

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

In the Matter of)
)
ESI Companies, Inc.)
1877 Vanderhorn Drive)
Memphis, Tennessee 38134)

File Number EB-02-NF-109
NAL/Acct. No. 200332640003
FRN 4245429

FORFEITURE ORDER

Adopted: September 7, 2004

Released: September 9, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to ESI Companies, Inc. (“ESI”), for willful violation of Section 301 of the Communications Act of 1934, as amended (“Act”).¹ The noted violation involves ESI’s operation of a maritime radio station on the frequency 156.8050 MHz without Commission authorization.

2. On March 4, 2003, the Commission’s Norfolk, Virginia, Resident Agent Office (“Norfolk Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to ESI proposing a forfeiture in the amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 301 of the Act.² ESI responded to the *NAL* on April 10, 2003.

II. BACKGROUND

3. On August 14, 2002, the Norfolk Office received a complaint indicating that transmissions on 156.8050 MHz were hampering the United States Coast Guard Auxiliary’s ability to monitor for distress calls from boaters on the maritime safety channel at 156.800 MHz.³ The complaint also indicated that the interfering transmissions were emanating from an area south of Taylorsville, North Carolina, and were related to construction.

¹ 47 U.S.C. § 301.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332640003 (Enf. Bur., Norfolk Office, released March 4, 2003).

³ The frequency 156.800 MHz is the international distress, safety and calling channel and is maintained by the United States Coast Guard to detect, among other things, calls from ships in distress.

4. On August 22, 2002, an agent from the Norfolk Office monitored 156.8050 MHz in the Taylorsville, North Carolina area. The agent observed communications relating to construction activities on that frequency. Using direction finding equipment and investigative techniques, he determined that these transmissions emanated from a construction site located off Old Land Fill Road (SR 1608), south of Taylorsville, North Carolina. The agent conducted an inspection and interviewed the construction superintendent, who stated that ESI's employees were using a base station radio and six hand-held radios as part of ESI's construction business. The agent made frequency measurements of ESI's base station and noted that it was tuned to 156.8050 MHz. That frequency is allocated exclusively for maritime use. ESI holds licenses for land mobile radio stations used in its construction business, but it is not authorized to transmit on 156.8050 MHz or any other maritime frequency.

5. In its letter of October 21, 2002, to the Norfolk Office, ESI stated that, after the FCC visited its Taylorsville, North Carolina, jobsite, ESI found that the wrong frequency -- 156.8050 MHz -- was installed there and "possibly other locations across the country." ESI also stated that it was "now using 151.505 and 158.400 MHz at all sites nationwide."

6. On March 4, 2003, the Norfolk Office issued an *NAL* to ESI for a forfeiture in the amount of \$10,000. In its reply to the *NAL*, ESI states that it originally operated radio transmitters on 156.8050 MHz during 1999⁴ at a San Diego, California, job site. ESI theorizes that the recurrence of such operation on August 22, 2002, arose from ESI's order to reprogram transmitters in late 2000. ESI asserts that, in making the order, it apparently -- through error -- sent Integrated Communications, Inc. ("ICI"), a transmitter which was supposedly programmed for the "correct" frequency but was actually programmed for 156.8050 MHz; and that, as a result, ICI reprogrammed the transmitters to operate on 156.8050 MHz. ESI seeks cancellation or reduction of the proposed monetary forfeiture. It argues that its violation is not willful; that the proper base forfeiture amount for its violation is \$4,000 rather than \$10,000; that "the nature, circumstances and history of compliance show ESI does not have the requisite degree of culpability to support [a] forfeiture"; and that "the Norfolk Office improperly used ESI's good faith and voluntary disclosures of prior improper programming by a service representative as a basis to refuse rather than allow any reduction of the base forfeiture."

III. DISCUSSION

7. The forfeiture amount in this case is being 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*

⁴ On July 14, 1999, the Commission's San Diego, California, Field Office issued a letter of inquiry ("LOI") to ESI concerning radio signals observed July 2, 1999, on 156.8050 MHz emanating from transmitters located at or near ESI's office at a San Diego, California construction site. ESI was not authorized to transmit on 156.8050 MHz or any other maritime frequency. ESI's response to the LOI indicated that ESI held a license to operate on 151.62500 MHz but "the single frequency was not working for us." ESI stated that, to find a solution, it consulted Integrated Communications, Inc. ("ICI"), a radio dealer and repair shop, which suggested using an itinerant frequency "which . . . would not require a license"; and that ICI then mistakenly programmed ESI's transmitters to operate on 156.8050 MHz. ESI asserted that it replaced those transmitters with rented equipment.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

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*”). Section 503(b) of the Act requires that the Commission, in examining ESI’s response, 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

8. Section 301 of the Act prohibits unauthorized radio operation.⁸ We conclude on the basis of the Norfolk agent’s observations and ESI’s response to the *NAL*, that ESI operated radio transmitting apparatus on a frequency reserved for maritime radio stations without an instrument of authorization for the maritime service on August 22, 2002, in violation of Section 301 of the Act.

