

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

In the Matter of	)	
	)	
Desert Television LLC	)	File No. EB-03-SD-017
TV Station KPSP-LP	)	NAL/Acct. No. 200332940006
Cathedral City-Palm Springs, California	)	FRN 000-497-4044
	)	

**FORFEITURE ORDER**

**Adopted: November 8, 2004**

**Released: November 10, 2004**

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of six thousand four hundred (\$6,400) to Desert Television LLC (“*Desert*”), licensee of Class A Television Broadcast Station KPSP-LP, for willful and repeated violation of Section 11.35 of the Commission’s Rules (“*Rules*”).<sup>1</sup> The noted violation involves *Desert*’s failure to ensure that required Emergency Alert System (“*EAS*”) equipment was installed and operational.

2. On March 31, 2003, the Commission's San Diego, California Field Office (“*San Diego Office*”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”), to *Desert* for a forfeiture in the amount of eight thousand dollars (\$8,000).<sup>2</sup> *Desert* filed a response to the *NAL* on May 14, 2003.

**II. BACKGROUND**

3. The FCC license for Station KPSP-LP was issued to *Desert* on July 9, 2001, and on September 2, 2002, *Desert* relocated the main studio for KPSP-LP from Palm Springs to Thousand Palms, California. On November 13, 2002, an agent from the San Diego Office attempted to conduct a routine inspection of the *EAS* equipment of Station KPSP-LP. The agent found that the *EAS* equipment was not functional, and *Desert*’s Chief Engineer advised the agent that the *EAS* system had been inoperable since the move, approximately eleven weeks prior to the inspection. *Desert*’s Chief Engineer stated it would be operating by November 15, 2002, because the necessary antenna equipment parts to repair the *EAS* system had just arrived. A week later, on November 20, 2002, the agent sent *Desert*’s Chief Engineer an E-mail requesting certain information: the status of *Desert*’s *EAS* equipment; copies of the *EAS* printouts if the equipment was functional; and other information as specified in Section 11.35(c) of the *Rules*.<sup>3</sup>

<sup>1</sup> 47 C.F.R. § 11.35.

<sup>2</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332940006 (Enf. Bur., San Diego Office, released March 31, 2003).

<sup>3</sup> 47 C.F.R. § 11.35 (c).

Because the agent did not receive a responsive E-mail from Desert, an agent from the San Diego Office conducted a follow-up inspection on February 12, 2003. Although the EAS equipment appeared to be operational at that time, the station records available to the agent contained no evidence that any required monthly or weekly EAS tests had been received since the November inspection, other than one EAS test report dated February 11, 2003.

4. On March 31, 2003, the San Diego Office issued the subject *NAL* to Desert for apparent willful and repeated violation of Sections 11.35 and 11.61 of the Rules.<sup>4</sup> In its response, Desert disputes certain factual findings, believes that it has remained in substantial, if not full, compliance with the Rules, and urges the Commission to rescind or reduce the forfeiture amount based on the fact that it used its best efforts to make the appropriate changes to the EAS equipment to make it operational.

### III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>5</sup> Section 1.80 of the Rules,<sup>6</sup> and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* (“*Forfeiture Policy Statement*”).<sup>7</sup> In examining Desert’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 other such matters as justice may require.<sup>8</sup>

6. Section 11.35(a) of the Rules<sup>9</sup> provides that broadcast stations are responsible for ensuring that EAS Encoders, EAS Decoders, and Attention Signal generating and receiving equipment used as a part of the EAS are installed so that the monitoring and transmitting functions are available during times that stations and systems are in operation. If there is a failure to receive the required tests, stations must determine the cause of any failure to receive the required tests and make appropriate entries in the stations logs indicating the reasons why any tests were not received. Section 11.35(b) of the Rules<sup>10</sup> provides, among other things, that if the EAS Encoder or EAS Decoder becomes defective, the broadcast station may operate without the defective equipment pending its repair or replacement for 60 days without contacting the FCC. Section 11.35(c) of the Rules further provides, however, that if the repair or replacement is not completed within that 60 days, the licensee must submit an informal request to the appropriate District Director requesting more time to repair the defective equipment. In that submission, the licensee must also provide information as to what is being used while the equipment is out of service, and when the defective equipment will be repaired or replaced.

