

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

In the Matter of	)	
	)	
Kojo Worldwide Corporation	)	File Number: EB-04-SD-187
	)	
San Diego, California	)	NAL/Acct. No.: 200532940005
	)	FRN: 0011163516

**FORFEITURE ORDER**

**Adopted: August 23, 2006**

**Released: August 25, 2006**

By the Regional Director, Western Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Kojo Worldwide Corporation (“Kojo”) for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“Act”).<sup>1</sup> On September 28, 2005, the Enforcement Bureau’s San Diego Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) in the amount of \$10,000 to Kojo after determining that Kojo apparently willfully and repeatedly operated an unlicensed microwave radio station on microwave channels 22355.0 MHz and 22471.75 MHz<sup>2</sup> in San Diego, California. In this *Order*, we consider Kojo’s argument that Commission staff had assured “similarly situated” microwave operators, and Kojo, by association, that the Commission would not take enforcement action against them.

**II. BACKGROUND**

2. On November 18, 2004, an agent from the Commission’s San Diego Office was investigating allegations that companies in the Otay Mesa area of San Diego were using unauthorized microwave radio stations to communicate with sister companies across the U.S. – Mexico border in Tijuana, Mexico. The agent monitored and measured the transmissions of a microwave radio station operated at the offices of Kojo Worldwide Corporation, at 9654 Siempre Viva Road, San Diego, California. The frequency measurement showed that this microwave radio station was operating on microwave channel 22355.0 MHz. At this time, the agent conducted an inspection of the radio station with the Kojo staff. The agent requested a copy of Kojo’s station authorization for its microwave radio station, but none could be produced.

3. On December 1, 2004, and December 2, 2004, the San Diego agent returned to the Kojo site and again measured the microwave radio station operating on the microwave channel 22355.0 MHz. No inspection was attempted on either day.

4. A review of the Commission’s database revealed that Kojo had no authorization to operate a point-to-point microwave radio station at 9654 Siempre Viva Road. The review showed that Kojo did have a pending application for license, filed November 1, 2004, for operation on 22471.75 MHz for this transmitter site (“2004 Application”).<sup>3</sup> Kojo previously submitted three applications for

<sup>1</sup> 47 U.S.C. § 301.

<sup>2</sup> 47 C.F.R. § 101.147(s).

<sup>3</sup> See File No. 0001919664.

microwave radio stations in 2001. However, all three applications were dismissed in 2001 for failing to submit the required application filing fee.<sup>4</sup> In each of the dismissal letters, Kojo was cautioned that “[i]f you are currently operating under authority provided by the Commission’s Rules based on your submission of the above referenced application, you must immediately cease operation until such time as you come into compliance with the Rules.”

5. On December 17, 2004, the San Diego Office sent a Notice of Unlicensed Operation (“NOUO”) to Kojo concerning its unauthorized operation on 22355.57 MHz, in violation of Section 301 of the Act.<sup>5</sup> The San Diego Office received a reply to the NOUO from Kojo’s attorney on December 27, 2004.

6. In this reply, the attorney stated that Kojo attempted to apply for a microwave radio station in 2001. During this same time period, the attorney had another client who attempted to apply for a microwave radio station in the same area in order to communicate with a sister office in Mexico. According to the attorney, this other client attempted to obtain a special temporary authority (“STA”) but was not granted one. The attorney stated that he was informed by the Commission’s International Bureau that “(1) it would not be issuing any more STA’s, and (2) there would be no further enforcement actions initiated by field offices regarding unlicensed cross-border 23 GHz systems.”<sup>6</sup> The attorney then stated that he gave this advice to Kojo as well. Upon receiving the NOUO, the attorney stated that Kojo ceased operation of the microwave radio station in question and filed for special temporary authority (“2004 STA Request”) to allow its operation.

7. On March 24, 2005, and on August 9, 2005, San Diego agents returned to the Kojo site and found the microwave radio station operational but now on microwave channel 22471.75 MHz, the frequency specified in their 2004 Application. On August 18, 2005, the pending Kojo application for a Private Operational Fixed Point-to-Point Microwave radio station on 22471.75 MHz, located at 9654 Siempre Viva Road, San Diego, California, was granted under call sign WQDG466.

8. On September 28, 2005, the San Diego Office issued a *NAL* in the amount of \$10,000 to Kojo.<sup>7</sup> In the *NAL*, the San Diego Office found that Kojo apparently willfully and repeatedly violated Section 301 of the Act by operating an unlicensed microwave radio station on microwave channels 22355.0 MHz and 22471.75 MHz<sup>8</sup> in San Diego, California. Kojo filed a response to the *NAL* on October 28, 2005 (“*Response*”). In this *Response*, Kojo reiterates its response to the NOUO and argues that “similarly situated” microwave operators had been assured by staff from the Commission’s International Bureau, in 2001, that the International Bureau would no longer grant STA’s to cross border microwave operators, such as Kojo, but that no enforcement action would be taken against these operators either. Kojo argues that its operations in 2004 and 2005, which are the basis of the San Diego Office’s *NAL*, were done in reliance on this advice and therefore the proposed forfeiture should be cancelled. Kojo attaches affidavits from its counsel and consulting engineer detailing what they were told by International Bureau staff in 2001.

