

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

In the Matter of	)	
	)	
Power Radio Corporation	)	File No. EB-04-SE-273
Licensee of Radio Station KXPW-LP	)	NAL/Acct. No. 200532100006
Georgetown, Texas	)	FRN 0006560650
Facility Identification Number 133411	)	

**FORFEITURE ORDER**

**Adopted: June 27, 2006**

**Released: June 29, 2006**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of three thousand dollars (\$3,000) to Power Radio Corporation (“Power Radio”), licensee of Low Power (“LP”) FM Station KXPW-LP in Georgetown, Texas, for willful violation of Section 73.875(c) of the Commission’s Rules (“Rules”).<sup>1</sup> The noted violation involves Power Radio’s failure to file a modification of license application on FCC Form 319 within ten days of replacing its authorized antenna.

**II. BACKGROUND**

2. Section 73.875 of the Rules provides that LPFM facility modifications to replace an antenna with one of the same or different number of antenna bays may be made without prior authorization from the Commission provided the height of the antenna radiation center is not more than 2 meters above or 4 meters below the authorized values. A modification of license application on FCC Form 319 must be submitted to the Commission within 10 days of commencing program test operations.<sup>2</sup> In response to the Division’s August 24, 2004 *Letter of Inquiry* (“*LOI*”),<sup>3</sup> Power Radio admitted it replaced its authorized three-bay antenna with a four-bay antenna without filing an FCC Form 319.<sup>4</sup>

3. On December 10, 2004, the Enforcement Bureau’s Spectrum Enforcement Division (“Division”) released a *Notice of Apparent Liability for Forfeiture* (“*NAL*”)<sup>5</sup> finding that Power Radio failed to timely file an FCC Form 319 ten days after it replaced Station KXPW-LP’s authorized three-bay

<sup>1</sup> 47 C.F.R. § 73.875(c).

<sup>2</sup> Program test operations at the full authorized ERP may commence immediately upon installation pursuant to Section 73.1620(a)(1) of the Rules, 47 C.F.R. § 73.1620(a)(1).

<sup>3</sup> See Letter from Joseph P. Casey, Chief Spectrum Enforcement Division, Enforcement Bureau, to James Aultfather, President, Power Radio Corporation (October 12, 2004).

<sup>4</sup> See Letter from James Aultfather, President, Power Radio Corporation, to Spectrum Enforcement Division, Enforcement Bureau (October 18, 2004).

<sup>5</sup> *Power Radio Corporation*, 19 FCC Rcd 23735 (Enf. Bur., Spectrum Enf. Div., 2004).

antenna with a four-bay antenna. The *NAL* proposed a \$3,000 forfeiture based on Power Radio's failure to file the required forms in apparent willful violation of Section 73.875(c) of the Rules.<sup>6</sup>

4. In its January 10, 2005 response to the *NAL*, Power Radio seeks cancellation or reduction of the proposed forfeiture due to the nature of the violation, the station's remedial response to the violation upon FCC notification, and the licensee's inability to pay. Power Radio claims it is a new operator with decreasing revenues and submitted its federal tax return for 2003 in support of these claims.

### III. DISCUSSION

5. On the basis of the information before us, we conclude that Power Radio willfully violated Section 73.875(c) of the Rules. Specifically, Power Radio, in its response to our *LOI*, has admitted to committing the acts leading to the violation but asserts that due to a misunderstanding with its engineering consultant, it was unaware of the need to file an application.<sup>7</sup> Section 312(f)(1) of the Communications Act of 1934, as amended ("Act"), provides that "the term 'willful,' when used with reference to the commission or omission of any act, means the conscious or 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 ...."<sup>8</sup> A violation resulting from an inadvertent mistake or a failure to become familiar with the FCC's requirements is considered a willful violation.<sup>9</sup>

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,<sup>10</sup> Section 1.80 of the Rules,<sup>11</sup> and the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>12</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>13</sup>

7. We have considered Power Radio's response to the *NAL* in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*, and conclude that no further reduction of the proposed forfeiture amount is warranted. Power Radio claims that the forfeiture amount is excessive based on the corporation's position as a new operator, the insignificance of the violation, and the

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<sup>6</sup> *Id.* at ¶ 5-6.

<sup>7</sup> *Id.* at ¶ 3 (Power Radio asserted that due to a misunderstanding with its engineering consultant, it did not know that it was required to file anything with the FCC for replacing an antenna with one that did not change the licensed HAAT by more than two meters above or four meters below that authorized by its license).

<sup>8</sup> 47 U.S.C. §312(f)(1).

<sup>9</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986); *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242 (1984).

<sup>10</sup> 47 U.S.C. § 503(b).

<sup>11</sup> 47 C.F.R. § 1.80.

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

<sup>13</sup> 47 U.S.C. § 503(b)(2)(D).

subsequent filing of the appropriate documentation on October 18, 2004.<sup>14</sup> We reject those arguments.

8. First, we find no merit to the claim that Power Radio's violation of the Rules is excused by its status as a new operator. All Commission licensees – regardless of the length of their status as such – are expected to know and comply with the FCC's Rules. In similar cases on multiple occasions, the Commission has declined to consider lack of knowledge of its rules and regulations as justification for violations thereof.<sup>15</sup> To do otherwise would jeopardize the Commission's core mission to regulate interstate and international communications by wire and radio in a manner aimed at promoting safety of life and property.

9. Second, designation of a violation as minimal or insignificant generally will not suffice to reduce the forfeiture amount.<sup>16</sup> Section 73.875(c) of the Rules requires licensees to submit the FCC Form 314 within 10 days of commencing program test operations. We do not agree that filing an FCC Form 314 on October 18, 2004, two months after making LPFM modifications, is a minor violation.<sup>17</sup> Further, it is not a minor violation when considering the potential impact on public safety if LPFM modifications do not comply with the Commission's radiofrequency radiation guidelines.<sup>18</sup>

10. Furthermore, we note that Power Radio undertook to file the form and inform the FCC of the new antenna only after a complaint was registered and the Division initiated an investigation of the violation. Therefore, we conclude that Power Radio's subsequent remedial actions are not mitigating circumstances that would warrant a further reduction of the forfeiture amount.<sup>19</sup>

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<sup>14</sup> The application was filed six days after the Division initiated its inquiry of the violation, via its *LOI*. See File No. BMLL – 20041018AAW.

<sup>15</sup> *Sitka Broadcasting Co., Inc.*, 70 FCC 2d 2375, 2378 (1979) (denying a mitigation claim of a broadcast licensee who claimed it was unaware that it could have applied for a waiver of operator requirements, stating that "Licensees are expected to know and comply with the Commission's rules") citing *Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) (denying a mitigation claim of a broadcast licensee who claimed it did not know it was in violation of the terms of a station license) and *Emporium Broadcasting Co.*, 23 FCC 2d 868 (1970) (denying a mitigation claim of a broadcast licensee who argued it was unaware of the availability of a temporary Commission waiver of the operator requirements, stating "the Commission has never considered lack of knowledge of its rules and regulations as justification for violations thereof").

<sup>16</sup> See, e.g., *KNFL, Inc.*, 15 FCC Rcd 10286 ¶¶ 6, 11 (Enf. Bur. 2000), *recon. denied*, 15 FCC Rcd 25527 (Enf. Bur. 2000); *Mapa Broadcasting, LLC*, 17 FCC Rcd. 10519 ¶¶ 8, 11 (Enf. Bur. 2002); *AGM-Nevada, LLC*, 18 FCC Rcd. 1476 ¶¶ 5, 8 (Enf. Bur. 2003); *Lakewood Broadcasting Service, Inc.*, 37 FCC 2d 437 ¶ 6 (1972).

<sup>17</sup> See *4M of Richmond, Inc.*, 19 FCC Rcd. 15,447 ¶ 10 (Enf. Bur. 2004) (duration of "only" four days did not make the violation "minor."), *recon. denied*, 20 FCC Rcd 14368 (Enf. Bur. 2005).

<sup>18</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd at 2088 (the Commission explained that licensees have a duty to operate in accordance with Commission rules...there is an independent public interest in licensees complying with the rules.); see also 47 C.F.R. § 73.875(c) (modification of license applications must contain an exhibit demonstrating compliance with the Commission's radiofrequency radiation guidelines).

<sup>19</sup> See, e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21861, 21864-75 (2002); *Sonderling Broadcasting Corp.*, 69 FCC 2d 289, 291 (1978); *Odino Joseph*, 18 FCC Rcd 16522, 16524 ¶ 8 (Enf. Bur. 2003); *South Central Communications Corp.*, 18 FCC Rcd 700, 702-03 ¶ 9 (Enf. Bur. 2003); *Northeast Utilities*, 17 FCC Rcd 4115, 4117 ¶ 13 (Enf. Bur. 2002); *AM Broadcast Station KTNC and C.R. Communications, Inc.*, DA 99-2960 ¶ 5 (Enf. Bur. 1999).

11. Power Radio also asserts an inability to pay the forfeiture amount based on decreasing revenues and an inability to reduce expenses. In support of these assertions, Power Radio supplied the corporation's 2003 federal tax return. In analyzing a financial hardship claim, the Commission generally has compared the licensee's gross revenues with the forfeiture amount when determining whether a licensee is able to pay the assessed forfeiture.<sup>20</sup> After reviewing Power Radio's supporting documentation, we find that it has generated sufficient gross revenues such that payment of the forfeiture will not pose a financial hardship.<sup>21</sup> Power Radio's assertion of decreasing revenues is insufficient to support reduction of the forfeiture.<sup>22</sup>

12. In sum, Section 1.80(b)(4) of the Rules<sup>23</sup> sets a base forfeiture amount of \$3,000 for failing to file a required form. In the instant case, we do not believe a reduction or cancellation of the proposed forfeiture is warranted.

#### IV. ORDERING CLAUSES

13. 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>24</sup> Power Radio Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of three thousand dollars (\$3,000.00) for a violation of Section 73.875(c) of the Rules.

14. 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>25</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 Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. A request for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12<sup>th</sup> Street, SW, Room 1A625, Washington, D.C.

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<sup>20</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07 ¶ 43.

<sup>21</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, 15 FCC Rcd 24385, 24389 ¶ 11 (2000), *recon. denied*, 16 FCC Rcd 10023, 10025 ¶ 6 (2001) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation, Inc.*, 14 FCC Rcd 3356 (CIB 1999), *recon. denied*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues). Here, the forfeiture does not exceed a percentage of Power's gross revenues such that it would be considered excessive.

<sup>22</sup> *PJB Communications*, 7 FCC Rcd at 2089; *Commonwealth Broadcasting Corp.*, 19 FCC Rcd. 8026, 8029 (Media Bur. 2004), *recon granted on other grounds*, 20 FCC Rcd 17985 (Media Bur. 2005).

<sup>23</sup> 47 C.F.R. § 1.80(b)(4).

<sup>24</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>25</sup> 47 U.S.C. § 504(a).

20554.<sup>26</sup>

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Power Radio Corporation, P.O. Box 73, Georgetown, Texas 78627-0073 and to Lauren Lynch Flick, Esq., Shaw Pittman LLP, 2300 N Street, NW, Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Casey  
Chief, Spectrum Enforcement Division  
Enforcement Bureau

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<sup>26</sup> See 47 C.F.R. § 1.1914.