

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

In the Matter of	)	
	)	
A-O Broadcasting Corporation	)	
	)	File Number: EB-04-DV-114
Operation of Unlicensed Radio Station on 97.9	)	
MHz near Cloudcroft, New Mexico	)	NAL/Acct. No. 200432800001
(Former Licensee of KTMN, Cloudcroft,	)	FRN 0005020474
New Mexico, Facility ID 89049)	)	

**ORDER**

**Adopted: July 29, 2008**

**Released: July 31, 2008**

By the Regional Director, Western Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Order*, we cancel a monetary forfeiture in the amount of ten thousand dollars (\$10,000) against A-O Broadcasting Corporation ("A-O"), former licensee of station KTMN, in Cloudcroft, New Mexico, and admonish A-O, for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended ("Act"),<sup>1</sup> by operating on the frequency 97.9 MHz without an authorization from the Federal Communications Commission ("Commission"). On April 23, 2004, the Enforcement Bureau's Denver Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$10,000 to A-O for operating on the frequency 97.9 MHz without an authorization from the Federal Communications Commission ("Commission").<sup>2</sup> In this *Order*, we consider A-O's arguments that its authorization did not expire by operation of Section 312(g) of the Act;<sup>3</sup> that it had authority to operate KTMN pursuant to Section 307(c) of the Act;<sup>4</sup> and that A-O does not have sufficient revenue to pay the forfeiture. While we cancel the forfeiture for a demonstrated inability to pay, we admonish A-O for its willful and repeated violation of Section 301 of the Act.

**II. BACKGROUND**

2. On January 3, 2003, the Commission's Media Bureau notified A-O by letter that the license for station KTMN expired and was thereby forfeited as of November 8, 2002, pursuant to Section 312(g) of the Act,<sup>5</sup> because of that station's failure to transmit broadcast signals for a consecutive 12 month period.<sup>6</sup>

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<sup>1</sup> 47 U.S.C. § 301.

<sup>2</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432800001 (Enf. Bur., Western Region, Denver Office, released April 23, 2004).

<sup>3</sup> 47 U.S.C. § 312(g).

<sup>4</sup> 47 U.S.C. § 307(c).

<sup>5</sup> 47 U.S.C. § 312(g). At the time of the Media Bureau action, Section 312(g) provided that "if a broadcasting station fails to transmit broadcast signal for any consecutive twelve-month period, then the station license . . . expires at the end of that period . . . ."

The Media Bureau also denied A-O's petition for reconsideration of the Media Bureau January 2003 Letter.<sup>7</sup> A-O filed an application for review of that action.

3. On April 8, 2004, the Denver Office received information from three different sources that KTMN had resumed broadcast operations. A search of the Commission's licensee database revealed that the KTMN license for operation on 97.9 MHz had been deleted.<sup>8</sup> A Denver agent then called KTMN and spoke with a disc jockey at the station who told the agent that KTMN had been on the air for two days. The Denver agent then contacted the President of A-O, who confirmed that KTMN was broadcasting on 97.9 MHz.<sup>9</sup>

4. On April 9, 2004, the Denver agent telephoned A-O's President and advised that the Commission records failed to show any Commission operating authority for KTMN. Later that day, A-O filed a notification with the Commission that KTMN would be broadcasting the weekend of April 10 – 11, 2004, pursuant to Section 73.1250 of the Commission's Rules.<sup>10</sup>

5. On April 13, 2004, the Chief of the Media Bureau's Audio Division sent a letter to A-O's counsel advising them that "DKTMN(FM), Cloudcroft, N.M., is without authority to initiate or continue broadcast operations."<sup>11</sup> A-O was also ordered to report, by April 15, 2004, "whether the licensee ceased operations and on what day it ceased operations."<sup>12</sup> On April 15, 2004, A-O's counsel responded to the Media Bureau April 2004 Letter with a letter stating that "on behalf of the licensee, I can report to you that KTMN remains on the air . . . ."<sup>13</sup> The station, however, went off the air on April 19, 2004.<sup>14</sup>

6. On April 23, 2004, the Denver Office issued a *NAL* in the amount of \$10,000 to A-O, finding that A-O apparently willfully and repeatedly operated on 97.9 MHz without an FCC authorization. A-O filed a response to the *NAL* on May 24, 2004 ("*Response*"). A-O supplemented its response ("*Supplemental Response*") on March 13, 2008. In its *Response* and *Supplemental Response*, A-O argues

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<sup>6</sup> *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (MB 2003) ("Media Bureau January 2003 Letter").

