

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

In the Matter of)	
)	
O'hana Radio Partners)	File Number: EB-03-HI-057
Licensee of Station KAWV(FM))	
Lihue, Hawaii)	NAL/Acct. No. 200432860003
)	FRN 0004059317
)	

FORFEITURE ORDER

Adopted: February 24, 2005

Released: February 28, 2005

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 dollars (\$6,400) to O'hana Radio Partners ("O'hana"), licensee of FM radio Station KAWV, Lihue, Hawaii, for willful and repeated violation of Section 11.35(a) of the Commission's Rules ("Rules").¹ The noted violation involves O'hana's failure to have Emergency Alert System ("EAS") equipment installed and operational at Station KAWV.

2. On March 22, 2004, the Commission's Honolulu, Hawaii Resident Agent's Office ("Honolulu Office") issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to O'hana for a forfeiture in the amount of eight thousand dollars (\$8,000).²

II. BACKGROUND

3. On July 1, 2003, agents from the Honolulu Office monitored Station KAWV, 98.1 MHz, from 11:10 a.m. until 12:35 p.m. HST. During this period, the EAS required monthly test, issued by the Hawaii State Civil Defense at approximately 11:13 a.m. HST, was not retransmitted. On July 1, 2003, agents from the Honolulu Office inspected Station KAWV's main studio, located in the Puhi Industrial Park at Leleiona Road, Lihue, Hawaii. The EAS equipment was not installed such that the monitoring and transmitting functions of the equipment were available during the times the station was in operation. The station manager advised the agents that EAS equipment had never been completely installed since the station began operation in August of 2002, and that the station was still awaiting correct parts to complete the EAS installation.

4. On March 22, 2004, the Honolulu Office issued an NAL to O'hana. The NAL found that O'hana had apparently willfully and repeatedly violated Section 11.35(a) of the Rules by failing to have

¹ 47 C.F.R. §§ 11.35(a).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432860003 (Enf. Bur., Honolulu Office, released March 22, 2004).

EAS equipment installed and operational at Station KAWV. O'hana responded to the *NAL* on April 21, 2004. In its response, O'hana admits the violation but, nevertheless, requests cancellation or reduction of the forfeiture. In support of its request, O'hana asks the Enforcement Bureau to consider that: it has corrected the violations; it does not have the ability to pay the proposed forfeiture; it has no other violations of record; and as a small business, the fine is disproportionate to the size of its business.

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"),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*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"). Section 503(b) of the Act requires that the Commission, in examining O'hana'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.⁵

6. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and attention signal generating and receiving equipment used as part of the EAS are installed and operational so that the monitoring and transmitting functions are available during the times the station is in operation. On July 1, 2003, O'hana did not have operational EAS equipment installed at Station KAWV. No station records existed to indicate that the EAS equipment was ever functional at any time since Station KAWV began operation in August of 2002. Thus, we find that O'hana willfully⁶ and repeatedly⁷ violated Section 11.35(a) of the Rules.

7. O'hana argues that the amount of the forfeiture should be reduced from the maximum to a much smaller amount to properly reflect the size of its business. O'hana's reliance on its small business status alone will not suffice;⁸ it must still substantiate its inability to pay claim with financial documentation.⁹ When considering an inability to pay claim, the Commission has determined that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.¹⁰ The

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 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 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

⁷ 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 Co. supra*.

⁸ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17109 paras. 51-52 (finding that the Commission's forfeiture policies and precedent is consistent with the requirements of Section 223 of the Small Business Regulatory Enforcement fairness Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996), because the agency considers, among other factors, inability to pay, good faith efforts, participation in alternative compliance programs, in assessing forfeitures).

⁹ See, e.g., *Jerry Szoka*, 14 FCC Rcd 20147, 20150 paras. 9-10 (1999); *Bay Broadcasting Corp.*, 15 FCC Rcd 13613, 13615-16 para. 8-9 (Enf. Bur. 2000); *Merichem Sasol LLC*, 15 FCC Rcd 8450, 8452 para. 4 (WTB 1999).

¹⁰ *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992) ("*PJB*").

Commission has also concluded that it is appropriate to take into account “income derived from other affiliated operations, as well as the financial status of the station(s) in question.”¹¹ O’hana, which is a partnership, has provided some but not all of its financial documentation. Although O’hana provided its 2003 partnership federal income tax return, it did not provide the tax returns of its partners, which are relevant to the issue of whether the partnership has the ability to pay the forfeiture. For 2002, O’hana provided the tax return of its majority partner, but did not provide its own tax return, nor did it provide the tax returns of its other partners. For the tax year 2001, O’hana provided its partnership federal income tax return and that of its majority partner, but it did not provide the tax returns of its other partners.¹² Because O’hana has not provided all of its financial documentation, we find that it has not provided sufficient documentation to support its inability to pay claim.¹³

8. Finally, although O’hana claims to have made the appropriate corrections to the EAS equipment, as the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), “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.”¹⁴ However, consistent with O’hana’s claim, we do find that it has a history of overall compliance with the Commission’s rules and reduce the forfeiture amount to \$6,400.

III. ORDERING CLAUSES

9. 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,¹⁵ O’hana Radio Partners **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand four hundred dollars (\$6,400) for willful and repeated violation of Section 11.35(a) of the Rules.

10. 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.¹⁶ 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

¹¹ *KASA Radio Hogar, Inc.*, 17 FCC Rcd 6256, 6258 (2002) (quoting *Emery Telephone*, 13 FCC Rcd 23854, 23859-60 (1998) (emphasis added), *recon. denied*, 15 FCC Rcd 7181 (1999)).

¹² Although O’hana did not come into existence until January 1, 2001, it also provided the 2000 federal income tax return for its majority partner.

¹³ See *KASA Radio Hogar, Inc.*, 17 FCC Rcd at 6259. We note that, although we do not have all of O’hana’s financial documentation before us, based on our review of the financial information provided thus far, it appears that O’hana’s gross revenues would not support an inability to pay reduction of the forfeiture. We further note that if O’hana provides the missing documentation, consistent with *PJB*, we would analyze the combined gross receipts of its partners to determine its ability to pay the forfeiture. Therefore, any additional gross receipts reflected in the missing financial documentation would only increase O’hana’s total gross receipts and, consequently, further demonstrate an ability to pay the forfeiture.

¹⁴ See also *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21875 (2002); *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002).

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

¹⁶ 47 U.S.C. § 504(a).

be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁷

11. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by certified mail, return receipt requested, to O'hana Radio Partners, 41-625 Eclectic Street, # J-1, Palm Desert, California 92260 and its counsel, James Primm, Esq., 2225 Skyway Drive, Santa Maria, California 93455.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau

¹⁷ See 47 C.F.R. § 1.1914.