

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

In re Application of)	
)	
Morgan County Industries, Inc.)	Facility I.D. No. 73280
)	NAL/Acct. No. MB200641410088
For Renewal of License for)	FRN: 0003789815
Station WMOR(AM))	File No. BR-20040317ADA
Morehead, Kentucky)	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: November 24, 2006

Released: November 27, 2006

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the captioned application of Morgan County Industries, Inc. (the "Licensee") for renewal of its license for Station WMOR(AM), Morehead, Kentucky (the "Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules")¹ by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,² we find that the Licensee apparently willfully and repeatedly violated Section 73.1350(a) of the Rules³ by operating the Station at an unauthorized location. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of four thousand dollars (\$4,000), and we grant the captioned WMOR(AM) license renewal application.

II. BACKGROUND

2. Section 73.1350(a) of the Rules prohibits operation of a broadcast station at an unauthorized location. In 1997, the land on which WMOR(AM)'s authorized tower was located was sold, and the tower was dismantled on August 26, 1997. WMOR(AM) was silent from that date until five months later, when temporary facilities were set up at the site of co-owned station WMOR-FM, Morehead, Kentucky. On January 22, 1999, Morehead Broadcasting Co. ("Morehead"), the then-licensee of the Station and of WMOR-FM, applied for special temporary authorization ("STA") to operate the Station at the WMOR-FM site.⁴ The staff granted the STA request on May 5, 1999 ("1999 STA").⁵ On

¹ 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ 47 C.F.R. § 73.1350(a).

⁴ The call sign of WMOR-FM was changed to WQXX(FM) on December 30, 2000. For administrative convenience, we will refer to the Station by its previous call sign, WMOR-FM, throughout this document.

⁵ *Letter to James E. Forrest, President, Morehead Broadcasting Co. from Edward P. De La Hunt, Mass Media Bureau* (May 5, 1999).

May 12, 1999, the Licensee purchased both stations from Morehead.⁶ The Licensee did not seek an extension of the 1999 STA, which therefore expired on its own terms on November 5, 1999. Nevertheless, the Licensee continued to operate WMOR(AM) from the site and with the facilities authorized in the 1999 STA.

3. On December 31, 2002, the Licensee filed an application for a construction permit to move WMOR(AM) to a recently constructed tower used by its WMOR-FM.⁷ The staff granted the application and issued the construction permit on April 21, 2003 (the “2003 Permit”). WMOR(AM) went silent again for approximately one month, between April 23 and May 20, 2003, after the previous WMOR-FM tower had been struck by lightning. WMOR(AM) then resumed operation from the previous WMOR-FM tower—still without Commission authority to do so.

4. The Licensee applied for an STA on August 10, 2004, to continue operating WMOR(AM) from the previous WMOR-FM tower, and the staff granted the request on August 31, 2004.⁸ This was the first STA request from the Licensee for authorization to operate WMOR(AM) from that location. Thus, from the November 5, 1999, expiration of the 1999 STA until the grant of the new STA on August 31, 2004, the Licensee operated WMOR(AM) at a location other than that authorized by the Commission. The Licensee subsequently asked for an extension of the August 31, 2004, STA, which was granted on March 3, 2005.⁹ In April 2005, the Licensee completed construction of the facilities authorized by the 2003 Permit and filed a covering license application.¹⁰ It is currently operating WMOR(AM) from the site in the 2003 permit pursuant to program test authority.

III. DISCUSSION

5. *Informal Objection.* The Licensee timely filed the captioned license renewal application for WMOR(AM) on March 17, 2004, which the staff granted on July 26, 2004. The staff rescinded that grant after receiving an informal objection to the application (the “Objection”) from Dan J. Alpert, Esq. (“Alpert”).¹¹ Alpert’s Objection alleges that: (1) the Station was not operating from its licensed site and had not requested an STA to operate at a different site; and (2) the Station had been silent for a period exceeding twelve months.¹² The Licensee responded to Alpert’s Objection on August 18, 2004, admitting that it had failed to seek an extension of the 1999 STA, but denying that the Station had been silent for over a year. Attached to the Licensee’s response were sworn statements from James E. Forrest, the President of Morehead, the previous licensee, and of Clifford C. Smith, the Licensee’s President. Each represents that, during the most recent license term, the Station was silent only from October 1997 to January 1998 and from April 23, 2003 to May 20, 2003.¹³ In response to a staff inquiry, the Licensee

⁶ File No. BAL-19990127EB, granted on March 16, 1999.

⁷ File No. BP-20021231AGF.

⁸ Letter to William D. Silva, Esq. from Charles N. Miller, Audio Division, Media Bureau (Aug. 31, 2004).

⁹ Letter to William D. Silva, Esq. from Charles N. Miller, Audio Division, Media Bureau (Mar. 3, 2005).

¹⁰ See File No. BL-20050407KYL, filed April 7, 2005.

¹¹ Mr. Alpert filed an informal complaint on July 28, 2004, two days after the license renewal was granted, asking the Enforcement Bureau to investigate the Licensee’s actions during the prosecution of its license renewal application. The staff rescinded the grant of the renewal license on August 5, 2004, pursuant to 47 C.F.R. § 1.113. See *Broadcast Applications*, Public Notice, Report No. 25796 (MB Aug. 5, 2004). We will consider Mr. Alpert’s informal complaint as an informal objection to the captioned license renewal application.