<sup>7</sup> See *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 3818 (MB 2003).

<sup>8</sup> The Commission's database lists the station call sign as "DKTMN" to reflect its deletion.

<sup>9</sup> A-O's President indicated that the station was simulcasting 100% of KUPR's programming, a FM broadcast station licensed to Southern New Mexico Radio Foundation to serve Alamogordo, New Mexico, operating on 91.7 MHz. A-O's President, who is also the President of Southern New Mexico Radio Foundation, stated that KTMN was broadcasting from the Wofford Mountain electronics site, located on United States Forest Service lands near Cloudcroft, New Mexico, and had been on the air for the last two days.

<sup>10</sup> 47 C.F.R. § 73.1250 (Broadcasting Emergency Information). See *Letter from A-O Broadcasting Corporation, KTMN, Cloudcroft, New Mexico, to Marlene Dortch, Secretary, Federal Communications Commission (April 9, 2004)*. A-O also contacted staff in the Audio Division of the Media Bureau about receiving temporary authority to operate April 10 – 11, 2004.

<sup>11</sup> April 13, 2004, letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Paul H. Brown, Wood, Maines & Brown ("*Media Bureau April 2004 Letter*").

<sup>12</sup> *Id.*

<sup>13</sup> April 15, 2004, letter from Barry D. Wood, Wood, Maines & Brown, to Peter H. Doyle, Chief, Audio Division, Media Bureau.

<sup>14</sup> The Denver Office also received complaints that A-O was again broadcasting on 97.9 MHz near Cloudcroft, New Mexico, between July 2 and July 6, 2004. No later reports were received.

that its authorization did not expire by operation of Section 312(g) of the Act; that it had authority to operate KTMN pursuant to Section 307(c) of the Act; and that it does not have sufficient revenue to pay the forfeiture.

### III. DISCUSSION

7. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>15</sup> Section 1.80 of the Rules,<sup>16</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>17</sup> In examining A-O's 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>18</sup>

8. Section 301 of the Act prohibits radio operations "except and in accordance with this Act and with a license granted under the provisions of this Act."<sup>19</sup> On or around April 6, 2004, A-O began transmitting on 97.9 MHz, from the Wofford Peak electronics site, near Cloudcroft, New Mexico, located on United States Forest Service lands, without the required Commission authorization. A-O apparently continued to operate KTMN until Monday, April 19, 2004, despite being notified by the Commission that KTMN's license had been automatically forfeited, by operation of law, and that KTMN had no Commission authority to initiate or continue broadcast operations.

9. A-O does not deny its operation on 97.9 MHz on the dates detailed above, but instead argues that its operation was authorized. First, A-O argues that because it operated on 97.9 MHz at least once between November 7, 2001, and November 7, 2002, its authorization had not been forfeited by operation of Section 312(g) of the Act. Second, A-O argues that because it filed an application to renew the KTMN license, it had authority to operate until a court or the Commission issued a final order on the renewal application.<sup>20</sup> On January 18, 2008, the Commission released the *2008 Memorandum Opinion and Order*, in which it considered the application for review filed by A-O of the Media Bureau actions, described above, along with various other petitions and requests filed by A-O concerning its operation of KTMN.<sup>21</sup> In the *Memorandum Opinion and Order*, the Commission considered A-O's arguments, as described above, and rejected them. Specifically, the Commission stated that "A-O's license [KTMN] expired on November 8, 2002 . . ." <sup>22</sup> Because the Commission has determined that the KTMN license expired on November 8, 2002, we find that A-O had no authority to operate on 97.9 MHz in April 2004.

10. A-O also argues that it is not able to pay the forfeiture proposed by the Denver Office

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<sup>15</sup> 47 U.S.C. § 503(b).

<sup>16</sup> 47 C.F.R. § 1.80.

<sup>17</sup> 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999).

<sup>18</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>19</sup> 47 U.S.C. § 301.

<sup>20</sup> A-O filed the renewal application on July 3, 2003, eight months after the twelve-month period had run under Section 312(g), and almost two years before the July 1, 2005, filing deadline for New Mexico radio station renewals. 47 C.F.R. §§ 73.1020, 73.3539.

<sup>21</sup> *A-O Broadcasting Corporation*, 23 FCC Rcd 603 (2008) ("2008 Memorandum Opinion and Order").

<sup>22</sup> *2008 Memorandum Opinion and Order*, 23 FCC Rcd at 617.

because it had no gross revenues for the three calendar years prior to the *NAL*, and supplies financial data to support that claim. To assess A-O's inability to pay argument, we must consider a related proceeding, where, on December 29, 2003, the Commission assessed a \$25,000 forfeiture against A-O for operating KTMN in willful and repeated violation of Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Rules.<sup>23</sup> In the *2003 Forfeiture Order*, the Commission took into account an argument from A-O concerning its inability to pay the forfeiture amount as A-O submitted documentation stating that it had no revenues.<sup>24</sup> Generally, when analyzing a financial hardship claim, the Commission has looked to gross revenues as a reasonable and appropriate yardstick in determining whether a licensee is able to pay the assessed forfeiture.<sup>25</sup> In the *2003 Forfeiture Order*, however, the Commission determined that because KTMN was on the air for such a brief period of time, it was necessary to look at other factors other than gross revenues to determine A-O's ability to pay the proposed forfeiture.<sup>26</sup> The Commission stated that because A-O had filed an application for a construction permit for KTMN at a new site along with a subsequent license application for authority to operate at the new site, A-O potentially had sufficient funds to reconstruct KTMN at the new site and did so.<sup>27</sup> In order to determine A-O's ability to pay the proposed monetary forfeiture in that proceeding, the Commission found that it was necessary to know what resources were available to A-O – e.g., A-O's lines of credit, A-O's liquid assets and the assets and income of A-O's owner. Because A-O did not provide that information, the Commission concluded that it was unable to determine whether A-O could pay the proposed forfeiture amount, and consequently, declined to reduce the forfeiture on the basis of A-O's inability to pay.<sup>28</sup>

11. A-O appealed the *2003 Forfeiture Order*, and in the *2005 Memorandum Opinion and Order*,<sup>29</sup> the Commission again addressed A-O's inability to pay argument, taking notice of the *Response* A-O filed in this proceeding, concerning the *NAL* issued by the Denver Office.<sup>30</sup> The Commission stated that according to the financial information found in the *Response*, A-O's operations and capital investments are funded primarily by loans and, to a lesser extent, by issuing new stock, and that A-O's loans are from its shareholder and from the Southern New Mexico Radio Foundation, whose president is also the owner and president of A-O.<sup>31</sup> The Commission determined that "if A-O wants to continue to pursue its inability to pay claim, A-O must prove that it does not have access to the resources necessary to pay the forfeiture."<sup>32</sup> The Commission concluded that because "A-O has not proven this, we are unable to determine that it cannot pay the forfeiture amount and we will not reduce the forfeiture on the basis of A-

<sup>23</sup> 47 C.F.R. §§ 1.1310, 11.35, 73.1125, and 73.1400. *A-O Broadcasting Corporation*, 31 Comm. Reg (P&F) 411 (2003) ("*2003 Forfeiture Order*"). The noted violations involved A-O's failing to comply with radio frequency radiation ("RFR") maximum permissible exposure ("MPE") limits applicable to transmitters on towers, failing to have Emergency Alert System ("EAS") equipment installed and operating, failing to maintain a main studio, and failing to have adequate transmission system control.

<sup>24</sup> *2003 Forfeiture Order* at para. 24.

<sup>25</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992).

<sup>26</sup> *2003 Forfeiture Order* at para. 24.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *A-O Broadcasting Corporation*, 20 FCC Rcd 756 (2005) ("*2005 Memorandum Opinion and Order*").

<sup>30</sup> *2005 Memorandum Opinion and Order*, 20 FCC Rcd at 761.

<sup>31</sup> *Id.*

<sup>32</sup> *2005 Memorandum Opinion and Order*, 20 FCC Rcd at 761 – 762.

O's inability to pay."<sup>33</sup>

12. After the release of the *2008 Memorandum Opinion and Order*, earlier this year, A-O supplemented its *Response* to the Denver *NAL*, in order to comply with the determination made by the Commission concerning A-O's financial documentation in the *2005 Memorandum Opinion and Order*. A-O's *Supplemental Response*, includes continuing financial information for the corporation beginning April 1, 1997, through March 31, 2007.<sup>34</sup> This financial information shows us, in retrospect, the sources of income A-O had access to after the release of the *2005 Memorandum Opinion and Order*. Upon review of this information, we see no apparent access to or use of lines of credit, and no apparent liquid assets. While the information does not reveal the income of A-O's shareholder (owner), it does show us what part of that income he made available to A-O in the form of loans in the years since the release of the *2005 Memorandum Opinion and Order*. In fact, since the release of the *2005 Memorandum Opinion and Order*, loans from A-O's shareholder appear to be the only significant source of cash to the corporation. We have reviewed this documentation, and looked at the totality of A-O's particular financial circumstances, including its accumulated debt, in evaluating its inability to pay claim, as well as the potential sources of income available to A-O.<sup>35</sup> We are satisfied that the data demonstrates that A-O does not have access to the resources necessary to pay the proposed forfeiture amount. A-O has not operated KTMN since 2004, and, consequently, A-O has received no revenues from 2004 through 2007. Also, according to the *2008 Memorandum Opinion and Order*, A-O has not been the licensee of KTMN for at least that long. Additionally, A-O shows no access to any additional resources, other than loans from its shareholder, particularly in the years subsequent to the issuance of the Denver *NAL* in April 2004. Given this new data, we find that payment of the proposed \$10,000 forfeiture would impose financial hardship on A-O. Therefore, we conclude that cancellation of the forfeiture is warranted. Nevertheless, we find that it is appropriate to admonish A-O for its willful and repeated violation of Section 301 of the Act.

#### IV. ORDERING CLAUSES

13. **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, that the proposed forfeiture in the amount of ten thousand dollars (\$10,000) issued to A-O Broadcasting Corporation, in the April 23, 2004, Notice of Apparent Liability for willful and repeated violations of Section 301 of the Act **IS CANCELLED**.<sup>36</sup>

14. **IT IS FURTHER ORDERED** that A-O Broadcasting Corporation, **IS ADMONISHED** for its willful and repeated violations of Section 301 of the Act.<sup>37</sup>

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<sup>33</sup> *2005 Memorandum Opinion and Order*, 20 FCC Rcd at 762.

<sup>34</sup> The initial *Response* contained continuing financial information (compiled balance sheets, compiled statements of operations, compiled statement of shareholder equity, and compiled statements of cash flow) from April 1, 1997 through March 31, 2004. The *Supplemental Response* continues that data through March 31, 2007.

<sup>35</sup> See *2005 Memorandum Opinion and Order*, 20 FCC Rcd at 762; *SM Radio, Inc.*, 23 FCC Rcd 2429, 2432 (2008); *Radio X Broadcasting Corporation*, 21 FCC Rcd 12209, 12216 (2006).

<sup>36</sup> 47 U.S.C. §§ 301, 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>37</sup> 47 U.S.C. § 301.

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to A-O Broadcasting Corporation, at its address of record, and Barry Wood, Esquire, its counsel of record.

**FEDERAL COMMUNICATIONS COMMISSION**

Rebecca L. Dorch  
Regional Director, Western Region  
Enforcement Bureau