

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

In the Matter of)

Norman Krieger, Inc)
Licensee of WQCC468)
San Diego, California)

File Number: EB-04-SD-191

NAL/Acct. No.: 200532940006

FRN: 0010627487

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 four thousand dollars (\$4,000) to Norman Krieger, Inc. (“Krieger”), for willful and repeated violation of Section 1.903(a) of the Commission’s Rules (“Rules”).¹ On September 28, 2005, the Enforcement Bureau’s San Diego Office issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of \$4,000 to Krieger after determining that Krieger apparently willfully and repeatedly operated microwave radio transmitting equipment on an unauthorized microwave channel of 21375.0 MHz² in San Diego, California. In this *Order*, we consider Krieger’s argument that Krieger did not willfully or repeatedly operate in violation of the Rules.

II. BACKGROUND

2. On December 1, 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 an office occupied by Norman Krieger Inc., a customs broker, at 9635 Heinrich Hertz Drive, San Diego, California.³ The frequency measurement showed that this microwave radio station was operating on microwave channel 21375.0 MHz.

3. The agent returned to the Krieger office on February 25, 2005, and again measured the frequency of the microwave radio station. The microwave channel for this measurement was again 21375.0 MHz. A review of the Commission’s database revealed that Krieger has authorization to operate a Private Fixed Point-to-Point Microwave radio station under license WQCC468 at the location. However, the authorized frequency for station WQCC468 is 22461.25 MHz. The agent also inspected the microwave radio station. The Krieger staff provided the agent of copy of the station authorization, WQCC468, the following day. The station authorization indicated that the authorized frequency for station WQCC468 is 22461.25 MHz.

¹ 47 C.F.R. § 1.903(a).

² See 47 C.F.R. § 101.147(s).

³ In its *Response*, Krieger notes that the San Diego Office incorrectly described Krieger’s business as a manufacturer of hotel bedding and fabrics.

4. On March 11, 2005, the San Diego Office sent a Letter of Inquiry (“LOI”) to Krieger concerning its unauthorized operation on 21377.74 MHz, in violation of Section 1.903(a) of the Commission’s Rules.⁴ On March 24, 2005, an agent of the Commission’s San Diego Office returned to the Krieger office and found that station WQCC468 was operating on its authorized frequency of 22461.25 MHz. The San Diego Office received a reply to the LOI on April 1, 2005. The reply stated that this radio station was used for Krieger’s internal business communications between their U.S and Mexican facilities. Krieger stated that the receiver and transmitter frequencies of the microwave radio station had been installed backwards and that the improper operation on 21375.0 MHz began in November of 2003.⁵ Krieger also indicated that the receiver and transmitter frequencies had been corrected.

5. On September 28, 2005, the San Diego Office issued a *NAL* in the amount of \$4,000 to Krieger.⁶ In the *NAL*, the San Diego Office found that Krieger apparently willfully and repeatedly operated microwave radio transmitting equipment on an unauthorized microwave channel of 21375.0 MHz⁷ in San Diego, California. Krieger filed a response to the *NAL* on October 31, 2005 (“*Response*”). In its *Response*, Krieger argues that it did not commit a “willful” violation of the Rules, as defined by the Communications Act of 1934, as amended (“*Act*”), and, therefore, the *NAL* should be cancelled.⁸ Krieger also argues that it did not knowingly cause the transmissions to be repeated. Finally, Krieger asserts that it corrected the error as soon as it was notified by the San Diego Office.

III. DISCUSSION

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

7. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service, and with a valid authorization granted by the Commission. On December 1, 2004, and February 25, 2005, San Diego

⁴ 21377.74 MHz is within the maximum allowable tolerance of microwave channel 21375.0 MHz. *See* 47 C.F.R. § 101.147(s).

⁵ According to Commission’s records, however, the reciprocal frequency for the WQCC468 license is 21229.25 MHz.

⁶ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200532940006 (Enf. Bur., Western Region, San Diego Office, released September 28, 2005).

⁷ *See* 47 C.F.R. § 101.147(s).

⁸ In its *Response*, Krieger incorrectly states that the *NAL* found Krieger in violation of Section 301 of the Act. As stated above, and in the *NAL*, the violation concerned Section 1.903 of the Rules. We will treat Krieger’s argument concerning Section 301 of the Act as if it concerns Section 1.903 of the Rules, in our consideration of Krieger’s *Response*.

⁹ 47 U.S.C. § 503(b).

¹⁰ 47 C.F.R. § 1.80.

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

¹² 47 U.S.C. § 503(b)(2)(D).

agents determined that Krieger was operating microwave radio station WQCC468 on the unauthorized frequency of 21375.0 MHz. Further, Krieger admitted to the San Diego Office that WQCC468 had been operating on 21375.0 MHz ever since it was first installed in 2003.

8. In its *Response*, Krieger acknowledges that it operated its microwave station WQCC468 on 21375.0 MHz. However, Krieger argues that it did not willfully violate Section 1.903(a) because Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act”¹³ Krieger states that it “did not know” and “did not plan in advance to operate” on 21375.0 MHz.¹⁴ Krieger further states, and supports with an affidavit from its radio service company, that the manufacturer of the equipment mislabeled the equipment to show the frequency of 22461.25 MHz on the equipment, but programmed the equipment to transmit on the reciprocal frequency, for this cross-border operation, of 21375.0 MHz. Krieger argues that it therefore did not consciously or deliberately operate its microwave station on 21375.0 MHz.

9. The Commission has long held that licensees 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.”¹⁵ In this case, Krieger consciously and deliberately operated WQCC468. Krieger apparently relied on its radio service company to ensure the station operated within the parameters of the WQCC468 authorization. Krieger’s radio service company, after contracting with the equipment company for the manufacture of the WQCC468 transmitting equipment, failed for almost two years to discover the unauthorized frequency being used by the WQCC468 transmitter. Therefore, Krieger operated WQCC468 on an unauthorized frequency for almost two years until notified by the San Diego Office. A licensee is required to operate on the frequency stated in its authorization,¹⁶ and while Krieger apparently relied on its radio service company to ensure its compliance with the WQCC468 authorization, we are compelled to treat the error by Krieger’s radio service company as an error by Krieger itself. Therefore, we find that Krieger’s violation was willful. However, even if we were to find that Krieger’s violation was not willful, its liability would not be decreased, as we find that its violation was repeated.

10. Krieger argues that its transmissions 21375.0 MHz were done without its knowledge and that if these transmissions were repeated or continuous, such operation cannot be attributed to Krieger. We disagree. Section 312(f)(2) of the Act defines “repeated” as “the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹⁷ In this case, the evidence is clear, and Krieger admits, that its operation of WQCC468 on 21375.0 MHz occurred for more than one day. Therefore, we find no merit to this argument.

11. We are also concerned by the statement in the affidavit provided by the radio service company concerning the reciprocal frequency, licensed by Mexico, for Krieger’s cross-border microwave station. As stated in the *NAL*,¹⁸ and on the WQCC468 license application filed by Krieger,¹⁹ the

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ *Response* at 3.

¹⁵ *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863 – 21864 (2002) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984)).

¹⁶ *Dominic DeNaples*, 19 FCC Rcd 12303 (EB 2004).

¹⁷ 47 U.S.C. § 312(f)(2).

¹⁸ *NAL* at n.5.

¹⁹ See File No. 00181061 (“Application”).

reciprocal frequency at issue here is 21229.25 MHz, not 21375.0 MHz. We are troubled that Krieger attached an affidavit to its *Response* that reflects that Krieger either remains unaware of the specific frequencies upon which it is licensed to operate or apparently may now be operating on an unauthorized frequency in Mexico. The only frequencies licensed for use by WQCC468 were 22461.25 MHz, licensed by the United States, and 22129.25 MHz, licensed by Mexico.

12. Finally, Krieger asserts that it took prompt action to correct its mistake concerning its operations on 21375.0 MHz. As the San Diego Office stated in the *NAL*, the Commission has consistently held that a licensee is expected to correct errors when they are brought to the licensee's attention and that such correction is not grounds for a downward adjustment in the forfeiture.²⁰

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 Krieger willfully and repeatedly violated Section 1.903(a) of the Rules. Considering the entire record and the factors listed above, we find that neither reduction nor cancellation of the proposed \$4,000 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, Norman Krieger, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$4,000 for willfully and repeatedly violating Section 1.903(a) of the Rules.²¹

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.²² 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. 20554.²³

²⁰ *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21871-76 (2002).

²¹ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 1.903(a).

²² 47 U.S.C. § 504(a).

²³ *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 Norman Krieger, Inc., 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