

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

| | | |
|------------------------------------|---|----------------------------|
| In the Matter of |) | File No. EB-02-BF-054 |
| |) | File No. EB-02-BF-055 |
| Roser Communications Network, Inc. |) | File No. EB-02-BF-056 |
| WBGK |) | |
| WBUG |) | NAL/Acct. No. 200232280003 |
| WBUG-FM |) | |
| Utica, New York |) | FRN 0003-3986-74 |

FORFEITURE ORDER

Adopted: June 12, 2003

Released: June 16, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eight thousand eight hundred dollars (\$8,800) to Roser Communications Network, Inc. (“Roser”), for repeated violations of Section 11.35(a) and 11.61(a) of the Commission’s Rules (“Rules”).¹ The noted violations involve Roser’s failure to have a fully operational Emergency Alert System (“EAS”) installed, its failure to log the reasons for the failure of its EAS apparatus to receive test transmissions and its failure to transmit the required monthly EAS tests.

2. On July 18, 2002, the Commission’s Buffalo, New York, Resident Agent Office (“Buffalo Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Roser for a forfeiture in the amount of eleven thousand dollars (\$11,000).² Roser filed its response to the *NAL* on August 16, 2002.

II. BACKGROUND

3. Roser is the licensee of broadcast stations WBGK, WBUG and WBUG-FM (“Roser’s stations”). On March 13, 2002, an agent from the Buffalo Office traveled to Utica, New York, to determine whether Roser was in compliance with the Commission’s EAS regulations. The agent determined that: (1) from December 4, 2001, to March 12, 2002, WBGK, WBUG and WBUG-FM did not receive monthly or weekly tests from a second assigned EAS monitoring source³; (2) WBGK,

¹ 47 C.F.R. §§ 11.35(a), 11.61(a).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232280003 (Enf. Bur., Buffalo Office, rel. July 18, 2002).

³ The *NAL* indicated that the agent determined WBUG and WBUG-FM did not receive monthly tests from any assigned EAS monitoring source from December 4, 2001, to March 12, 2002. In fact, the agent determined that WBUG and WBUG-FM received tests from the first assigned source but not from the second assigned source.

WBUG, and WBUG-FM did not transmit monthly tests during December 2001 and February 2002; (3) there were no EAS log entries for WBGK, WBUG, and WBUG-FM indicating why those stations did not receive EAS tests from the second assigned source between December 4, 2001, and March 12, 2002; and (4) the EAS equipment at WBGK, WBUG, and WBUG-FM failed consistently to receive and transmit weekly and monthly EAS tests and, therefore, was not fully operational between December 4, 2001, and March 12, 2002.

4. On March 21, 2002, the Buffalo Office issued three Official Notices of Violation (“NOVs”) to Roser for the violations detected during the March 13, 2002, inspection. On April 12, 2002, Roser submitted responses prepared by Roser’s contractor, Digital Radio Engineering, Inc. (“Digital”). The responses acknowledged the violations alleged by the NOVs and indicated that they had been corrected.

5. On July 18, 2002, the Buffalo Office issued a *NAL* for a forfeiture in the amount of \$11,000 to Roser for its willful and repeated violations of Sections 11.35(a) and 11.61(a) of the Rules by (1) failing to have a fully operational EAS installed (\$8,000); (2) failing to determine and log the reasons for the failure of its EAS apparatus to receive test transmissions (\$1,000 for each of Roser’s three stations); and (3) failing to transmit the required monthly EAS tests.⁴ In its response, filed August 16, 2002, Roser seeks cancellation of the monetary forfeiture. Roser states that the responses to the NOVs “drafted and mailed by Roser’s independent contractor engineer . . . [do] not reflect Roser’s official position on this matter” and that Roser “denies the allegations set forth in the *NAL*.” Roser also argues that, if it did violate the EAS rules, it was done “unknowingly” and “unintentionally” and, therefore, not willfully. The period during which the violations allegedly occurred, Roser states, was one of transition for it, a small, family-owned business, as it was in the midst of selling stations, purchasing and building out a station, relocating equipment, and bringing on new staff. Its record before us, Roser asserts, is “spotless.” Finally, Roser argues that the imposition of an \$11,000 monetary forfeiture would “severely damage” it and that it would be forced to consider terminating one or more of its employees.