¹² See 47 U.S.C. § 312(g) (failure of a broadcast station to transmit a broadcast signal for any consecutive 12 month period generally results in expiration of the station’s license at the end of that period). Alpert provides no support for his contention that the Station was silent for such a period of time.

¹³ See Response to Informal Objection, Attachments A and B.

clarified that the Station was, in fact, also silent from August 26, 1997, to January 1998.¹⁴

6. We will grant Alpert's Objection to the extent it addresses the Licensee's operation of the Station at an unauthorized location, in violation of Section 73.1350(a) of the Rules. In its response to Alpert's Objection, the Licensee admits that it failed to request an extension of the 1999 STA, yet continued operation of the Station for approximately five years after the expiration of that STA. However, we reject Alpert's contention that the Station was silent for over one year. While Alpert offers no support for this allegation, in contrast, the Licensee has provided sworn statements from its President and the President of the former licensee, representing that any period of silence lasted less than six months. Under the circumstances, Alpert has failed to establish a substantial and material question of fact whether the Station was silent in excess of 12 consecutive months.¹⁵

7. *Proposed Forfeiture.* In this case, the Licensee has admitted to having failed to seek or obtain renewal of the 1999 STA and, accordingly, to have operated WMOR(AM) at an unauthorized location for a period of nearly five years.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁶ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁸ and the Commission has so interpreted the term in the Section 503(b) context.¹⁹ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."²⁰

9. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$4,000 for operation at an unauthorized location.²¹ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the

¹⁴ *Letter to Michael Wagner, Audio Division, Media Bureau, from William D. Silva* (Jun. 7, 2006). Attached as exhibits to the letter are statements of James Forrest; Mervill Lawson, former chief engineer of WMOR(AM); and Paul Lyons, chief operator for the Licensee. These statements clarify that Mr. Forrest's original statement regarding the beginning date of WMOR(AM)'s silence was made in error. Mr. Forrest further admits he failed to notify the Commission of WMOR(AM)'s silence and failed to obtain Commission authorization to move WMOR(AM) to the co-owned WMOR-FM site in January 1998. Mr. Forrest's admissions are corroborated by Mr. Lawson and Mr. Lyons. In light of the circumstances present, including the fact that neither Morehead nor any of the individuals in question holds a Commission authorization, we exercise our prosecutorial discretion and choose not to impose any sanction against them for the foregoing.

¹⁵ See 47 U.S.C. § 309(d)(1) (requiring that petitioner support allegations of fact with affidavit of a person or persons with personal knowledge thereof); see also 47 C.F.R. § 73.3584(b).

¹⁶ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²⁰ 47 U.S.C. § 312(f)(2).

²¹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

Act, including “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.”²²

10. In this case, the Licensee has admitted that it “was remiss in not seeking an extension of the STA obtained by the former owner,”²³ but claims that it was unaware it needed to request an extension of the 1999 STA while the construction permit application was under consideration.²⁴ However, it did not file a construction permit application for authority to move the Station to the new WMOR-FM site until December 31, 2002, over three years after the 1999 STA had expired. The continued nature of this violation is not excused by the Licensee’s ignorance of the Rules. We also note, however, that the Station had previously been authorized to operate at the location in question. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we find that the Licensee is apparently liable for a forfeiture in the full amount of \$4,000 for its apparent willful and repeated violation of Section 73.1350(a) of the Rules.²⁵

11. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by Section 309(k) of the Act.²⁶ That Section provides that if, upon consideration of the application and pleadings, we find that (1) the Station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.²⁷ If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”²⁸

12. We find that the Licensee’s apparent violation of Section 73.1350(a) of the Rules does not constitute a “serious violation” warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.²⁹ Further, we find that

²² 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

²³ *Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William D. Silva, Esq.* (Aug. 17, 2004).

²⁴ *Id.* Attachment A, Statement Under Penalty of Perjury of Clifford C. Smith, President of the Licensee.

²⁵ *See Beyond the Bay Media Group*, Notice of Apparent Liability, 21 FCC Rcd 6967 (MB 2006) (\$4,000 forfeiture proposed against licensee for constructing a tower at a variance from authorized coordinates and height, in violation of 47 C.F.R. § 73.1350(a)).

²⁶ 47 U.S.C. § 309(k).

²⁷ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

²⁸ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

²⁹ For example, we do not find here that the Licensee's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the Station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. *See also Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991) and *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

Station WMOR(AM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application below.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the Informal Objection of Dan J. Alpert, Esq. IS GRANTED TO THE EXTENT INDICATED AND DENIED IN ALL OTHER RESPECTS.

14. IT IS FURTHER ORDERED, that the license renewal application of Morgan County Industries, Inc. for Station WMOR(AM), Morehead, Kentucky (File No. BR-20040317ADA) IS GRANTED.

15. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Morgan County Industries, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars (\$4,000) for its apparent willful and repeated violation of Section 73.1350(a) of the Commission's Rules.

16. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Morgan County Industries, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment of the proposed 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, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

18. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

20. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁰

21. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Morgan County Industries, Inc., 129 College Street, West Liberty, Kentucky 41472, to its counsel, William D. Silva, Esq. 5335 Wisconsin Avenue, N.W., Suite 400, Washington, D.C. 20015-2003, and to Dan J. Alpert, Esq., 2120 N. 21st Road, Suite 400, Arlington,

³⁰ See 47 C.F.R. § 1.1914.

Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau