

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

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| In the Matter of |) | |
| |) | |
| Americom Las Vegas Limited Partnership |) | File No. EB-02-DV-094 |
| |) | |
| Licensee of FM Radio Station KZTQ |) | |
| (Formerly KWNZ) |) | NAL/Acct. No. 200332800006 |
| Carson City, Nevada |) | FRN 0003-7662-92 |
| Facility ID # 53706 |) | |

ORDER ON RECONSIDERATION

Adopted: November 26, 2007

Released: November 29, 2007

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Order on Reconsideration* (“*Order*”), we dismiss the petition for reconsideration (“petition”) filed by Americom Las Vegas Limited Partnership (“Americom”), licensee of FM radio station KZTQ (Formerly KWNZ),¹ Carson City, Nevada, of the Commission’s *Memorandum Opinion and Order* issued December 1, 2006 (“*MO&O*”).² In that *MO&O*, the Commission denied Americom’s application for review of the *Forfeiture Order* issued May 28, 2004, by the Chief, Enforcement Bureau (“Bureau”),³ in the amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 1.1310 of the Commission’s Rules (“Rules”).⁴ The noted violations involve Americom’s failure to comply with the radio frequency radiation (“RFR”) maximum permissible exposure (“MPE”) limit applicable to KZTQ’s transmission facilities and failure to adequately take measures to prevent the public from accessing areas that exceeded the RFR exposure limits. As discussed below, we dismiss Americom’s petition because it does not comply with the requirements of Section 1.106(b)(2) of the Rules,⁵ and is therefore procedurally defective.

II. BACKGROUND

2. KZTQ’s transmission facilities are located on McClellan Peak, near Carson City, Nevada. The McClellan Peak site is on unfenced, publicly accessible property managed by the Bureau of Land Management (“BLM”), approximately 4 kilometers northeast of Carson City. On November 6, 2001, agents from the FCC’s San Francisco, California, Field Office (“San Francisco Office”) conducted a site

¹ Subsequent to the initiation of this proceeding, on February 26, 2004, the station’s call sign was changed to KZTQ.

² *Americom Las Vegas Limited Partnership*, Memorandum Opinion and Order, 21 FCC Rcd 14286 (2006) (“*MO&O*”).

³ *Americom Las Vegas Limited Partnership*, Forfeiture Order, 19 FCC Rcd 9643 (Enf. Bur. 2004) (“*Forfeiture Order*”).

⁴ 47 C.F.R. § 1.1310.

⁵ 47 C.F.R. § 1.106(b)(2).

inspection at the McClellan Peak antenna site. There are 13 broadcast stations which transmit from the McClellan Peak site. During the November 6, 2001, inspection, the personal RFR monitors worn by the agents began to alarm while in the vicinity of the KZTQ transmitter site.⁶ On May 1, 2002, the FCC's Denver, Colorado Field Office ("Denver Office") issued a Letter of Inquiry ("LOI") to Americom and to each of the 12 other broadcast licensees which transmit from the McClellan Peak site regarding RFR compliance at the site and advising that a site inspection would take place on May 15, 2002.

3. On May 14, 2002, FCC agents from the Denver and San Francisco Offices conducted preliminary measurements in publicly accessible areas throughout the McClellan Peak site. On May 15, 2002, the agents returned to the McClellan Peak site and conducted additional measurements. The measurements taken by the agents on May 15, 2002, indicated that there were RFR fields in publicly accessible areas at ground level that exceeded the FCC's MPE limits for the general public and that KZTQ's operation alone exceeded the MPE limits for the general public in an unfenced area between the KZTQ transmitter building and the KZTQ antenna tower.

4. The agents observed that the site was easily accessible to 4-wheel drive vehicles from a public gravel and dirt roadway off Goni Road. Two commercial gravel pits were located along the gravel roadway to the site. An ungated internal dirt road led from the gravel roadway to the site, with multiple branches to reach the various antenna structures. The agents observed that there were trails for off-road 4-wheel drive vehicles and all terrain vehicles ("ATVs") along the gravel roadway and at the site itself. The agents also observed persons who appeared to be teenagers driving ATVs, ATV tire tracks, a campfire ring, beer and wine bottles, and other trash indicative of public use of the BLM site.

5. Additionally, the agents observed that the only signs warning the public of excessive RFR levels at the KZTQ antenna site were posted at the front of the site and along the road leading to the site. The agents also observed that there were no warning signs which could be seen by persons approaching the unfenced area in which the RFR exceeded the public MPE limit from the rear of the KZTQ antenna site.

