

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

In the Matter of)	
)	Facility ID No. 24250
John L. White)	NAL/Acct. No. MB-200841410026
)	FRN: 0008960726
Licensee of KOLJ(AM))	File No. BSTA-20090604ACD
Quanah, Texas)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: October 8, 2009

Released: October 9, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")*,¹ we find John L. White ("Licensee"), licensee of Station KOLJ(AM), Quanah, Texas ("Station"), apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000) for his apparent willful and repeated violations of Section 301 of the Act² and Sections 73.1350 and 73.1745 of the Rules, and his apparent willful violation 73.1690 of the Rules.³ The apparent violations involve Licensee's unauthorized operation of the Station at a variance from his license without first filing for and obtaining Commission approval for the modification of the Station's facilities.

II. BACKGROUND

2. On June 5, 2008, the Station went silent due to severe storms that caused damage to the Station equipment, particularly its tower, which collapsed.⁴ On June 9, 2008, Media Technology, the Station's former licensee, filed a request for Special Temporary Authority ("STA") for the Station to remain silent. On February 9, 2009, the staff granted Media Technology's request, cautioning that, notwithstanding the grant of STA, the Station's broadcast license would automatically expire as a matter of law if broadcast operations did not resume by June 6, 2009.⁵

3. On June 4, 2009, Licensee notified the Bureau that the Station had resumed operation on March 19, 2009, with a replacement tower at a different electrical height from its licensed tower.

¹ This *NAL* is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Section 1.80 of the Commission's Rules ("Rules"), by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules. See 47 U.S.C. § 301; 47 C.F.R. §§ 1.80 and 0.283.

² See 47 U.S.C. § 301.

³ See 47 C.F.R. §§ 73.1350, 73.1745, and 73.1690.

⁴ At the time the Station went silent it operated under the call sign KREL(AM) and was licensed to Media Technology Ventures Holding, LLC ("Media Technology"). Media Technology voluntarily assigned the Station's license and other assets to Licensee on September 2, 2008. See FCC File No. BAL-20080721AAN (granted Sep. 2, 2008; consummated Sep. 15, 2008).

⁵ See *Letter to First Broadcasting Investment Partners, LLC*, Reference 1800B3-KAW (MB Feb. 9, 2009); see also 47 U.S.C. § 312(g).

Licensee filed a concurrent request for an engineering STA to operate the replacement tower, specifying a height of 75.7 electrical degrees, reduced from its authorized height of 93.4 electrical degrees. The STA request also sought permission to operate at a reduced nighttime power of 0.063 kW from the previous nighttime power of 0.073 kW, and included a nighttime allocation study demonstrating that no impermissible interference would be caused to other stations as a result of this proposal.

4. On July 22, 2009, the staff granted Licensee's engineering STA request, but stated that Licensee "apparently constructed a tower with different electrical height from the licensed tower without first having obtained a construction permit from the Commission," in apparent violation of Section 73.1690(b)(1) of the Rules.⁶ The letter stated "that Licensee must immediately file a Form 301 application for construction permit specifying the new tower, and upon grant of the application, must apply for a license to cover the permit on Form 302-AM."⁷ The letter also advised that the STA was granted "without prejudice as to whatever action the Commission may take" with regard to its unauthorized construction and operation of the Station at its modified facilities.⁸

III. DISCUSSION

5. *License Expiration.* Section 73.1740(c) of the Rules, which implements Section 312(g) of the Act,⁹ provides that the license of any broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary. Moreover, Commission precedent makes it clear that returning a station to the air with unauthorized facilities does not override this "automatic forfeiture" provision of our Rules.¹⁰

6. It is undisputed that the Station suspended operation at its licensed facility beginning on June 5, 2008, and operated from non-conforming facilities without authority from March 19, 2009, until July 22, 2009, when the Commission granted its June 4, 2009, STA request. Because the Station was either silent or engaging in unauthorized operation for nearly 14 months, the Station license was subject to forfeiture pursuant to Section 312(g) of the Act. Although Section 312(g) and Commission precedent provide for the forfeiture of a broadcast license under such circumstances, it also allows the Commission the discretion, where appropriate, to extend or reinstate a forfeited license, notwithstanding more than 12 months of station silence or, as in this case, unauthorized operation. Specifically, in pertinent part, Section 312(g) provides, ". . . the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any reason to promote equity and fairness."¹¹

⁶ See Letter to John L. White from Charles N. Miller, Engineer, Audio Division (MB July 22, 2009) ("JLW").