9. ESI argues that, under the standard of *Midwest-Radio Television, Inc.*, 45 FCC 1137 (1963),⁹ its violation of Section 301 was not willful because it did not know ICI had programmed its radios with an improper frequency. As the Commission recently reiterated, “the Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”¹⁰ ESI is, therefore, chargeable with ICI’s knowledge of the frequencies installed in its transmitters.¹¹ We conclude that ESI’s violation of Section 301 of the Act on August 22, 2002, was willful.

10. 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. In light of our determination that ESI’s violations were willful it is not necessary to determine whether they were also repeated.¹²

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ Section 301 provides, in pertinent part, that “No person shall . . . operate any apparatus for the transmission of energy or communications or signals . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”

⁹ That case holds that – to establish that a violation is willful – the language of Section 503(b) of the Act “requires only that the Commission establish that the licensee knew that he was doing the acts in question” *Midwest-Radio Television, Inc.*, 45 FCC 1137, 1141 (1963). In 1982 Congress codified the same standard in 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. Section 312(f)(1) 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 *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation marks omitted) and cases cited therein.

¹¹ See *Southern Media Communications, Inc.*, 18 FCC Rcd 24008, 24010 (Enf. Bur. 2003).

¹² *KOKE, Inc.*, 23 FCC 2d 191 (1970).

11. Even if we agreed with ESI's contention that the proper base forfeiture amount for its violations of Section 301 is \$4,000, we would still find \$10,000 to be the proper forfeiture amount because of the egregiousness¹³ of ESI's violations. ESI's unlicensed operation occurred on 156.805 MHz, a frequency located so close to the international distress, safety and calling channel, 156.800 MHz, that there was a significant risk of interference to distress and safety communications. This case originated from a complaint about transmissions on 156.805 MHz which were hampering the United States Coast Guard Auxiliary's ability to monitor for distress calls from boaters on 156.800 MHz. Additionally, ESI had been previously warned about operation on 156.805 MHz. We find that \$10,000 is the proper forfeiture amount for ESI's violations.

12. We also reject ESI's claim that "the nature, circumstances and history of compliance show ESI does not have the requisite degree of culpability to support [a] forfeiture." First, as indicated in the July 14, 1999, LOI described in fn. 4, ESI violated Section 301 during 1999 and, therefore, does not have a history of overall compliance. Second, as indicated in paragraph (9), above, ESI is responsible for the acts and omissions of ICI, its contractor. Third, ESI's culpability is increased by its failure to take the necessary steps to prevent the recurrence of its violation of Section 301 on August 22, 2002.

13. Finally, we reject ESI's assertion that "the Norfolk Office improperly used ESI's good faith and voluntary disclosures of prior improper programming by a service representative as a basis to refuse rather than allow any reduction of the base forfeiture." While voluntary disclosure of violations before detection by the Commission or correction of violations before notification by the Commission does warrant a reduction, neither circumstance exists here. In this case, ESI acted only after the Commission notified it of its violation of Section 301 of the Act.

14. We have examined ESI'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 ESI willfully violated Section 301 of the Act and find no basis for cancellation or reduction of the proposed \$10,000 monetary forfeiture.

IV. 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,¹⁴ **ESI IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willfully violating Section 301 of the Act.

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.¹⁵ 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,

¹³ Note to Section 1.80(b)(4) of the Rules, 47 C.F.R. § 1.80(b)(4), *Guidelines for Assessing Forfeitures, Section II — Adjustment Criteria for Section 503 Forfeitures*.

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

¹⁵ 47 U.S.C. § 504(a).

Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332640003 and FRN 4245429. 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. 20554.¹⁶

17. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to ESI's counsel, Nathan E. Minear, Esq., Hendrick, Phillips Salzman & Flatt, 230 Peachtree Street, N.W., Suite 1800, Atlanta, Georgia 30303.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁶ See 47 C.F.R. § 1.1914.