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<sup>4</sup> See File No. 0000432307, dismissed for failure to pay required fee, June 8, 2001; File No. 0000477582, dismissed for failure to pay required fee, June 19, 2001; and File No. 00000506891, dismissed for failure to pay required fee, July 18, 2001.

<sup>5</sup> 22355.57 MHz is within the maximum allowable tolerance of microwave channel 22355.0 MHz. See 47 C.F.R. § 101.147(s).

<sup>6</sup> We note that the attorney indicates that this advice was given orally and nothing was given to him in writing.

<sup>7</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200532940005 (Enf. Bur., Western Region, San Diego Office, released September 28, 2005).

<sup>8</sup> 47 C.F.R. § 101.147(s).

### III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>9</sup> Section 1.80 of the Rules,<sup>10</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>11</sup> In examining the *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>12</sup>

10. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license.<sup>13</sup> On November 18, 2004, December 1, 2004, and December 2, 2004, measurements made by San Diego agents revealed that Kojo was operating a microwave radio station on microwave channel 22355.0 MHz. On March 24, 2005, and August 9, 2005, measurements made by San Diego agents revealed that Kojo was operating a microwave radio station on microwave channel 22471.75 MHz. A review of Commission records indicated that Kojo had no authorization to operate on microwave channel 22355.0.MHz. The review also indicated that Kojo had a pending application, filed November 1, 2004, but no authorization, to operate on microwave channel 22471.75 MHz until August 18, 2005.<sup>14</sup>

11. In its *Response*, Kojo does not claim that it held a valid authorization to operate its microwave station during the 2004 and 2005 time period detailed in the *NAL*. Indeed, Kojo does not deny operating repeatedly without a license. Kojo also does not deny it changed operations to another unlicensed frequency, and does not explain its actions. Further, Kojo also does not discuss its November 1, 2004 application, or why it was filed. Instead, Kojo argues that it should not be liable for a forfeiture because it was relying on oral advice given to its counsel by Commission staff in 2001, concerning other similarly situated microwave operators.

12. The Commission has consistently held that applicants are responsible for compliance with the Commission's Rules and that they should not rely on informal oral opinions from Commission staff.<sup>15</sup> However, assuming *arguendo* that Commission staff did advise Kojo's counsel in 2001 that there would be no further enforcement actions initiated by field offices regarding unlicensed cross-border 23 GHz systems in 2001, we agree with the San Diego Office's determination that Kojo's continued reliance on this advice in 2004 and 2005 was misplaced. Kojo argues that in 2001, and "[u]ntil 2005, the FCC's microwave licensing branch had steadfastly refused to grant applications seeking cross-border 23 GHz links because the licensing authority in Mexico was not then issuing authorizations for parallel links from

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<sup>9</sup> 47 U.S.C. § 503(b).

<sup>10</sup> 47 C.F.R. § 1.80.

<sup>11</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>12</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>13</sup> 47 U.S.C. § 301.

<sup>14</sup> Pursuant to Sections 101.31(b)(1) and 101.31 (b)(1)(v) of the Rules, 47 C.F.R. §§ 101.31(b)(1), 101.31(b)(1)(v), certain applicants for point-to-point microwave stations, not located within 56.3 kilometers of any international border, operating in certain frequency bands, are deemed to have conditional authority to operate their proposed stations during the pendency of their applications. The frequency proposed for use by Kojo in its applications is not contained in these frequency bands. Also, Kojo's station is located approximately 0.75 km from the Mexican border.

<sup>15</sup> *Texas Media Group, Inc.* 5 FCC Rcd 2851, 2852 (1990) *aff'd sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991).

Mexico to the U.S.” A review of the Commission’s database shows that Kojo is mistaken. By January 2004, cross-border coordination and licensing by both the FCC and the Mexican Ministry of Communications and Transport (“SCT”) was routinely occurring. Indeed, Kojo filed an application for authority to operate in 2004. Therefore, Kojo clearly understood that licensing was both required, and available, for its cross-border operations in 2004 and 2005, the period during which the San Diego Office agents observed and questioned Kojo’s unauthorized operations. Additionally, on December 17, 2004, Kojo was warned in writing by the San Diego Office that its operation was in violation of Section 301 of the Act and that Kojo was subject to various penalties pursuant to the Communications Act. Kojo’s continued unlicensed microwave operation, even after it had given written assurances to the San Diego Office that it had ceased its illegal operation, belies its argument of reliance on oral advice received by Commission staff in 2001. Therefore, we find no merit to Kojo’s argument.

13. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Kojo willfully and repeatedly violated Section 301 of the Act. Considering the entire record and the factors listed above, we find that neither reduction nor cancellation of the proposed \$10,000 forfeiture is warranted.

#### IV. ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s Rules, Kojo Worldwide Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$10,000 for willfully and repeatedly violating Section 301 of the Act.<sup>16</sup>

15. 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>17</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. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, Room 1A625, 445 12th Street, S.W., Washington, D.C. 20554.<sup>18</sup>

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<sup>16</sup> 47 U.S.C. §§ 301, 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>17</sup> 47 U.S.C. § 504(a).

<sup>18</sup> See 47 C.F.R. § 1.1914.

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Kojo Worldwide Corporation, at its address of record, and its counsel of record, Frederick J. Day, Esquire.

**FEDERAL COMMUNICATIONS COMMISSION**

Rebecca L. Dorch  
Regional Director, Western Region  
Enforcement Bureau