III. DISCUSSION

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁵ Section 1.80 of the Rules,⁶ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). In examining Roser’s response, Section 503(b) of the Act requires that the Commission take into account the

⁴ The *NAL* did not specify a separate forfeiture amount for failure to transmit the required monthly EAS tests. However, this violation was considered as an additional basis for the \$11,000 forfeiture amount calculated for the violations of Section 11.35(a) of the Rules.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

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 other such matters as justice may require.⁷

7. Section 11.35(a) of the Rules requires that broadcast stations have fully operational EAS equipment. That section also requires that broadcast stations determine and log the reasons for any failure of their EAS apparatus to receive test transmissions. Section 11.61(a) requires monthly and weekly EAS tests. Roser submitted responses (prepared by its contractor) to the NOV's acknowledging violations of these requirements and indicating that Roser had corrected those violations. Now, in response to the *NAL*, Roser repudiates its responses to the NOV's and denies the alleged violations but does not submit a sworn statement or provide any factual basis for the denial. In the absence of any factual basis for Roser's denial, we conclude on the basis of the FCC agent's investigation that between December 4, 2001 and March 12, 2002, Roser did not have a fully operational EAS installed and did not determine and log the reasons for the failure of its EAS apparatus to receive test transmissions, and during December 2001 and February 2002 Roser did not transmit the required monthly EAS tests. We, therefore, conclude that Roser repeatedly violated Sections 11.35(a) and 11.61(a) of the Rules.⁸

8. Section 503(b) of the Act gives the Commission authority to assess a forfeiture penalty against any person if the Commission determines that the person has "willfully or repeatedly" failed to comply with the provisions of the Act or with any rule, regulation or order issued by the Commission.⁹ Roser claims that the violations, if any, occurred during a period of transition for it and were unknowing and unintentional, and, therefore, not willful. In light of our determination that Roser's violations were repeated, it is not necessary to determine whether they were also willful.¹⁰ We remind Roser that, as a Commission licensee, it is obligated to maintain its stations in full compliance with the Act and the Rules during all periods, and will not be excused for violations absent clear mitigating circumstances.¹¹

9. Roser claims that payment of the proposed forfeiture amount of \$11,000 would pose a severe financial hardship. As explicitly stated in the *NAL* at paragraph 13, we 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. We cannot consider Roser's inability to pay claim because Roser did not provide any of the required financial documentation.

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), defines "repeated" when used with reference to the commission or omission of any act as "the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

⁹ 47 U.S.C. § 503(b)(1)(B).

¹⁰ *Koke, Inc.*, 23 FCC 2d 191 (1970).

¹¹ *Sitka Broadcasting Co.*, 70 FCC 2d 2375, 2378 (1979); *East Tennessee Radio Group, L.P.*, DA 03-868 (Enf. Bur., rel. Mar. 26, 2003).

10. The *NAL* found at paragraph 8 that Roser has a history of overall compliance, a “downward” adjustment criterion,¹² and that its violations are egregious, an “upward” adjustment criterion,¹³ and made no adjustment to the \$11,000 base forfeiture amount.¹⁴ Based on our review of the facts, we do not find in this instance that an egregiousness-based upward adjustment is warranted. Therefore, we find that Roser’s history of overall compliance warrants mitigating its forfeiture to \$8,800.

11. We have examined Roser’s response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Roser repeatedly violated Sections 11.35(a) and 11.61(a) of the Rules and find that, while there is no basis for cancellation of the proposed monetary forfeiture, a reduction to \$8,800 is warranted.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁵ Roser **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars eight hundred (\$8,800) for failing to have a fully operational EAS installed, failing to determine and log the reasons for the failure of its EAS apparatus to receive test transmissions, and failing to transmit the required monthly EAS tests, in repeated violation of Sections 11.35(a) and 11.61(a) of the Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁶ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232280003 and FRN 0003-3986-74. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁷

¹² See 47 C.F.R. § 1.80(b)(4), *Guidelines For Assessing Forfeitures*, Section II.

¹³ *Id.*

¹⁴ Paragraph 8 of the *NAL* also indicates that the Buffalo Office applied “inflation adjustments” in calculating the *NAL* amount. This appears to be a misstatement as no such adjustments are authorized by the Rules or the Act. Our review of this case indicates that the Buffalo Office actually made no such adjustments to the base forfeiture amounts.

¹⁵ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁶ 47 U.S.C. § 504(a).

¹⁷ See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Roser Communications Network, Inc., P.O. Box 4490, Utica, New York, 13504, and to its counsel, Richard J. Hayes, Jr., Esq., 8404 Lee's Ridge Road, Warrenton, Virginia 20186.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau