

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

In the Matter of)
)
Calvary Chapel of Costa Mesa, Inc.) File No. EB-09-SE-137
FM Radio Station KWVE) NAL/Acct. No. 200932100077
San Clemente, California) FRN No. 0006377303
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 15, 2009

Released: September 17, 2009

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we find Calvary Chapel of Costa Mesa, Inc., licensee of FM radio station KWVE (also referred to as "KWVE" or "Licensee"), in San Clemente, California,1 apparently liable for a forfeiture in the amount of five thousand dollars (\$5,000) for willful violation of Section 11.61(a) of the Commission's Rules ("Rules").2 The apparent violation involves station KWVE's transmission of an unauthorized Required Monthly Test ("RMT") of the Emergency Alert System ("EAS") in a manner that was not in accordance with the procedures specified in the EAS Operating Handbook,3 in violation of Section 11.61(a) of the Rules.

II. BACKGROUND

2. KWVE is a Local Primary ("LP")4 station designated to initiate the transmission of EAS tests and EAS alerts in several California counties. The Commission's Enforcement Bureau ("Bureau") received a complaint alleging that on October 19, 2008, station KWVE transmitted commercial programming and an advertisement as part of an EAS test message, thus causing the programming and

1 File No. BALH-19810223HT. The Commission most recently granted the Licensee a license renewal for station KWVE on November 29, 2005. See, File No. BRH-20050801DFO. The license expires on December 1, 2013.

2 47 C.F.R. § 11.61(a).

3 47 C.F.R. §11.61(a). The Emergency Alert System 2007 AM and FM Handbook ("EAS Operating Handbook") can be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278628A3.pdf.

4 See 47 C.F.R. § 11.18(b). State and local EAS plans identify LP sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials. In addition, required monthly and weekly EAS tests originate from LP sources and must be retransmitted by the participating broadcast station.

advertisement to be retransmitted by other broadcast stations and cable systems in the area.⁵

3. On August 27, 2009, the Bureau's Spectrum Enforcement Division ("Division") issued a letter of inquiry ("LOI") to the Licensee⁶ directing it to respond to the allegations against station KWVE. On September 9, 2009, the Licensee filed its response to the LOI.⁷ In its LOI response, the Licensee admits that on October 19, 2008, an employee of station KWVE who intended to run a scheduled weekly EAS test instead ran an unscheduled RMT, and then failed to transmit the End of Message ("EOM") code and the message advising that the test had been concluded.⁸ The Licensee has also submitted station KWVE's EAS logs for October 19, 2008, in which an entry notes that "[t]he RMT was not supposed to be sent ... [t]he board operator mis-interpreted the cart label."⁹ The Licensee asserts that the incident of October 19, 2008 was caused "solely by operator error" and "did not constitute a willful or repeated violation" of the Rules.¹⁰ Additionally, the Licensee asserts that it has provided additional EAS training for each of the station operators to ensure that the events of October 19, 2008, are not repeated.¹¹

III. DISCUSSION

4. Section 503(b) of the Communications Act of 1934, as amended ("Act"),¹² and Section 1.80(a) of the Rules,¹³ provides that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Act, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules.¹⁴

5. Section 11.61 of the Rules states that EAS participants shall conduct tests at regular intervals and that "all tests will conform with the procedures in the EAS Operating Handbook." Section

⁵ The programming that was incorporated in the RMT broadcast included religious music, an advertisement for a religious conference, and information regarding KWVE's Spanish HD radio channel.

⁶ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Jerry Walker, FCC Contact, Calvary Chapel of Costa Mesa, Inc. (August 27, 2009).

⁷ See Letter from Lauren A. Colby, Esq., Counsel for Calvary Chapel of Costa Mesa, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (September 9, 2009) ("LOI response").

⁸ *Id.* at 2; *see also, id.* at Declaration of Ken Kellog.

⁹ *Id.* at Daily Station Operating Log, Entry for October 19, 2008.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² 47 U.S.C. § 503(b).

¹³ 47 C.F.R. § 1.80(a).

¹⁴ The term "willful," as used in Section 503(b) of the Act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate the Commission's Rules. 47 U.S.C. § 312(f)(1). A violation is "repeated" within the meaning of Section 503(b) of the Act if it occurs more than once or continues for more than one day. 47 U.S.C. § 312(f)(2). *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

11.61(a)(1) and the EAS Handbook specify EAS test procedures for AM and FM broadcast stations, providing that RMTs consist of transmitting the EAS head codes, the Attention Signal, Test Script and EOM code.¹⁵ In particular, the EAS Operating Handbook indicates that during required monthly tests the EOM code must be transmitted prior to the resumption of normal programming.¹⁶ Based upon our review of the record before us, it does not appear that the Licensee intentionally used the EAS signal to draw attention to the commercial programming and advertisement that it broadcast. Nevertheless, the Licensee acknowledges that on October 19, 2008, KWVE transmitted an unscheduled RMT and failed to transmit the EOM code prior to the resumption of normal programming during its origination of the RMT. Accordingly, we find that the Licensee violated Section 11.61(a) of the Rules by transmitting an unauthorized RMT and by failing to conform to the RMT procedures set forth in the EAS Operating Handbook.

6. In its LOI response, the Licensee admits that on October 19, 2008, a station KWVE employee transmitted an unscheduled RMT and failed to transmit the EOM code, which caused the inadvertent inclusion of KWVE's regular broadcast as part of the EAS transmission, but claims that this error occurred because of the one-time error of that KWVE employee. As a Commission licensee, KWVE is charged with the responsibility of knowing and complying with the terms of its authorization and the Act and the Rules,¹⁷ including the required procedures for conducting EAS tests.¹⁸ Moreover, the Commission has long held that "licensees are responsible for the acts and omission of their employees and independent contractors,"¹⁹ and has consistently "refused to excuse licensees from forfeiture penalties where the actions of employees or independent contractors have resulted in violations."²⁰ Accordingly, we find that the Licensee's violation of Section 11.61(a) was willful.²¹

¹⁵ See 47 C.F.R. § 11.61(a).

¹⁶ EAS Operating Handbook at 34.

¹⁷ See *Discussion Radio Incorporated*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 7433, 7437 (2004); see also *Gilmore Broadcasting Corporation*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6284, 6286-87 (Enf. Bur., Spectrum Enf. Div. 2006), *rescinded on other grounds*, 21 FCC Rcd 9812 (Enf. Bur., Spectrum Enf. Div. 2006); *Criswell College*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 5106, 5109 (Enf. Bur., Spectrum Enf. Div. 2006); *National Weather Networks, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 3922, 3926 (Enf. Bur., Spectrum Enf. Div. 2006); *Journal Broadcast Corporation*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18211, 18214 (Enf. Bur., Spectrum Enf. Div. 2005); *Shared Data Networks, LLC*, 20 FCC Rcd 18184, 18187 (Enf. Bur., Spectrum Enf. Div. 2005).

¹⁸ See also EAS Operating Handbook.

¹⁹ *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64 (2002) ("*Eure*"); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972); see also, *Rama Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 18209, 18211 (Enf. Bur. 2008) ("[W]here lapses in compliance occur, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify the licensee's rule violation.") (citations omitted); *Corr Wireless Communications LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 5419, 5421 (Enf. Bur., Spectrum Enf. Div. 2009) (declining to reduce a proposed forfeiture when licensee claimed unauthorized operation of two stations was caused inadvertently by a technician's error).

²⁰ See *Eure*, 17 FCC Rcd at 21863-64; *Triad Broadcasting Company, Inc.*, Memorandum Opinion and Order, 96 FCC 2d 1235, 1244 (1984).

²¹ See *supra* n. 14.

7. In determining the appropriate forfeiture amount, Section 503(b)(2)(E) of the Act directs us to consider factors, such as “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 Having considered the statutory factors, we propose a forfeiture in the amount of \$5,000 for station KWVE’s failure to conform its monthly test to the procedures set forth in the EAS Operating Handbook. There is no base forfeiture amount established for violation of Section 11.61 of the Rules. The base forfeiture amount for “EAS equipment not installed or operational” is, however, \$8,000.²³ We find that failure to conform a RMT to the procedures set forth in the EAS Operating Handbook is not as serious as failure to have any EAS equipment installed or operational. We therefore conclude that a lower proposed forfeiture of \$5,000 is appropriate.

8. As the nation’s emergency warning system, the EAS system is critical to public safety. KWVE is a designated LP station, and broadcast stations and cable systems in the San Clemente area are dependent upon KWVE to transmit accurate emergency information over the EAS system. Thus, not only did KWVE’s failure to adhere to the EAS test procedures result in KWVE transmitting commercial programming and advertisement in conjunction with an EAS test, it also caused other broadcast stations and cable systems to erroneously retransmit KWVE’s commercial programming and advertisement in conjunction with an EAS test. The transmission of EAS tones that are followed by a broadcast that is not part of an EAS test or actual emergency information, whether intentional or accidental, compromises the integrity of the EAS system. Accordingly, we conclude that station KWVE is apparently liable for a \$5,000 forfeiture for its willful violation of Section 11.61(a) of the Rules.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act²⁴ and Sections 0.111, 0.311 and 1.80 of the Rules,²⁵ Calvary Chapel of Costa Mesa, Inc., licensee of FM Radio Station KWVE, **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of five thousand dollars (\$5,000) for willful violation of Section 11.61(a) of the Rules.

10. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules,²⁶ within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture*, Calvary Chapel of Costa Mesa, Inc., licensee of FM Radio Station KWVE, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number

²² 47 U.S.C. § 503(b)(2)(E); see also *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17110 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

²³ 47 C.F.R. § 1.80(b).

²⁴ 47 U.S.C. § 503(b).

²⁵ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

²⁶ 47 C.F.R. § 1.80.

021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Calvary Chapel of Costa Mesa, Inc., licensee of FM Radio Station KWVE, will also send electronic notification on the date said payment is made to Deborah.Broderson@fcc.gov and Kathy.Berthot@fcc.gov.

12. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner'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.

14. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by first class mail and certified mail return receipt requested to Charles W. Smith, President, Calvary Chapel of Costa Mesa, Inc., 3000 W. Macarthur Blvd, Suite 500, Santa Ana, CA 92704, and to Lauren A. Colby, Esq., Counsel for Calvary Chapel of Costa Mesa, Inc., FM Radio Station, KWVE, 10 East 4th Street, Frederick, MD 21701.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau