

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

In the Matter of	)	
	)	
Big Island Radio	)	File No. EB-03-HL-035
Former Licensee of Station KHWI(FM)	)	NAL/Acct. No. 200432860002
Hilo, Hawaii	)	FRN 0004-9794-64

**FORFEITURE ORDER**

**Adopted:** October 18, 2004

**Released:** October 21, 2004

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of one thousand three hundred dollars (\$1,300) to Big Island Radio (“Big Island”), former licensee of Station KHWI(FM), Hilo, Hawaii,<sup>1</sup> for its repeated violations of the Emergency Alert System (“EAS”) requirements of Sections 11.35(a) and 11.61 of the Commission’s Rules (“Rules”).

**II. BACKGROUND**

2. On March 11, 2004, the Commission’s Honolulu, Hawaii Field Office (“Field Office”) released a *Notice of Apparent Liability for Forfeiture* (“NAL”).<sup>2</sup> The NAL found that Station KHWI failed to receive and retransmit the EAS Required Monthly Test (“RMT”) between March and May 1, of 2003, and further failed to receive and retransmit the EAS Required Weekly Tests (“RWTs”) between January and April of 2003. The NAL proposed a \$2,000 forfeiture, finding that Big Island apparently repeatedly violated Sections 11.35(a) and 11.61 of the Rules because it did not conduct the required monthly and weekly EAS tests and did not determine and log the reasons for its failure to receive the required EAS transmissions.

3. In its response to the NAL, Big Island did not dispute the NAL’s findings. Rather, Big Island sought a reduction or cancellation of the proposed forfeiture based on its good faith efforts, its unblemished history of compliance and its inability to pay.

**III. DISCUSSION**

4. The forfeiture amount proposed in this case was assessed in accordance with Section

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<sup>1</sup>Commission records reflect that the assignment application was granted on March 11, 2004, and the license for Station KHWI was transferred on May 21, 2004. See BALH-20031002ABG (granted March 11, 2004).

<sup>2</sup>*Big Island Radio*, NAL/Acct. No. 200432860002 (Enf. Bur., Honolulu, Hawaii Office, released March 11, 2004).

503(b) of the Communications Act of 1934, as amended (“Act”),<sup>3</sup> Section 1.80 of the Rules,<sup>4</sup> and the *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>5</sup> In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we 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.<sup>6</sup> As discussed below, we have considered Big Island’s response to the *NAL* in light of these statutory factors and have found that reduction of the proposed forfeiture amount is warranted.

5. Big Island claimed, and provided a supporting sworn declaration from its Chief Executive Officer attesting to the fact, that prior to the Field Office’s inspection it took corrective measures by terminating “nonperforming personnel, including the General Manager and Engineer,” retaining the services of qualified staff, including a new radio engineer, and instituting scheduled implementation of measures to bring Station KHWI, and Big Island’s other seven radio stations in compliance with the requirements of the Act and Rules;<sup>7</sup> and that after the inspection, it informed the Field Office that it corrected the noted deficiencies and replaced the noted defective EAS equipment.<sup>8</sup> As the broadcast licensee, Big Island is held accountable and is not absolved from liability for the actions of its prior nonperforming staff.<sup>9</sup> Moreover, Big Island’s replacement of defective EAS equipment and resumption of testing and logging, *after* the Field Office’s inspection, generally would not be considered a mitigating

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<sup>3</sup>47 U.S.C. § 503(b).

<sup>4</sup>47 C.F.R. § 1.80.

<sup>5</sup>12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

<sup>6</sup>47 U.S.C. § 503(b)(2)(D).

<sup>7</sup>Sworn Declaration of Glenn Yee, Chief Executive Officer, Big Island Radio (April 12, 2004) at 1. According to Mr. Yee’s declaration, Big Island Radio’s implemented a three-phase “priority of projects,” which consisted of (1) relocating an AM antenna structure and transmitter; (2) repairing and/or replacing eight AM/FM transmitters; and (3) repairing and/or replacing studio equipment, including Station KHWI’s EAS equipment. *Id.* At the time of the inspection, Big Island, having completed the first phase, had been implementing the second phase; and, within a month after the inspection, it replaced Station KHWI’s defective EAS equipment. *Id.*

<sup>8</sup>In this connection, Big Island cited *Radio Lake Placid, Inc.*, DA 03-4093 (Enf. Bur., released December 30, 2003) and noted that it was allowed under Commission rules to operate for a period of 60 days with defective EAS equipment. Whereas a station is permitted to operate for a 60-day period while its EAS equipment is repaired or replaced, an informal request must be made to the District Director if it could not accomplish the repairs or replacement within such time period. See 47 C.F.R. §§ 11.35(b) and (c). Because Station KHWI was operating beyond the 60-day period, its reliance upon *Radio Lake Placid, Inc.* is misplaced. See, e.g., *Rotijefco, Inc.*, 18 FCC Rcd 14629, 14630-31 ¶ 7 (Enf. Bur. 2003) (finding that the station had not repaired or replaced the defective EAS equipment within the 60-day period, and thus was not entitled to cancellation of the proposed forfeiture).

<sup>9</sup>See *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 ¶¶ 6-7 (2002); *Sonderling Broadcasting Corp.*, 69 FCC 2d 289, 290-91 ¶ 6 (1977); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361, 361-62 ¶ 3 (1972); *Charter Communications VI, LLC*, 17 FCC Rcd 16516, 16518-19 ¶¶ 8-9 (Enf. Bur. 2002); *American Paging, Inc.*, 12 FCC Rcd 10417, 19419-20 ¶ 11 (WTB 1997).

circumstance that would warrant reduction or cancellation of the proposed forfeiture.<sup>10</sup> However, because the record establishes that Big Island voluntarily and on its own accord initiated, and was in the process of implementing, corrective measures *prior* to the Field Office's inspection, we conclude that reduction of the proposed forfeiture amount to \$1,600 is warranted.<sup>11</sup>

6. Big Island also claimed, and a search of Commission, Bureau and Field Office decisions confirmed, that Station KHWI, and its seven sister radio stations, have had an unblemished history of serving their communities in compliance with Commission regulations. After considering Ad-Venture's past history of compliance, we conclude that a further reduction of the proposed forfeiture amount to \$1,300 is appropriate.<sup>12</sup>

7. Finally, Big Island claimed, and provided financial documentation to show, that over the last three years its stations have been operating with net losses, which has culminated in its recent efforts to "sell the stations and leave the broadcasting business."<sup>13</sup> Whereas Big Island's documentation establishes that it has consistently operated at net losses, we nevertheless find that it has generated sufficient gross revenues such that payment of the reduced forfeiture will not pose a financial hardship.<sup>14</sup>

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections

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<sup>10</sup>See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875-76 ¶¶ 26-28 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 ¶ 7 (1994); see also *TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992) (noting that it would be inappropriate to base "mitigation or cancellation of a forfeiture upon corrective action taken subsequent to misconduct upon which liability is based," because it "would tend to encourage remedial rather than preventative action").

<sup>11</sup>See, e.g., *Pearson Broadcasting of Mena, Inc.*, DA 04-2391, ¶ 8 (Enf. Bur., released August 2, 2004); *Petracom of Texarkana, LLC*, 19 FCC Rcd 8096, 8097-98 ¶ 6 (Enf. Bur. 2004).

<sup>12</sup>See, e.g., *Rotijefco, Inc.*, 18 FCC Rcd 14629, 14631 ¶ 8 (Enf. Bur. 2003); *Roser Communications Network, Inc.*, 18 FCC Rcd 11766, 11768-69 ¶ 10 (Enf. Bur. 2003); *Tidewater Communications, Inc.*, 18 FCC Rcd 5524, 5525 ¶¶ 5-6 (Enf. Bur. 2003); *Southern Rhode Island Public Broadcasting, Inc.*, 15 FCC Rcd 8115, 8117-18 ¶ 8 (Enf. Bur. 2000); *Aurio A. Matos and Juan Carlos Matos*, DA 99-1931 ¶ 7 (MMB 1999).

<sup>13</sup>Letter from William D. Silva, Esq. to Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division (April 12, 2004) at 2. Commission records reflect that three of Big Island's assignment applications have been granted, and that five applications are pending and subject to petitions to deny. See BALH-20031002ABG (granted May 26, 2004); BALH-20031002AAW (granted April 16, 2004); BAL-20031106AMG (granted March 11, 2004); BALH-20031002AAY (applications reinstated and pending).

<sup>14</sup>See *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17106 ¶ 43 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (stating that "[i]f gross revenues are sufficiently great . . . the mere factor that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture"); *Independent Communications, Inc.*, 15 FCC Rcd 16060, 16060 ¶ 2 (2000) (finding that although a corporation had net losses of \$520,667, it had gross revenues of \$516,147, and that absent "other information indicating that payment of the \$27,500 forfeiture would threaten its ability to continue to provide service to the public, reduction or cancellation in the forfeiture amount was not warranted); see also *Small Town Radio, Inc.*, 19 FCC Rcd 7187, 7188-89 ¶ 9 (Enf. Bur. 2004) (finding that although a broadcast licensee's liabilities may have greatly exceeded its assets, it had "contracted to sell its station for a substantial amount" such that reduction or cancellation of the forfeiture was not warranted).

0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>15</sup> Big Island Radio **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one thousand three hundred dollars (\$1,300.00) for repeated

violations of Sections 11.35(a) and 11.61 of the Rules.

9. 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.<sup>16</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>17</sup>

10. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Big Island Radio, Pioneer Plaza, Suite 1725, 900 Fort Street Mall, Honolulu, Hawaii 96813, and to its counsel, William D. Silva, Esq., 5335 Wisconsin Avenue, N.W., Suite 400, Washington, D.C. 20015.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon  
Assistant Chief, Enforcement Bureau

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<sup>15</sup>47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>16</sup>47 U.S.C. § 504(a).

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