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<sup>4</sup> We will not address the apparent violation of Section 11.61 in this *Order* because the *NAL* only specified a forfeiture amount for the apparent violation of Section 11.35 of the Rules (EAS equipment not installed and operational). See *Blue Skies Broadcasting Corporation*, 18 FCC Rcd 15184 n. 2 (Enf. Bur. 2003).

<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>8</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>9</sup> 47 C.F.R. § 11.35(a).

<sup>10</sup> 47 C.F.R. § 11.35(b).

7. Desert seeks a cancellation or reduction in the amount of the proposed forfeiture arguing that it did not violate Section 11.35 of the Rules for the entire period specified in the *NAL* (September 2002 through February 11, 2003) and that it was, and has been, in “substantial, if not full, compliance with the EAS rules.” It maintains that when it reinstalled EAS equipment on October 16, 2002, after its move, it discovered that the equipment was not fully operational. Desert claims it began partial EAS operations on November 14, 2002 (the day after the Commission inspection), ordered new EAS equipment on November 29, 2002 and was able to receive, send and log weekly and monthly EAS tests on a regular basis starting on or about January 3, 2003, all prior to the Commission’s re-inspection on February 12, 2003. Desert’s response is accompanied by documentation, including a copy of an E-mail response dated November 20, 2002, allegedly sent by Desert’s Chief Engineer to an agent in the San Diego Office, and program logs to demonstrate that EAS tests of the equipment were performed regularly from January 6, 2003 through May 9, 2003. Desert maintains that by answering the agent’s E-mail on November 20, Desert was in compliance with Section 11.35(b) which gives licensees 60 days to operate with defective equipment without notifying the Commission, and 11.35(c) which requires the licensee to notify the appropriate District Director explaining its attempts to come into compliance with 11.35(a) if repairs can not be completed within 60 days.<sup>11</sup> Desert further states that it has fully corrected its defective EAS equipment, and its violations, if any, were inadvertent and minor, as well as unintentional.

8. In its program logs submitted with its response to the *NAL*, Desert states that its EAS equipment was not operational between September 2, 2002 and November 13, 2002, the date when the agent inspected Station KPSP-LP.<sup>12</sup> This admission affirms a violation of Section 11.35(a). Additionally, since this time period is more than 60 days, the operation without the defective EAS equipment exceeded the 60 day period permitted by Section 11.35(b) of the Rules.<sup>13</sup> The copy of the E-mail which Desert submitted as substantiation of its response to the Commission agent’s inquiries of November 20, 2002,<sup>14</sup> does not excuse Desert’s violation. At best, this E-mail, if it had been received, could be considered a post 60 day period request for more time to complete the repairs to its EAS equipment, as contemplated by Section 11.35(c) of the Rules. In sum, we find that Desert willfully<sup>15</sup> and repeatedly<sup>16</sup> violated Section

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<sup>11</sup> Because the *NAL* forfeiture amount is based on Desert’s apparent violation of Section 11.35(a) of the Rules, we need not determine whether Desert’s alleged E-mail complied with Section 11.35(b) and (c) of the Rules.

<sup>12</sup> In its Deviation Report of November 14, 2002, Desert states “[a]s of 9-02-02 [t]he EAS System has not been operational and is not a scheduled log event as a weekly test.” See, *NAL* response, Exhibit 4.

<sup>13</sup> Desert mistakenly relies on *Smith Broadcasting of Santa Barbara*, 18 FCC Rcd 9127 (Enf. Bur. 2003), wherein the Bureau cancelled an *NAL*, finding that less than 60 days had elapsed while a station operated with defective EAS equipment. Here, Desert operated without fully operational EAS equipment for more than 60 days before allegedly contacting the Commission, and gives no indication that it would have contacted the Commission but for the Commission’s November 13, 2002 inspection.

<sup>14</sup> The agent from the San Diego Office agent states that she did not receive the E-mail from Desert’s Chief Engineer, and knew nothing about it until she read Desert’s *NAL* response.

<sup>15</sup> 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, 4388 ¶ 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1993).

<sup>16</sup> 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

11.35 of the Rules, by its operation without the defective EAS equipment between November 2, 2002 and January 6, 2003 (the date the installed equipment was fully operational).

9. Desert also argues that if the Commission concludes that a violation occurred, it should reduce the forfeiture because of Desert's good faith efforts to come into compliance with the rules.<sup>17</sup> The Commission recognizes Desert's discovery that its EAS system was not in working order, and its subsequent ordering of necessary antenna connector parts before the Commission's November 13, 2002 inspection, are actions indicative of a good faith attempt to comply with the Commission's rules.<sup>18</sup> These pre-inspection actions do not warrant cancellation of the proposed forfeiture, however, but do warrant a reduction from \$8,000 to \$6,400.

10. Further, Desert's claim of inadvertence for its failure to have the EAS equipment operational does not excuse or mitigate its violation of the Rules. As the Commission has stated, "inadvertence . . . is at best ignorance of the law," and is not considered a mitigating circumstance.<sup>19</sup> Similarly, the Commission does not believe that Desert's not having its required EAS equipment operating at the time of its relocation, or within 60 days thereof, and thus not being able to participate in the EAS program, is a minor violation.<sup>20</sup> Finally, Desert's claim that its violations were unintentional, or not willful, does not mitigate its violation of the Rules.<sup>21</sup> Therefore, we conclude that no reduction or cancellation of the proposed forfeiture is warranted due to the Desert's claim of inadvertence, that its violations were minor, or unintentional.

11. We have examined Desert's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement* as well. As a result of our review, we find that Desert willfully and repeatedly violated Section 11.35 of the Rules, and we find that cancellation of the proposed monetary forfeiture is not warranted, but a reduction to six thousand four hundred dollars (\$6,400) is appropriate.

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of the Act as well as Section 312. See H.R. Rep. 97<sup>th</sup> Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Co.*, *supra* at 4388 ¶ 5.

<sup>17</sup> Desert proffers two cases where the Commission reduced a penalty for a Section 11.35 violation when similar actions were taken to fix defective EAS equipment prior to Commission notice of the violation, *KNEC Arnold Broadcasting Company, Inc.*, 16 FCC Rcd 267 (Enf. Bur. 2001) and *Rego, Inc., Licensee of Station WGEZ (AM)*, 16 FCC Rcd 16795 (Enf. Bur. 2001). Because we agree that Desert's pre-inspection actions denote good faith, there is no need to discuss these cases further.

<sup>18</sup> See also *Atlantic Beach Radio, Inc.*, 18 FCC Rcd 14263 (Enf. Bur. 2003) (crediting a licensee for its good faith attempt at compliance with Section 11.35 of the Rules by purchasing EAS equipment before the agent's inspection), and *CB Radio, Inc.*, 19 FCC Rcd 14868, 14870 ¶ 10 (Enf. Bur. 2004) (crediting a licensee for its good faith attempt at registering its tower with the Commission).

<sup>19</sup> See *Southern California Broadcasting Co.*, *supra*, at 4387 ¶ 3, and *Maxwell Broadcasting Group, Inc.*, 8 FCC Rcd 784, 784 ¶ 2 (MMB 1993) (denying a mitigation claim of a noncommercial broadcast licensee, stating that the excuse of inadvertence, due to inexperience and ignorance of the rules is not a reason to mitigate a forfeiture for violation of the advertisement restrictions).

<sup>20</sup> See *Mapa Broadcasting, L.L.C.*, 17 FCC Rcd 10519 (Enf. Bur. 2002) (finding that not having the required EAS equipment was not a minor violation).

<sup>21</sup> See text accompanying note 15 *supra*.

**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,<sup>22</sup> Desert Television LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand four hundred dollars (\$6,400) for willfully and repeatedly violating Section 11.35 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.<sup>23</sup> Payment shall 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 must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption. 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 Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>24</sup>

14. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Mr. William Evans, Vice President and General Manager, Desert Television LLC, 31-276 Dunham Way, Thousand Palms, California, 92276, and to its counsel, Maureen R. Jeffreys, Esq., Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C. 20004-1206.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon  
Assistant Chief, Enforcement Bureau

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<sup>22</sup>47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>23</sup>47 U.S.C. § 504(a).

<sup>24</sup>See 47 C.F.R. § 1.1914.