⁷ *Id.* at 2.

⁸ *Id.*

⁹ 47 U.S.C. § 312(g).

¹⁰ 47 U.S.C. § 312(g); see *Great Lakes Community Broadcasting, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244-47 (MB 2009) ("Great Lakes") (finding that "construction with unauthorized facilities does not override the 'automatic forfeiture' provision in our Rules") (citing *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) ("Eagle") (affirming Commission's determination that station's broadcast license had expired pursuant to Section 312(g) of the Act, due to its failure to broadcast at its authorized facilities for one year) and *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 603 (2008) ("A-O Broadcasting") (affirming staff decision that station's license had expired as a matter of law due to the station's failure to broadcast at its authorized facilities for one year)).

¹¹ 47 U.S.C. § 312(g).

7. We find that cases in which the Commission has declined to exercise its discretion under Section 312(g) of the Act are readily distinguishable from the instant case.¹² For example, in *Great Lakes, Eagle* and *A-O Broadcasting*, licensees' unauthorized operations were at geographically different locations, and in each case, the Commission rejected the licensee's request for Commission approval to operate from its unauthorized site.¹³ Moreover, the licensees in *Great Lakes* and *Eagle* made misrepresentations to the Commission regarding their operations.¹⁴ Finally, in *A-O Broadcasting*, the licensee continued to broadcast with unauthorized facilities despite multiple warnings by Commission staff.¹⁵ By contrast, Licensee in the instant case (1) remained at its authorized site; (2) received Commission approval to operate with its modified facilities pursuant to STA; (3) did not make any misrepresentations to Commission staff regarding its operation; and (4) did not disregard Commission warnings to cease operation. In light of these distinctions, we believe that exercise of our discretion under Section 312(g) of the Act is appropriate in this case. We therefore find that forfeiture for unauthorized operation, rather than a determination that the Station's license expired by operation of law, is the appropriate sanction.

8. *Proposed Forfeiture.* Section 73.1690 of the Rules prescribes the procedures and restrictions that apply to licensee modifications of authorized broadcast transmission system facilities. Under Sections 73.1690(b)(1) and (b)(5) of the Rules, a commercial licensee must first file a construction application on FCC Form 301 and receive a construction permit from the Commission before it can (1) build a new tower structure at a variance from its authorization, or (2) in the case of AM stations and other certain broadcast stations, decrease its authorized power.¹⁶ Additionally, Section 301 of the Act and Section 73.1350 of the Rules prohibit the operation of a broadcast station except under, and in accordance with, a Commission-granted authorization.¹⁷ Finally, Section 73.1745 of the Rules states that "[n]o broadcast station shall operate . . . with modes or power, other than those specified and made a part of the license"¹⁸

9. As discussed above, Licensee returned the Station to the air on March 19, 2009, at an antenna height and power level at a variance from its authorization without first filing a modification

¹² At the time of the staff action in *Eagle* and *A-O Broadcasting*, the Commission had no discretion to waive Section 312(g)'s expiration provision. On appeal, however, the Commission held that the licensees' arguments supporting reinstatement of their respective licenses would have failed even had they been considered under the 2004 amendment to Section 312(g) which gave the Commission discretion to reinstate expired licenses, among other things, "to promote equity and fairness." See *Eagle*, 563 F.3d at 550; *A-O Broadcasting*, 23 FCC Rcd at 616-17,

¹³ Specifically, in *Great Lakes*, the Commission rejected the licensee's modification application to operate from the unauthorized site, where, among other things, it found that the licensee had made false certifications to the Commission on several occasions regarding operation at its authorized site; committed multiple Rule violations in its station operations, and kept the station off the air without Commission approval for almost three years. See *Great Lakes*, 24 FCC Rcd at 8244. The Commission likewise rejected the licensee's modification application to operate at the unauthorized site in *Eagle*, due to the licensee's failure to obtain FAA clearance of the proposed tower structure. See *Eagle*, 563 F.3d at 554. In *A-O Broadcasting*, the Commission rejected the licensee's STA request to operate from its unauthorized facilities, in part because the request was not made until nearly two years after its license expired pursuant to Section 312(g) of the Act). See *A-O Broadcasting*, 23 FCC Rcd at 612-13.

