

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

In the Matter of)	
)	
North American Broadcasting Co., Inc.)	File No. EB-02-SD-197
Licensee of KFNX(AM))	NAL/Acct. No. 200232940007
Cave Creek, Arizona)	FRN 0007-2982-68

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 2004

Released: February 19, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. By this *Memorandum Opinion and Order* (“*Order*”), we deny the February 25, 2003 petition for reconsideration filed by North American Broadcasting Co., Inc. (“North American”),¹ licensee of KFNX(AM), Cave Creek, Arizona of the *Forfeiture Order* released on January 30, 2003.² The *Forfeiture Order* imposed a monetary forfeiture in the amount of four thousand dollars (\$4,000) against North American for willful violation of Section 73.1560(a)(1) of the Commission’s Rules.³ The noted violation involves North American’s failure to reduce transmitter output power as its station authorization requires.

II. BACKGROUND

2. On June 22 and 23, 2002, agents from the Commission’s San Diego, California District Office (“District Office”) conducted AM broadcast field strength measurements of Station KFNX(AM) at various locations throughout the Phoenix, Arizona area at various times throughout the day and night time hours. Based on the field strength measurements, the agents determined that Station KFNX(AM), which was authorized to transmit on frequency 1100 kHz with a daytime operating power of 50 kW and a nighttime operating power of 1 kW, had not reduced its operating power at sunset as required.⁴

¹ In its petition for reconsideration, North American identifies itself as the Debtor in Possession. *See* Petition at 1.

² *North American Broadcasting Company, Inc.*, 18 FCC Rcd 860 (Enf. Bur. 2003).

³ 47 C.F.R. § 73.1560(a)(1) (providing that the specified antenna input power of an AM station “must be maintained as near as is practicable to the authorized antenna input power and may not be less than 90% nor more than 105% of the authorized power”).

⁴ The field measurements, which demonstrated the station was operating at daytime power levels, were taken on June 22, 2003, from “approximately 6:45 p.m. until 10:30 p.m.,” and on June 23, 2003, from “approximately 7:30 p.m. until 10:30 p.m.” *North American Broadcasting Company, Inc.*, NAL/Acct. No. 200232940007 (Enf. Bur. San Diego Office, released August 30, 2002) (“*NAL*”) at ¶ 3.

Specifically, the agents determined that, after sunset, Station KFNX(AM) operated at its daytime power level of 50 kW, fifty times its authorized nighttime power level.

3. The District Office's June 2002 investigation culminated in the issuance of a *NAL*,⁵ that proposed a \$4,000 forfeiture against North American for its apparent willful violation of Section 73.1560 of the Rules.⁶ On January 30, 2003, having received no response to the *NAL*, the Enforcement Bureau ("Bureau") released a *Forfeiture Order*, affirming the *NAL*'s assessed forfeiture.

4. On February 25, 2003, the Bureau received North American's petition for reconsideration. In its petition, North American does not deny the *NAL*'s findings. North American nevertheless seeks a reduction in or cancellation of the forfeiture, based on its filing for bankruptcy, claiming that its "debts vastly exceed its assets" and that "the forfeiture will simply reduce the amount available to creditors when the bankruptcy is ultimately concluded."⁷ North American also denies that the violation was willful, characterizing it as an "isolated incident . . . result[ing] from inadvertency on the part of the station's staff."⁸

III. DISCUSSION

5. In *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, the Commission adopted guidelines for assessing base forfeiture amounts for violations of the Act and the Commission's rules, and "retain[ed] the discretion to take action in specific cases as warranted."⁹ The forfeiture guidelines establish a \$4,000 base forfeiture for exceeding authorized power limits.¹⁰ In assessing the forfeiture, the Commission may adjust the base forfeiture by taking into account, *inter alia*, a violator's ability to pay and other such matters as justice may require.¹¹ It is in this context, that we consider North American's petition for reconsideration.

6. North American's petition primarily rests upon its bankruptcy filing as justification for adjustment or cancellation of the forfeiture. As the *NAL* correctly noted, the Commission will consider adjusting or canceling a forfeiture on the basis of an inability to pay claim only if the petitioner submits financial documentation (*i.e.*, "federal tax returns for the most recent three-year period, financial statements prepared according to generally accepted accounting practices, or some other reliable and objective documentation that accurately reflects the petitioner's current financial status").¹² In the instant case, North American did not provide any financial documentation in support of its requested adjustment

⁵ *Id.*

⁶ *See* note 2, *supra*.

⁷ Petition at 2.

⁸ *See* Petition, Declaration of Francis Battaglia, President of North American Broadcasting Co., Inc. at 1. ("Battaglia Declaration"). In this connection, North American states that its practice is to reduce operating power levels at sunset and that its available transmitter logs document such reductions. *Id.*

⁹ 12 FCC Rcd 17087, 17093 ¶ 8, *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

¹⁰ *Id.* at 17113.

¹¹ *See* 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

¹² *NAL* at ¶ 12.

or cancellation of the forfeiture, and thus we have no basis upon which to assess its inability to pay claim. It should be noted that the Commission has adjusted or canceled a forfeiture based on bankruptcy filings in limited circumstances, where the licensee or regulatee has relinquished control over the assets.¹³ However, because North American did not relinquish control over the station¹⁴ and did not submit financial documentation, its bankruptcy filing, alone, neither precludes the imposition of a forfeiture¹⁵ nor justifies an adjustment or cancellation of the forfeiture amount for a violation of the Rules.¹⁶

7. North American's assertion that the violation was isolated, inadvertent, and not willful, is without merit.¹⁷ Section 503(b)(1)(B) of the Act provides that any person who "willfully or repeatedly" fails to comply with any provision of the Act or any rule, regulation or order issued by the Commission under the Act "shall be liable to the United States for a forfeiture penalty."¹⁸ In this context, "willful" means the conscious and deliberate commission or omission of an act, irrespective of any intent to violate statutory or regulatory requirements.¹⁹ As a Commission licensee, North American is responsible and held accountable for the actions of its staff,²⁰ and, here, it is undisputed that its staff consciously and deliberately operated the station at daytime power levels after sunset on June 22 and 23, 2002.²¹ By operating the station, we conclude that North American willfully violated Section 73.1560(a)(1) of the Rules.²²

¹³ See, e.g., *Dennis Elam, Trustee for Bakcor Broadcasting, Inc., Debtor*, 11 FCC Rcd 1137, 1137 ¶ 5 (1996); *Interstate Savings, Inc. d/b/a/ ISI Communications*, 12 FCC Rcd 2934, 2936 ¶ 5 (CCB 1997)

¹⁴ See note 1, *supra*.

¹⁵ See 11 U.S.C. § 362(b); see also *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 522-26 (8th Cir. 1990) (excepting from bankruptcy imposed stays, suits by government to obtain monetary judgment for past violations of the law); *Coleman Enterprises, Inc.*, 15 FCC Rcd 24385, 24389 notes 27-28 (2000), *recon. denied*, 16 FCC Rcd 10016 (2001) (noting that a bankruptcy filing does not preclude the Commission from assessing forfeitures for violations of the Act and Rules).

¹⁶ See *Adelphi Communications*, 18 FCC Rcd 7652, 7654 ¶ 8 (Enf. Bur. 2003) (finding that a Chapter 11 bankruptcy filing -- alone, without financial documentation -- does not support an inability to pay claim and thus does not provide a basis to adjust or cancel an assessed forfeiture); see also *Pinnacle Towers, Inc.*, 18 FCC Rcd 16365, 16366-67 ¶ 7 (Enf. Bur. 2003); *Friendship Cable of Texas, Inc.*, 17 FCC Rcd 8571, 8572-73 ¶ 9 (Enf. Bur. 2002).

¹⁷ See Battaglia Declaration at 1.

¹⁸ 47 C.F.R. § 503(b)(1)(B).

¹⁹ See 47 U.S.C. § 312(f); see also *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991).

²⁰ See *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21864-65 ¶¶ 7-8 (2002); *Sonderling Broadcasting Corp.*, 69 FCC 2d 289, 291 ¶ 6 (1978); *American Paging, Inc.*, 12 FCC Rcd 10417, 10419 ¶ 11 (Enf. Bur. 1997); *Dial-A-Page, Inc.*, 10 FCC Rcd 8825, 8826 ¶ 5 (Enf. Bur. 1995)

²¹ See note 4, and accompanying text, *supra*.

²² North American also claimed that after receiving the *Forfeiture Order*, it contracted to install remote equipment, which would automatically adjust the power levels at sunset and sunrise and thus ensure compliance with Section 73.1560(a)(1). See Battaglia Declaration at 1. However, remedial measures, while commendable, do not lessen, mitigate or excuse past violations of the Act or the Rules -- particularly when such measures are instituted only after Commission investigations and actions. See *AT&T Wireless Services, Inc.*, 17 FCC Rcd (continued....)

ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act²³ and Section 1.106 of the Rules,²⁴ the Petition for Reconsideration filed by North American Broadcasting Co., Inc. of the Bureau's January 30, 2003 *Forfeiture Order* for NAL No. 200232940007 **IS DENIED**.

9. Payment of the \$4,000 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.²⁵ 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. 200232940007 and FRN-0007-2982-68. 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. 20554.²⁶

10. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Lauren A. Colby, Esq., counsel for North American Broadcasting Co., Inc., at 10 E. Fourth Street, P.O. Box 113, Frederick, Maryland 21705-0113.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

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21866, 21871 ¶ 14 (2002); *KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Max Media of Montana, LLC*, DA 03-3276 ¶ 11 (Enf. Bur. October 21, 2003); *East Tennessee Radio Group, L.P.*, DA 03-868 ¶ 7 (Enf. Bur. March 26, 2003).

²³ 47 U.S.C. § 405.

²⁴ 47 C.F.R. § 1.106.

²⁵ 47 U.S.C. § 504(a).

²⁶ *See* 47 C.F.R. § 1.1914.