6. Americom submitted its response to the LOI on June 7, 2002 ("LOI response"). As part of the response, Americom submitted a report of RFR measurements conducted at the McClellan Peak site on May 15, 2002, by an Americom consultant. This report shows that RFR fields in an unfenced area adjacent to the KZTQ tower exceeded the MPE limits for the general public.⁷ Americom stated that out of an abundance of caution, it had contracted for this location to be fenced.

7. On November 22, 2002, the Bureau issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to Americom in the amount of ten thousand dollars (\$10,000) for apparent willful and repeated violations of Section 1.1310 of the Rules.⁸ In its response to the NAL, filed December 23, 2002 ("NAL response"), Americom sought cancellation of the proposed monetary forfeiture. Americom argued that

⁶ The personal RFR monitors are designed by the manufacturer to begin alarming when RFR exposure levels reach 50 percent of the Commission's occupational exposure limit. The occupational exposure limit is five times greater than the public exposure limit. Thus, the alarming indicated that there were RFR levels in excess of the MPE limit for the general public in the vicinity of the KZTQ transmitter.

⁷ See LOI response, Attachment 2; see also *Application for Review*, Attachment – Response to Notice of Apparent Liability for Forfeiture at 3, note 4.

⁸ *Americom Las Vegas Limited Partnership*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 26689 (Enf. Bur. 2002) (finding that, based on RFR measurements conducted in May 2002 by FCC agents and by Americom's consultant, the operation of KZTQ (formerly KWNZ) created RFR fields that exceeded the RFR exposure limits for the public in unfenced, publicly accessible areas).

there was “only circumstantial evidence” of recent public use of the area near the KZTQ transmitter site; that there was “no evidence whatsoever of public use of the particularized ten square foot area” where Americom exceeded the RFR MPE limits; that, by providing appropriate signs warning the public of excessive RFR levels, Americom has in “good faith” treated the KZTQ transmitter site as “controlled environment” and implemented a “common sense” approach to RFR compliance which is consistent with OET Bulletin 65;⁹ and that, if it did violate Section 1.1310 of the Rules, the appropriate sanction is admonishment. In its May 28, 2004, *Forfeiture Order*, the Bureau rejected these arguments and imposed a monetary forfeiture of \$10,000. In particular, the Bureau concluded that there was ample evidence of recent public use of the area near the KZTQ transmitter site; that public use of the area near the KZTQ transmitter site was sufficient to establish the applicability of the public exposure limits; that Americom did not have signs that sufficiently warned the public; and that a monetary forfeiture – not an admonishment -- is the appropriate sanction for Americom’s violations.¹⁰

8. In its application for review, Americom argued that “the resolution of this proceeding hinges on whether Americom reasonably concluded that the KZTQ Antenna Site . . . was remote and not likely to be visited by the public, making tower fencing unnecessary, particularly in light of three posted warning signs.”¹¹ Americom also argued that its treatment in this proceeding should not be the same as that of the licensee in *A-O Broadcasting Corporation*,¹² which also was assessed a monetary forfeiture of \$10,000, but was found to have operated further above the public RFR exposure limits than Americom and that, if the Bureau has overruled the “common sense” approach of OET Bulletin 65, it is obligated to give Americom advance notice of this change but failed to do so. In its *MO&O* released December 1, 2006, the Commission rejected these arguments and affirmed the Bureau’s *Forfeiture Order*. In particular, the Commission concluded that Americom did not present any evidence which contradicts the FCC agents’ observations indicating public use of the KZTQ antenna site; that Americom’s signs were not adequate to warn the public; that an RFR violation need not be as significant as A-O Broadcasting Corporation’s violation to warrant imposition of the full \$10,000 base forfeiture amount and that there was no overruling of the “common sense” approach of OET Bulletin 65.¹³

9. In its petition for reconsideration of the Commission’s *MO&O*, Americom reiterates arguments already rejected by the Commission.¹⁴ Specifically, Americom argues that the signage at Americom’s transmitter site was compliant with the “common sense” approach set forth in OET Bulletin 65,¹⁵ that no forfeiture is appropriate because Americom lacked notice of the “new” RFR standard created by the rulings in this case,¹⁶ and that the public is not likely to visit Americom’s transmitter site.¹⁷

⁹ OET Bulletin 65, “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields” (August 1997) (“OET Bulletin 65”).

¹⁰ *Forfeiture Order* at 9645-9646.

¹¹ *Application for Review* at 2 – 3.

¹² *A-O Broadcasting Corporation, Notice of Apparent Liability*, 17 FCC Rcd 24184 (2002); *forfeiture ordered, Forfeiture Order*, 18 FCC Rcd 27069 (2003).

