relied on Commission authority holding it to be error to permit "evidence of meritorious service in mitigation of *KQED*'s intentional misrepresentations." *KQED, Inc.*, 3 F.C.C. Rcd 2601, 2607 (Review Bd. 1988). Compare *Arkansas Educational Television Commission*, 6 F.C.C. Rcd 478 (1991) (where poorly-kept records failed to show ascertainment of community interests, programming was allowed to be considered in determining whether "substantial efforts" had been made to ascertain).

### Meritorious Service and Forfeiture

As ruled previously,<sup>1</sup> there is a forfeiture issue under Para. 25 of the *HDO*.

[I]rrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934,<sup>2</sup> whether an ORDER OF FORFEITURE in an amount not to exceed \$300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission's Rules,<sup>3</sup> which occurred or continued within the applicable statute of limitations.

The forfeiture statute and regulation both provide for mitigating evidence:

In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, and history of prior offences, ability to pay, *and such other matters as justice may require*. [Emphasis added.]

47 U.S.C. § 503(a)(1)(D) and 47 C.F.R. § 1.80(b)(4). The inclusion of a forfeiture issue in the *HDO*, which was discretionary, justifies receipt of evidence in mitigation and SFUSD will be permitted to make a reasonable showing of meritorious service. Receipt of such evidence is consistent with the forfeiture statute and the Commission's rule on forfeiture which provide specifically for considering "such other matters as justice may require." *Id.* Furthermore, the Commission's forfeiture rule specifies mitigation as discretionary for imposing and/or in reducing a forfeiture. 47 C.F.R. § 1.80(h)(i).

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<sup>1</sup> See *Memorandum Opinion and Ordered*, FCC 04M-31, *supra* at 5-6.

<sup>2</sup> 47 U.S.C. § 503(b)(1).

<sup>3</sup> 47 C.F.R. §§ 73.1015, 73.3527, and 73.3613.

### SFUSD Exhibit 79

Accordingly, evidence on meritorious programming is now ripe for being received, subject to certain conditions as indicated above. Therefore, evidence of meritorious programming will be considered, but should be presented in proposed findings and conclusions only to argue ascertainment of community interests, and/or for considering reduction of forfeiture amounts.

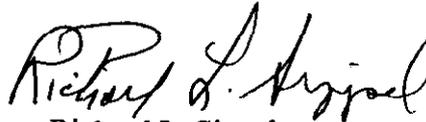
Public Comments ARE RECEIVED in evidence as SFUSD Exh. 79, subject to the following conditions:

- (1) Public comments included in SFUSD Exh. 79 must have been received by the Commission on or before June 30, 2005.<sup>4</sup>
- (2) Public comments must identify the commenting community, individual or entity.
- (3) Public comments must relate to service in this proceeding, as restricted by relevant dates.
- (4) Public comments must not be duplicative.

SFUSD MUST CERTIFY to the Presiding Judge by **September 26, 2005**, that conditions for receipt of SFUSD Exhibit No. 79 have been complied with.<sup>5</sup>

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>4</sup> See previous ruling in *Order* FCC 05M-30, released June 17, 2005 (written public comment must be received by June 30, 2005 in order to be considered for possible evidence; comment letters must state specific facts and the document must be legally competent, material and relevant. 47 C.F.R. § 73.3594(e)(2)).

<sup>5</sup> Counsel for SFUSD will coordinate with OALJ's Paralegal Specialist to assure accuracy and completeness of bound Exh. 79 that was submitted to OALJ, and that ultimately will be inserted into the record.

<sup>6</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.