

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

In the Matter of)	
)	
Ely Radio, LLC)	File Number: EB-08-SF-0039
)	
Antenna Structure Owner)	NAL/Acct. No.: 200932960001
Winnemucca, NV)	FRN: 0014848899
ASR # 1005854)	

FORFEITURE ORDER

Adopted: October 28, 2009

Released: October 30, 2009

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“*Order*”), we issue a monetary forfeiture in the amount of eleven thousand (\$11,000) to Ely Radio LLC, (“Ely”) owner of antenna structure number 1005854, in Winnemucca, Nevada, for repeated violation of Section 303(q) of the Communications Act of 1934, as amended, (“Act”),¹ and Sections 17.51(a), 17.47(a), 17.48, and 17.57 of the Commission's Rules (“Rules”).² On October 31, 2008, the Enforcement Bureau’s San Francisco Office issued a Notice of Apparent Liability for Forfeiture (“*NAL*”) to Ely in the amount of \$13,000 after determining that Ely apparently repeatedly failed to comply with the antenna structure registration (“ASR”) lighting, monitoring, record keeping, and notification requirements specified for antenna structure number 1005854. In this *Order*, we consider Ely’s arguments that it is not the owner of antenna structure number 1005854, and therefore it did not violate any of the rules listed above. We also consider Ely’s claim that it has a history of compliance with the Commission’s Rules.

II. BACKGROUND

2. Antenna structure number 1005854 is an antenna tower of 61.8 meters (202.7 feet) in height above ground. According to the antenna structure registration (“ASR”) for antenna structure 1005854, the structure is required to be painted and lit in accordance with specific Chapters of the FAA Advisory Circular for Obstruction Marking and Lighting.³ Specifically, the structure is required to be painted,⁴ and have, at its top, a flashing beacon equipped with two lamps and red filters, along with at least two lamps enclosed in red obstruction light globes⁵ located on a level at approximately one-half the

¹ 47 U.S.C. § 303(q).

² 47 C.F.R. §§ 17.47(a), 17.48, 17.51(a), 17.57.

³ FAA Circular Number 70/7460-1J, Chapters 3, 4, 5 and 13.

⁴ FAA Circular Number 70/7460-1J, Chapters 3 and 13.

⁵ FAA Circular Number 70/7460-1J, Chapters 4, 5 and 13.

overall height of the tower.⁶ The lights on antenna structure number 1005854 are required to burn continuously or be controlled by a light sensitive device.⁷

3. On March 11, 2008, in response to a complaint that the red beacon lighting on the antenna structure used to broadcast KWNA(AM) was out, a San Francisco agent determined that the structure was antenna structure number 1005854, registered to Sheen Broadcasting Company. The agent then contacted the Federal Aviation Administration ("FAA") Flight Service Station to determine if the tower light outage had been reported and if a Notice to Airmen ("NOTAM") had been issued for the structure. The FAA reported that there were no NOTAMs on file for antenna structure number 1005854 and advised that they would issue a NOTAM for the structure. The San Francisco agent then contacted the Winnemucca Police department and asked them to make an observation of antenna structure 1005854. At approximately 9:00 p.m. PDT, a Winnemucca Police officer drove to antenna structure 1005854 and observed no lights illuminated on the antenna structure.

4. On March 12, 2008, a San Francisco agent inspected antenna structure number 1005854, located at 5130 Weikel Drive in Winnemucca, Nevada.⁸ The agent observed that at 8:10 p.m. PDT, no lights were illuminated on antenna structure number 1005854.⁹

5. On March 13, 2008, the San Francisco agent inspected station KWNA(AM) at the KWNA(AM) transmitter address of 5130 Weikel Drive, in Winnemucca, Nevada, and the KWNA(AM) studio address of 355 West Fourth Street, Winnemucca. The San Francisco agent interviewed the owner of Ely and the general manager and the programming director of KWNA(AM). The Ely and KWNA(AM) management told the San Francisco agent that for about the past two months, when the flasher beacon rotated, there was noise getting into the audio of the KWNA(AM), so they shut off the lights on antenna structure number 1005854. They further told the San Francisco agent that they were unable to determine if this was a grounding problem or antenna tuning problem, so they kept the antenna structure lights off until they could fix the problem. Ely's owner stated that he spoke to the FAA a year ago and notified the FAA over the past two months about the outage, but did not make any entries in the station log to memorialize this. Ely's owner also stated that he believed that antenna structure number 1005854 was less than 200 feet in height and that the airport does not have a control tower. Ely's owner further stated that he wanted to move the antenna structure to a new location. The KWNA(AM) programming director was also contacted by the owner of the previous licensee of KWNA(AM), Sheen Broadcasting Company ("Sheen"), about the light outage on the antenna structure. Ely and KWNA(AM) management also told the San Francisco agent that Ely leases the land, building and tower from Sheen; that there is no agreement between the two parties concerning who monitors the lights; and that they believe that the lights work by photocell. The KWNA(AM) management also stated that they did not notify Sheen when they turned the lights off on antenna structure number 1005854.

6. Later on March 13, 2008, the San Francisco agent interviewed Sheen. Sheen stated that

⁶ FAA Circular Number 70/7460-1J, Appendix 1, Figure 11.

⁷ FAA Circular Number 70/7460-1J, Chapters 5 and 13.

⁸ The agent noted that unlike the street address listed, the latitude and longitude data shown on the antenna structure registration for antenna structure 1005854 did not correspond to its actual location.

⁹ According to the U.S. Naval Observatory, sunset in Winnemucca, Nevada, occurred at 5:55 p.m., PDT, on March 12, 2008.

he had received several complaints about the lighting on antenna structure number 1005854 being out during the previous six to nine months and that he was aware that there was heliport less than a mile from the antenna structure. Sheen also stated that he rents the land and transmitter building to Ely for KWNA(AM), but that all of the assets and equipment to operate KWNA(AM), including antenna structure number 1005854, were sold to Ely as of December 1, 2006.

7. Still on March 13, 2008, at 7:30 p.m. PDT, the San Francisco agent met with the KWNA(AM) general manager at the KWNA(AM) transmitter site. The lights on the antenna structure were not functioning. The KWNA(AM) general manager switched on the power to antenna structure number 1005854, and the San Francisco agent observed that the lights on the antenna structure were functioning. As no noise was heard in the KMNA(AM) audio, the general manager left the lights on the structure on.¹⁰

8. On March 17, 2008, Sheen faxed to the San Francisco agent a copy of the Asset Purchase Agreement by and between Sheen Broadcasting Co., Seller, and Ely Radio LLC, Buyer, for the sale and purchase of stations KWNA AM and FM, Winnemucca, Nevada ("Sales Agreement"). Section 2 of the Sales Agreement states that the "Seller will sell, assign, transfer, convey and deliver to buyer . . . [a]ll tangible personal property and fixtures owned by Seller used or useful in the operation of the station." Section 2.4 and Section 2.5 of the Sales Agreement detail the real property lease and [a] lease on the building owned by the Seller which is used as the Station's studios and offices" Section 3 of the Sales Agreement details the "Excluded Assets" and antenna structure number 1005854 is not listed.

9. On June 26, 2008, the San Francisco Office issued Letters of Inquiry to both Ely and Sheen asking each if they were the owner of antenna structure number 1005854 and if they were aware of the registration, painting and lighting requirement for antenna structure 1005854. In their responses, both Ely and Sheen denied ownership of antenna structure number 1005854. Ely stated that the Sales Agreement "did not include the transmitter site or tower" and that Ely intended to relocate the station to a new transmitter site with a "shorter ¼-wave tower." Ely also stated that it has paid rental checks to Sheen every month and that Sheen remains the owner of the tower and transmitter site used by KWNA(AM). Ely further stated that the owner of Sheen Broadcasting Company continues to occupy the residence on the transmitter site; that "it made sense for him to retain responsibility and for observing and ensuring compliance with the FAA and FCC lighting and other tower requirements;" that the light switches are on his property; and that Mr. Sheen "never brought to [Ely's] attention that that the tower was not lit properly." Sheen responded to the Letter of Inquiry stating that Sheen had sold all of its business assets and equipment to operate KWNA(AM) and KWNA-FM to Ely as of December 1, 2006; that Sheen Broadcasting Company ceased to exist on January 1, 2007; and that Sheen "is leasing a building and ground to [Ely] for the AM transmitter and the tower in question."

10. On October 31, 2008, the San Francisco Office issued a *NAL* in the amount of \$13,000 to Ely.¹¹ In the *NAL*, the San Francisco Office found that Ely apparently repeatedly violated Section 303(q) of the Communications Act of 1934, as amended, ("Act"),¹² and Section 17.51(a) of the Rules¹³ by failing

¹⁰ On March 20, 2008, the KWNA(AM) general manager contacted the San Francisco Office and stated that they would do visual observations of the lighting on antenna structure number 1005854.

¹¹ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932960001 (Enf. Bur., Western Region, San Francisco Office, released October 31, 2008).

¹² 47 U.S.C. § 303(q).