¹³ *MO&O* at 14289-14291.

¹⁴ Petition at 1-5.

¹⁵ Petition at 2.

¹⁶ Petition at 1-3.

¹⁷ Petition at 3-4.

10. Americom also raises two new arguments. First, Americom claims that “[i]n analogous contexts, where the facts are unclear or disputed, the FCC has stayed its enforcement hand.”¹⁸ Second, Americom argues that the site owner, BLM, was obligated to “encourage ‘common solutions’ to RFR issues” at Americom’s site but did not do so, and therefore a forfeiture was not appropriate in this case because “the government limited its role to enforcement, forsaking proactive involvement.”¹⁹

III. DISCUSSION

11. Section 1.106(b)(2) of the Rules provides that where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

- (i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or
- (ii) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

Section 1.106(b)(3) of the Rules²⁰ authorizes the Bureau to dismiss as repetitious “[a] petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances.”

12. Americom makes no attempt to establish that its petition meets the criteria of Section 1.106(b)(2) of the Rules. As discussed below, Americom does not rely on any facts or events that occurred or circumstances that have changed since its last opportunity to present such matters or that were unknown to Americom and could not have been learned through the exercise of ordinary diligence. Americom’s petition must, therefore, be dismissed as repetitious.²¹

13. Americom’s arguments that the signage at Americom’s transmitter site was compliant with the “common sense” approach set forth in OET Bulletin 65,²² that no forfeiture is appropriate

¹⁸ Petition at 4.

¹⁹ Petition at 4-5.

²⁰ 47 C.F.R. § 1.106(b)(3).

²¹ See, e.g., *Hexagram, Inc.*, Order on Reconsideration, 22 FCC Rcd 1795 (Wireless Tel. Bur., Mobility Div. 2007) (petitioner failed to support its arguments with any new facts or circumstances that changed after the filing of its application for review); *Alvin Lou Media, Inc.*, Order on Reconsideration, 20 FCC Rcd 17234, 17235 (Media Bur., Audio Div. 2005) (petitioner did not cite to facts or events that occurred or circumstances that have changed since petitioner’s last opportunity to present such matters or that were unknown to petitioner and could not have been learned through the exercise of ordinary diligence); *James Kay, Jr.*, Order on Reconsideration, 19 FCC Rcd 2938, 2940 (Wireless Tel. Bur., Mobility Div. 2004) (argument did not rely on any new facts or changed circumstances), *affirmed*, Order, 20 FCC Rcd 12228 (2005); and *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service*, Memorandum Opinion and Order, 17 FCC Rcd 19408, 19412 (Wireless Tel. Bur., Pub. Safety and Priv. Wireless Div., 2002) (argument did not relate to any new facts or changed circumstances requiring reconsideration of Commission’s Order).

²² Petition at 2.

because Americom lacked notice of the “new” RFR standard created by the rulings in this case,²³ and that the public is not likely to visit Americom’s transmitter site,²⁴ reiterated again in its petition for reconsideration, do not rely on any facts or events that occurred or circumstances that have changed since its last opportunity to present such matters or that were unknown to Americom and could not have been learned through the exercise of ordinary diligence. Americom’s new arguments also fail to meet the standard set forth in Section 1.106(b)(2).

14. The only newly presented “fact” in either of these arguments is the claim that the BLM did not take a proactive role in achieving compliance. Americom had every opportunity to present this claim to the Bureau before filing its application for review but did not do so. We find, accordingly, that Americom’s new arguments do not rely on any facts or events that occurred or circumstances that have changed since its last opportunity to present such matters or that were unknown to Americom and could not have been learned through the exercise of ordinary diligence.

15. In sum, Americom has not met the requirements of Section 1.106(b)(2) of the Rules. Its petition for reconsideration must therefore be dismissed.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.106(b)(2) and (3) of the Rules, Americom’s petition for reconsideration of the Commission’s *MO&O* **IS DISMISSED**.

17. 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.²⁵ Payment of the forfeiture must be made by credit card through the Commission’s Debt and Credit Management Center at (202) 418-1995, or 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, 445 12th Street, SW, Room 1A625, Washington, D.C. 20554.²⁶

²³ Petition at 1-3.

²⁴ Petition at 3-4.

²⁵ 47 U.S.C. § 504(a).

²⁶ See 47 C.F.R. § 1.1914.

18. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Americom's counsel Dennis P. Corbett, Esq., and Phillip A. Bonomo, Esq., Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau