

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

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| In the Matter of |) | |
| |) | |
| Petracom of Joplin, L.L.C. |) | File No. EB-02-KC-782 |
| Licensee of Station KCAR-FM |) | NAL/Acct. No. 200332560006 |
| Lutz, FL 33548 |) | FRN 0005-0098-40 |
| |) | |

FORFEITURE ORDER

Adopted: April 2, 2004

Released: April 6, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of three thousand, five hundred dollars (\$3,500) to Petracom of Joplin, L.L.C. ("Petracom"), licensee of station KCAR-FM, Galena, Kansas, for willful and repeated violations of Sections 11.61(a)(2)(i)(A) and 73.3526(a)(2) of the Commission's Rules ("Rules").¹ The noted violations involve, respectively, Petracom's failure to conduct weekly Emergency Alert System ("EAS") tests and to include "issues/programs" lists in the station's public file.

2. On December 12, 2002, the Commission's Kansas City, Missouri Field Office ("Kansas City Office") issued a *Notice of Apparent Liability for Forfeiture* ("NAL")² in the amount of three thousand, five hundred dollars (\$3,500). Petracom filed a response to the NAL on January, 10, 2003.

II. BACKGROUND

3. On November 7, 2002, a Commission agent from the Kansas City Office inspected the EAS installation and public file for radio station KCAR-FM. The operator on duty at the time of the inspection could not send an EAS test without instruction from the station's engineer. After such instruction and a successful EAS transmission, the agent inspected the EAS log. The agent found that the most recent log entry of an EAS test was dated July 22, 2002. The station manager admitted to the agent that the station had not conducted EAS tests since that date. The agent also found that the station's public file contained no "issues/programs" lists. The station manager told the agent that the station had no "issues/programs" lists, though Petracom had owned KCAR-FM for over two years. Based on the violations noted during the inspection, the Kansas City Office issued Petracom an NAL for the noted violations on December 12, 2002. On January 10, 2003, Petracom submitted a response to the NAL, requesting cancellation of the forfeiture

¹ 47 C.F.R. §§ 11.61(a)(2)(i)(A) and 73.3526(a)(2).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332560006 (Enf. Bur., Kansas City Office, released December 12, 2002).

claiming that the violations resulted from employee error. Petracom also seeks cancellation based on remedial measures taken, an inability to pay, and a history of overall compliance.

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ Section 1.80 of the Rules,⁴ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Policy Statement").⁵ In examining Petracom'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.⁶

5. Section 11.61(a)(2)(i)(A) of the Rules requires each AM, FM, and TV station to conduct tests of the EAS Header and End of Message Codes at least once a week at random days and times. KCAR-FM's EAS log showed, and the station manager's admission confirmed, that KCAR-FM failed to conduct the required weekly EAS tests from July 22, 2002 to November 7, 2002. The field agent's test of the EAS equipment showed it to be fully operational. Petracom, therefore, willfully⁷ and repeatedly⁸ failed to conduct the required tests pursuant to 11.61(a)(2)(i)(A) of the Rules.

6. Section 73.3526(a)(2) of the Rules requires each commercial AM and FM radio station to comply with Section 73.3526(e)(12), which in turn requires each station to include in its public inspection file, every three months, a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period. This "issues/programs" list is required to be filed in the station's public inspection file by the tenth day of the succeeding calendar quarter, and the list should be retained in the station's public inspection file until the Commission takes final action on the station's next license renewal application. The Commission's field agent found no "issues/programs" lists in KCAR-FM's public inspection file. The station manager told the field agent that there were no "issues/programs" lists, even though Petracom had owned the station for at least two years. Petracom, therefore, willfully and repeatedly violated Section 73.3526(a)(2) by not maintaining "issues/programs" lists

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) [hereinafter *Policy Statement*].

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ 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).

⁸ 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*, *supra* at 4388.

in KCAR-FM's public inspection file.

7. In its response to the *NAL*, Petracom asserts that, because the KCAR-FM station manager regularly certified to Petracom that the station was in compliance with all Commission rules, Petracom exercised proper diligence in monitoring its station and the Commission should cancel Petracom's forfeiture. Such monitoring of and certification by employees does not warrant cancellation of the forfeiture. "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."⁹

8. Petracom states in its response that, upon receiving the *NAL*, Petracom terminated the former KCAR-FM station manager, implemented new procedures to ensure compliance with Commission rules, and corrected KCAR-FM's violations. While commendable, these measures also do not warrant cancellation of the forfeiture. As the Commission stated in *Seawest Yacht Brokers*, "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."¹⁰

9. Also in its *NAL* response, Petracom cites financial hardship as a reason why the Commission should cancel the forfeiture. Petracom submits copies of its financial statements for fiscal years 2000 and 2001 in support of its claim of inability to pay the proposed forfeiture amount.¹¹ Though prepared in accordance with Generally Accepted Accounting Practices ("GAAP"), the balance sheets Petracom provides do not give an accurate picture of the company's finances, because the balance sheets do not include gross receipts.¹² Even if Petracom had provided its gross receipts, that would not necessarily be sufficient for us to evaluate Petracom's ability to pay the forfeiture. The entity before us in this proceeding is a subsidiary of Petracom Media, L.L.C, which owns three broadcasting companies. We must look to the totality of the circumstances surrounding Petracom's ability to pay the forfeiture. The parent company's ability to pay, therefore, is relevant in evaluating the subsidiary company's ability to pay the forfeiture.¹³ The Commission would need to see tax returns or GAAP-prepared balance sheets

⁹ See, e.g. *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation marks omitted) and cases cited therein.

¹⁰ See 9 FCC Rcd 6099 (1994). See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVl, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

¹¹ See *Policy Statement*, *supra* note 5 at 17158 (stating that the "Commission has the flexibility to consider any documentation [e.g., balance sheets, profit/loss statement certified by the licensee] that it considers probative, objective evidence of the violator's inability to pay a forfeiture") (brackets were parentheses in original).

¹² See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992) (finding gross receipts a "very useful yardstick in helping to analyze a company's financial condition for forfeiture purposes"). See also *In re Alpine Broadcasting, Station KKIT*, 17 FCC Rcd. 18242, 18244 (Enf. Bur. 2002) (stating, "the best indication of a company's ability to pay a forfeiture amount is its gross receipts").

¹³ See *In the Matter of KASA Radio Hogar, Inc.*, 17 FCC Rcd 6256, 6258-59 (2002) (finding no reduced forfeiture despite a claim of inability to pay, because the licensee was a subsidiary of a company with the financial means to pay the forfeiture).

showing gross receipts from the parent company to determine Petracom's ability to pay.¹⁴ Because Petracom has not provided adequate information to enable us to evaluate its financial condition, we are unable to cancel or reduce the forfeiture based on Petracom's claim of an inability to pay.¹⁵

10. Petracom's final argument for canceling the forfeiture is its claim of a history of overall compliance. We do not think that Petracom is entitled to such a reduction, however. Though the Commission has taken no prior action against Petracom, the Commission has acted against one of Petracom's sister companies, Petracom of Texarkana, L.L.C. On May 2, 2003, the Commission's Dallas, Texas Field Office issued an *NAL* to Petracom of Texarkana, L.L.C. as licensee of FM Station KPGG, Dallas, Texas, for a violation of Section 11.35(a) of the Rules (also an EAS violation).¹⁶ Petracom of Texarkana L.L.C. is also a subsidiary of Petracom Media, L.L.C. When a parent or sister company has previously received notice of a violation from the Commission, it is as if the company at issue has received the notice, and the company at issue will not qualify for a reduction based on a history of overall compliance.¹⁷ We therefore reject Petracom's claim for a reduction based on a history of overall compliance.

11. We have examined Petracom'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 Petracom willfully and repeatedly violated Sections 11.61(a)(2)(i)(A) and 73.3526(a)(2) of the Rules and that cancellation or reduction of the proposed \$3,500 monetary forfeiture is not warranted.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 503(b) of the Act¹⁸, and

¹⁴ See *id.* at 6257.

¹⁵ The FCC has received notice that Petracom has filed for Chapter 11 bankruptcy. However, the filing for bankruptcy does not necessarily preclude the imposition of a forfeiture. 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). Moreover, the filing for bankruptcy does not necessarily justify an adjustment or cancellation of the forfeiture amount for a violation of the Rules. 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 *North American Broadcasting Co., Inc.*, 19 FCC Rcd 2754 ¶ 6 (Enf. Bur. 2004); *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).

¹⁶ See *Notice of Apparent Liability of Forfeiture*, NAL/Acct. No. 200333500006 (Enf. Bur., Dallas, Texas Office, released May 2, 2003).

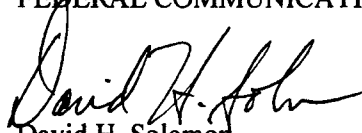
¹⁷ See *In re Mega Communications of St. Petersburg, Licensee, L.L.C.* 16 FCC Rcd 15948, 15949 (Enf. Bur. 2001) (denying a subsidiary's claim of history of overall compliance because the Commission had issued eight NOV's to parent and sister companies). See also *In the Matter of Rio Grande Transmission, Inc.* 16 FCC Rcd 17040, 17042-43 (Enf. Bur. 2001) (imposing a forfeiture against a subsidiary \$13,000 for a tower-related violation and rejecting the subsidiary's claim of history of overall compliance because the Commission had previously issued six prior NOV's against the parent company for tower-related violations).

¹⁸ 47 U.S.C. § 503(b).

Sections 0.111, 0.311 and 1.80(f)(4) of the Rules¹⁹, Petracom of Joplin, L.L.C. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of three thousand, five hundred dollars (\$3,500) for willfully and repeatedly violating Sections 11.61(a)(2)(i)(A) and 73.3526(a)(2) of the Rules. For collection, the Commission will file a proof of claim at the appropriate time in Petracom's bankruptcy action.²⁰

13. IT IS FURTHER ORDERED that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested to Petracom of Joplin, L.L.C. at 1527 N. Dale Mabry Hwy, Suite 105, Lutz, FL 33548, and to Petracom's counsel, M. Scott Johnson, Gardner, Carton & Douglas, 1301 K St., N.W., Suite 900, East Tower, Washington D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION


David H. Solomon
Chief, Enforcement Bureau

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

²⁰ See *Coleman Enterprises, Inc.*, *supra* at 24390. See also *Commonwealth*, *supra* at 523 note 15.