¹⁴ In *Great Lakes*, the licensee falsely certified in its license application that it had been broadcasting from its authorized site, and in *Eagle*, the licensee misrepresented to the Commission that it had obtained FAA approval for its tower registration. See *Great Lakes*, 24 FCC Rcd at 8244, and *Eagle*, 563 F.3d at 554-55.

¹⁵ See *A-O Broadcasting*, 23 FCC Rcd at 612-13.

¹⁶ See 47 C.F.R. §§ 73.1690(b)(1) and (b)(5).

¹⁷ See 47 U.S.C. § 301; 47 C.F.R. § 73.1350.

¹⁸ 47 C.F.R. § 73.1745(a).

application and receiving Commission approval of such an application. Moreover, it appears that Licensee engaged in unauthorized operation of the Station at its modified facilities until the Commission granted Licensee's STA request on July 22, 2009.¹⁹ Accordingly, we find that Licensee apparently willfully violated Sections 73.1690(b)(1) and (b)(5) of the Rules for his failure to file a modification application on FCC Form 301, and further find that Licensee apparently willfully and repeatedly violated Section 301 of the Act and Sections 73.1350 and 73.1745 of the Rules by engaging in unauthorized operation of the Station during the nine-week period from March 19, 2009, to June 22, 2009.

10. 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.²⁰ 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.²¹ 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,²² and the Commission has so interpreted the term in the Section 503(b) context.²³ 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."²⁴

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.²⁵ The guidelines also specify a base forfeiture amount of \$10,000 for construction and/or operation without an instrument of authorization for the service.²⁶ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the 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."²⁷

12. In this case, Licensee failed to timely file a modification application and continued Station operations for more than nine weeks at its modified facilities before seeking an STA to so operate. Nevertheless, because he held a license to operate Station KOLJ(AM) at the same transmitter site, where the Station's original tower was destroyed by a storm, the latter transgression is not comparable to "pirate" wireless operations, which typically have been subject to forfeitures of approximately \$10,000. 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 propose a forfeiture for the full \$3,000 amount for the failure to timely file the modification application and STA request, but reduce the proposed forfeiture for the

¹⁹ See *JLW* at 1.

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

²¹ 47 U.S.C. § 312(f)(1).

²² See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²³ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²⁴ 47 U.S.C. § 312(f)(2).

²⁵ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 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.

²⁶ A broadcast station requires an authorization from the Commission to operate. See 47 U.S.C. § 301.

²⁷ 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).

unauthorized operation from the \$10,000 base amount to \$4,000.²⁸ Thus, we propose a forfeiture in the total amount of \$7,000.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Act²⁹ and Sections 0.111, 0.311 and 1.80 of the Rules,³⁰ John L. White IS hereby NOTIFIED of his APPARENT LIABILITY FOR A FORFEITURE in the amount of seven thousand dollars (\$7,000) for the willful and repeated violation of Section 301 of the Act and Sections 73.1350 and 73.1745 of the Rules and the willful violation of Section 73.1690 of the Rules.

14. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules,³¹ within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture*, John L. White SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. 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 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. KOLJ will also send electronic notification on the date said payment is made to Jacqui.Johnson@fcc.gov and JoAnn.Lucanik@fcc.gov.

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

17. 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)

²⁸ See, e.g., *Discussion Radio Incorporated*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7438 (2004); *Gospel Media, Inc.*, Letter, 19 FCC Rcd 15600 (MB 2004). Although in *Gospel Media*, the Bureau imposed a proposed forfeiture of \$3,000 for unauthorized operation, the unauthorized operation lasted only two weeks and the applicant did not allow its STA for continued operations to expire. The \$4,000 forfeiture proposed here for unauthorized operation is analogous to use of an unauthorized frequency by a land mobile station holding a license for a different frequency. See, e.g., *In the Matter of Dave Mitchell*, Forfeiture Order, 20 FCC Rcd 1366 (EB 2005); *In the Matter of Joselyn Gordon*, Forfeiture Order, 19 FCC Rcd 23557 (EB 2004).

²⁹ 47 U.S.C. § 503(b).

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

³¹ 47 C.F.R. § 1.80.

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.

18. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by certified mail return, receipt requested, to John L. White, Box 396, Quanah, Texas 79252.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau