

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

In the Matter of
Playa del Sol Broadcasters
Licensee, KRCK-FM
Mecca, California
File No. EB-02-SD-288
NAL/Acct. No. 200332940004
FRN 000-425-6426

FORFEITURE ORDER

Adopted: August 19, 2004

Released: August 23, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of twelve thousand dollars (\$12,000) to Playa del Sol Broadcasters ("Playa del Sol"), licensee of station KRCK-FM, Mecca, California, for willful and repeated violation of Sections 11.35, 11.61, and 73.1125 of the Commission's Rules ("Rules").

2. On March 31, 2003, the Commission's San Diego, California Office ("San Diego Office") issued a Notice of Apparent Liability for Forfeiture ("NAL") to Playa del Sol for a forfeiture in the amount of fifteen thousand dollars (\$15,000).

II. BACKGROUND

3. On November 13, 2002, a Commission agent from the San Diego Office attempted to conduct a routine inspection of station KRCK-FM's EAS equipment. However, the agent was unable to locate a main studio for KRCK-FM in the Palm Springs - Mecca, California area.

1 47 C.F.R. §§ 11.35, 11.61 and 73.1125.

2 See Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200332940004 (Enf. Bur. San Diego Office, March 31, 2003).

4. On December 2, 2002, two agents from the San Diego Office attempted to conduct an inspection of KRCK-FM's nearly completed studio in Palm Desert, California. The agents found no staff present at the new main studio. The agents contacted Playa del Sol's owner and general manager, Edward Stolz II, who met the agents at the new studio later that day. Mr. Stolz advised the agents that the new main studio would be completed later that week. Mr. Stolz also informed the agents that station KRCK-FM's EAS equipment was and had been located for the past year at the old main studio at the transmitter site near Mecca, California.

5. Later on December 2, 2002, accompanied by Mr. Stolz, the agents inspected station KRCK-FM's transmitter site. The transmitter building was located on a dirt road, with a locked fence blocking the entrance and no apparent public access to the building. Mr. Stolz provided the agents access to the transmitter building. There was no evidence that a main studio had been located at the transmitter site. There were no desks, phones, or restroom facilities in the small windowless building. Mr. Stolz then acknowledged that no main studio actually existed at the transmitter site.

6. Station KRCK-FM's EAS equipment was located at the transmitter site. No formal station log of EAS tests was maintained and the automatic printouts from the EAS equipment served as the station log. The lack of printouts indicated that the EAS equipment had been out of service from December 30, 2001 to March 10, 2002. No records existed regarding any attempt by Playa del Sol to determine the cause of the EAS equipment failure. No records existed noting that the EAS equipment had been taken out of service for repair.³ No request for additional time to repair the KRCK-FM EAS equipment was ever received by the San Diego Office.

7. The EAS printouts revealed that Playa del Sol did not retransmit any required monthly tests at station KRCK-FM during the calendar year 2002 and only received one required monthly test during 2002. The printouts also revealed that Playa del Sol did not regularly conduct, receive or transmit the required weekly tests at station KRCK-FM. In fact, the printouts indicated that only seven required weekly tests were transmitted during all of 2002. No records existed indicating any attempt by Playa del Sol to determine the cause of the failure to receive the required monthly and weekly EAS tests. At the time of the inspection, the EAS equipment appeared to be set to monitor only one EAS source, not the requisite two sources. On March 31, 2003, the San Diego Office issued a *NAL* for \$15,000 to Playa del Sol for willfully and repeatedly violating Sections 11.35, 11.61, and 73.1125 of the Rules.

III. DISCUSSION

8. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁶ In examining Playa del Sol's response, Section 503(b) of the Act requires that the Commission take into account 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.⁷

9. Section 73.1125 of the Rules requires the licensee of a broadcast station to maintain a

³ EAS equipment may be removed from service for repair for up to 60 days without Commission approval. Stations are required to make log entries noting the date removed and returned to service. See 47 C.F.R. § 11.35(b).

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

main studio at one of the following locations: (1) within the station's community of license; (2) at any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station's community of license; or (3) within twenty-five miles from the reference coordinates of the center of its community of license. In adopting the main studio rules, the Commission stated that the station's main studio must have the capability to serve the needs and interests of the residents of the station's community of license.⁸ At the time of the inspection, station KRCK-FM had no main studio. In fact, KRCK-FM's general manager admitted to the investigating agents that there was no main studio at the transmitter site, and in its response Playa del Sol does not dispute the evidence in the *NAL* indicating that there was no main studio located at the transmitter site. Moreover, in its response to the *NAL*, Playa del Sol discusses its efforts to get the new Palm Desert studio up and running but admits that, at the time of the inspection, the new main studio did not meet occupancy, staffing and equipment requirements. Thus, there was neither a new operational main studio nor an existing main studio located at the transmitter site. Therefore, we find that station KRCK-FM had no main studio from at least November 13, 2002, the date on which the San Diego Office began attempting to locate station KRCK-FM's main studio, to December 5, 2002 in willful⁹ and repeated¹⁰ violation of Section 73.1125 of the Rules.

10. Section 11.35 of the Rules requires broadcast stations to ensure that EAS Encoders, EAS Decoders and Attention Signal generating and receiving equipment used as part of the EAS are installed so that monitoring and transmitting functions are available during the times the stations and systems are in operation.¹¹ Section 11.61 of the Rules requires broadcast stations to (a) receive monthly EAS tests from designated local primary EAS sources and retransmit the monthly test within 60 minutes of its receipt and (b) conduct tests of the EAS header and EOM codes at least once a week at random days and times.¹² Section 11.35 also requires broadcast stations to determine the cause of any failure to receive required the required EAS tests, and make appropriate entries in the station log indicating reasons why the required tests are not received.¹³ Further, if a broadcast station's EAS equipment becomes defective, the broadcast station may operate without the defective equipment pending its repair or replacement for 60 days without further FCC authority.¹⁴ If the failure cannot be corrected within 60 days, Section 11.35(c) of the Rules requires the licensee to make an informal request to the District Director of the FCC Field

⁸ *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215, 3217-18 (1987), *clarified*, 3 FCC Rcd 5024, 5026 (1988).

⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁰ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn 56 (2003).

¹¹ 47 C.F.R. § 11.35.

¹² 47 C.F.R. § 11.61. The required monthly and weekly tests are required to conform with the procedures in the EAS Operational Handbook. See also, *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, EB Docket No. 01-66, *Report and Order*, FCC 02-64 (Feb. 26, 2002); 67 Fed Reg 18502 (April 16, 2002) (effective May 16, 2002, the required monthly EAS test must be retransmitted within 60 minutes of receipt).

¹³ 47 C.F.R. § 11.35.

¹⁴ 47 C.F.R. § 11.35(b).

office serving the area for additional time to make necessary repairs.¹⁵

11. The *NAL* found that Playa del Sol did not retransmit any required monthly EAS tests at station KRCK-FM during 2002 and only received one required monthly test in 2002. The *NAL* also found that KRCK-FM did not regularly conduct, receive or transmit the required weekly EAS tests, and that it only retransmitted seven required weekly tests during 2002. Moreover, the *NAL* found that KRCK-FM's EAS equipment was out of service for more than 60 days in 2002 and that no records existed indicating any attempt by Playa del Sol to ascertain the reason the equipment was not operating or why the required weekly and monthly EAS tests were not received or retransmitted.

12. Playa del Sol asserts its belief that KRCK-FM's EAS equipment was not out of service for any period during 2002. Playa del Sol attributes its inability to demonstrate that it received and transmitted monthly EAS tests to problems it experienced with its equipment. Playa del Sol states that it began experiencing problems with its EAS equipment in late 2001, when it noted that the system was recording the incorrect day of the week and the years 1901 and 1902. Playa del Sol further claims that an unfortunate series of events resulted in its not being able to produce EAS printouts, including its air conditioning system vent shredding tapes, and incorrect machine ribbon rubbing against the tape advance mechanism, which caused the entire printout to stop. Playa del Sol also contends that, contrary to the *NAL's* finding, station KRCK-FM actually received four required monthly tests and eleven required weekly tests.¹⁶

13. Although Playa del Sol acknowledges having experienced problems with its EAS equipment that required the system to be sent back to the manufacturer and that required a software patch to correct the Y2K problem that caused the machine to print the wrong years, there are no logged entries to indicate that there were any problems with the EAS. In fact, there was no EAS log. While Playa del Sol argues in reply that the EAS equipment was operational, the combination of not having an EAS log, not having any type of EAS printouts for the period December 30, 2001 through March 10, 2002, and the acknowledged problems that Playa del Sol was having with station KRCK-FM's EAS equipment caused the investigating agents to determine that station KRCK-FM's EAS system was not operational for that time-period. Playa del Sol admits that its EAS equipment was out of service sometime in late 2001, during which time Playa del Sol returned the equipment to the manufacturer. Playa del Sol also admits that it can not provide any documentary evidence to establish that station KRCK-FM transmitted the required monthly tests during 2002. Further, whether station KRCK-FM actually received four monthly and eleven weekly tests is irrelevant. Station KRCK-FM should have received and logged twelve monthly tests and at least 40 weekly tests and it should have had the records to prove it.¹⁷ It did not. Moreover, there are no records to indicate that it retransmitted any of the required monthly tests or that it retransmitted any more than seven weekly tests during all of 2002. The absence of any corroborating logs belies Playa del Sol's claim that KRCK-FM's EAS equipment was not out of service at any time in 2002. Thus, although the equipment may have been operational at times during 2001 through 2002, Playa del Sol admits and the record establishes that there were extended periods during which there are no log entries to indicate whether the equipment functioned properly as required by of Section 11.35 of the Rules. Further, there are no records that indicate that Playa del Sol transmitted all of the weekly and

¹⁵ 47 C.F.R. 11.35(c).

¹⁶ Playa Del Sol also discusses problems with station KRCK-FM's toll-free phone telephone number and its disagreement with the *NAL's* finding that it was monitoring only one EAS source instead of two. We do not address these matters herein because neither was cited in the *NAL* as a violation for which a forfeiture amount was imposed.

¹⁷ See 47 C.F.R. § 73.1820.

monthly EAS tests required by Section 11.61 of the Rules.¹⁸

14. Based on the findings of the *NAL* and Playa del Sol's response thereto, we find that Playa del Sol's violations of Sections 73.1125, 11.35, and 11.61 of the Rules were willful and repeated. We also note that, even though Playa del Sol has a new accessible main studio and a new EAS system, these measures were accomplished after the Commission's inspection. Although Playa del Sol's corrective actions are commendable, they do not mitigate its violations. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations."¹⁹ Finally, we note that Playa del Sol claims to have a history of compliance with the Commission's Rules. Having found that Playa del Sol does have a history of compliance with the Commission's Rules, we believe a reduction of the forfeiture to \$12,000 is warranted.

ORDERING CLAUSES

15. 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,²⁰ Playa del Sol Broadcasters, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twelve thousand (\$12,000) for its willful and repeated violations of Sections 73.1125, 11.35, and 11.61 of the Rules at station KRCK-FM.

16. 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.²¹ 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. 200332940004 and FRN 000 425 6426. 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. 20554.²²

17. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Playa del Sol Broadcasters, 801 K Street, 27th Floor, Sacramento, California 95814 and its counsel Andrew Kersting, Esq., Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street, NW, Washington, DC 20037-1526.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁸ We note that Commission agents tested the EAS equipment during the inspection on December 2, 2002, by transmitting a weekly test and the resulting EAS printout indicated that the year was 1902. Thus, at the time of the inspection the EAS equipment was not fully functional.

¹⁹ See also *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002).

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

²¹ 47 U.S.C. § 504(a).

²² See 47 C.F.R. § 1.1914.