¹³ 47 C.F.R. § 17.51(a).

to exhibit the structure's red obstruction lighting from sunset to sunrise; and by failing to make observations of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights, a violation of Section 17.47(a) of the Rules.¹⁴ The San Francisco Office found that Ely's failure to make the required observations of the lighting on the antenna structure resulted in its failure to notify the nearest Flight Service Station of the Federal Aviation Administration ("FAA") of the outage of the flashing obstruction lights, a violation of Section 17.48 of the Rules.¹⁵ The San Francisco Office also found that Ely apparently repeatedly failed to immediately notify the Commission of a change in ownership information for antenna structure number 1005854, a violation of section 17.57.¹⁶ Ely filed a response ("*Response*") on December 1, 2008, arguing that it is not the owner of antenna structure 1005854, and that it has a history of compliance with the Commission's Rules.

III. DISCUSSION

11. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹⁷ Section 1.80 of the Rules,¹⁸ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.¹⁹ In examining the *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.²⁰

12. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.²¹ Section 17.51 of the Rules states that all red obstruction lighting shall be exhibited from sunset to sunrise unless otherwise specified.²² According to its ASR record, antenna structure number 1005854 is required to have, at its top, a flashing beacon equipped with two lamps and red filters, along with at least two lamps enclosed in red obstruction light globes located on a level at approximately one-half the overall height of the tower.²³ Section 17.47(a) requires that the owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications shall make an observation of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure.²⁴ Section 17.48 of the Rules requires the owner of an antenna structure to report

¹⁴ 47 C.F.R. § 17.47(a).

¹⁵ 47 C.F.R. § 17.48.

¹⁶ 47 C.F.R. § 17.57.

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 C.F.R. § 1.80.

¹⁹ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

²⁰ 47 U.S.C. § 503(b)(2)(E).

²¹ 47 U.S.C. § 303(q).

²² 47 C.F.R. § 17.51(a).

²³ FAA Circular Number 70/7460-1J, Chapters 4 and 5.

²⁴ 47 C.F.R. § 17.47(a).

immediately by telephone or telegraph to the nearest Flight Service Station or office of the FAA any observed or otherwise known extinguishment or improper functioning or any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes.²⁵ Section 17.57 of the Rules requires the owner of an antenna structure to immediately notify the Commission, using FCC Form 854, upon any change in structure height or change in ownership information.²⁶

13. On March 11, 2008, a San Francisco agent, in response to complaints concerning lighting outages on antenna structure number 1005458, contacted the FAA Flight Service Station and found that Ely had not reported the outage, thus, requiring the San Francisco agent to request the issuance of a NOTAM.²⁷ On March 12, 2008, and March 13, 2008, a San Francisco agent observed antenna structure number 1005854 after sunset and found that the lights were extinguished. In an interview with Ely and KWNA(AM) management, the San Francisco agent was advised that the lights on antenna structure number 1005854 had been turned off by KWNA(AM) personnel because of noise that was being made by the lighting mechanism. In the *NAL*, the San Francisco Office determined that this indicated that Ely and KWNA(AM) personnel had control over antenna structure 1005854 and its lighting, as evidenced by their ability to switch the lighting on and off to conform to their operation of KWNA(AM) and use of antenna structure number 1005854 for the operation of KWNA(AM). The San Francisco Office also determined that although Ely argued that it is not the owner of antenna structure number 1005854, and that it leases the antenna structure from Sheen, the former licensee of KWNA(AM), the preponderance of the evidence suggests otherwise. Specifically, the San Francisco Office determined that in the Sales Agreement, Sheen conveyed to Ely “[a]ll tangible personal property and fixtures owned by Seller used or useful in the operation of the station.”²⁸ The San Francisco Office also determined that, “[a]s Ely continues to use antenna structure number 1005854 to broadcast KWNA(AM), there is no doubt that the structure, whether it is considered a fixture or personal property, is used or is useful in the operation of KWNA(AM). Additionally, the lease in question, according to the Sales Agreement, covers only the real property of the transmitter site and the building used for the KWNA(AM) studios and offices.”²⁹

14. In its *Response*, Ely argues that it is not the owner of antenna structure number 1005854 and that the San Francisco Office ignored the sworn testimony of Ely’s managing member, in its response to the LOI, in which the managing member “demonstrated that the tower remained under the proper licensee’s Ownership.” We find that the San Francisco Office did not disregard the LOI response, or the statement from Ely’s managing member. In his statement, the managing member stated that he paid monthly rental checks to Sheen Rentals and that he “assumed that either Sheen Broadcasting Company, or perhaps an affiliate under Mr. Sheen’s control, remains the owner of the tower and the transmitter site used by KWNA.” Contrary to Ely’s contention in its *Response*, this is not undisputed evidence. As

²⁵ 47 C.F.R. § 17.48.

²⁶ 47 C.F.R. § 17.57.

²⁷ The San Francisco agent’s request to issue a NOTAM was done to protect the public safety, given that the FAA-mandated lighting on the structure was not functioning and the antenna structure was therefore a potential hazard to air navigation. We caution antenna structure owners, however, that it is incumbent upon them, and not a third party, to notify the FAA of any extinguishments or malfunctioning lights.

²⁸ A “fixture” is defined as “[a]n article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the real property That which is fixed or attached to something permanently as an appendage, and not removable.” *Black’s Law Dictionary*, West Publishing (Sixth Edition 1990).

²⁹ *NAL* at para. 13.

detailed above, and in the *NAL*, Mr. Sheen specifically stated to the San Francisco Office that Sheen Broadcasting Company had sold all of its business assets and equipment to operate KWNA(AM) and KWNA-FM to Ely as of December 1, 2006; that Sheen Broadcasting Company ceased to exist on January 1, 2007; and that Sheen “is leasing a building and ground to [Ely] for the AM transmitter and the tower in question.”³⁰ It is precisely because of this disparity between the statements from Mr. Sheen and Ely that the San Francisco Office looked to the written Sales Agreement between the two parties.

15. Ely argues that the San Francisco Office mistakenly determined that real property was being conveyed and argues that “nothing in these relevant provisions of the Sales Agreement suggests a transfer of title to the real estate or the tower located on it.”³¹ We find that the San Francisco Office did not determine that real property had been conveyed or that title to the real estate had transferred. In reviewing the Sales Agreement, we find that the San Francisco Office did determine, correctly, that antenna structure number 1005458 had been sold to Ely. Specifically, as described above and in the *NAL*, “Section 2 of the Sales Agreement states that the ‘Seller will sell, assign, transfer, convey and deliver to buyer . . . [a]ll tangible personal property and fixtures owned by Seller used or useful in the operation of the station.’ Section 2.4 and Section 2.5 of the Sales Agreement detail the real property lease and [a] lease on the building owned by the Seller which is used as the Station’s studios and offices’ Section 3 of the Sales Agreement details the “Excluded Assets” and antenna structure number 1005854 is not listed.”³²

16. Ely also argues that the San Francisco Office ignored Section 6.8 of the Sales Agreement which indicates that the “Leases” referenced in the Sales Agreement cover both the studio/office building and the real property used in the stations’ operation. We disagree. The San Francisco Office specifically concluded that that lease in question covered “the real property of the transmitter site and the building used for the KWNA(AM) studios and offices.”³³ This language comes from Section 6.8 of the Sales Agreement.

17. Ely does not dispute that antenna structure number 1005458 was used and continues to be used to transmit KWNA(AM), that Ely personnel had access to and control over the lighting on antenna structure number 1005854, and that Ely personnel extinguished the lights some time prior to the FCC’s inspection due to a noise purportedly caused by the tower lighting system. Ely acknowledges it had contacted the FAA previously regarding light outages on antenna structure number 1005854. Ely also proffers no new evidence or information in its *Response* that supports its assertion that Sheen retained title to the tower structure used in the operation of KWNA(AM). Rather, Ely merely disputes the San Francisco Offices’ interpretation and analysis of the Lease and the Sales Agreement. While jurisdiction to make a definitive judicial determination as to who owns antenna structure number 1005854 rests with the state and local judicial system in Nevada, we find that the San Francisco Office reasonably concluded that the preponderance of the evidence showed that Ely had purchased antenna structure number 1005458.³⁴ Accordingly, weighing the totality of the evidence presented by the San Francisco Office in

³⁰ *NAL* at para 9.

³¹ *Response* at 2.

³² *NAL* at para. 8.

³³ *NAL* at para. 13.

³⁴ We note that Section 73.1213 of the Commission’s Rules states that “[i]n the event of a default by the owner [of an antenna structure] each licensee or permittee shall be responsible for ensuring that the structure complies with applicable painting and lighting requirements.” 47 C.F.R. § 73.1213. See also 47 C.F.R. § 17.6(a). We also note that Ely appears to be the only licensee on antenna structure number 1005854.

the *NAL* and Ely's *Response*, we conclude that Ely repeatedly violated Sections 17.47(a), 17.48, and 17.51(a) of the Rules.

18. Ely further argues that it has a history of compliance with the Commission's Rules. We have reviewed our records and we agree. We note, however, that one violation detailed in the *NAL* continues, that is, Ely has failed to update the antenna structure registration for antenna structure number 1005458, in violation of Section 17.57 of the Rules. The forfeiture proposed for this violation is \$3,000 and we therefore decline to reduce the forfeiture amount for this violation. However, because Ely has a history of compliance with the Commission's Rules, we will reduce the \$10,000 forfeiture amount for the other violations listed in the *NAL* to \$8,000.

19. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Ely repeatedly violated Section 303(q) of the Act, and Sections 17.51(a), 17.47(a), 17.48, and 17.57 of the Rules. Considering the entire record and the factors listed above, we find that reduction of the proposed \$13,000 forfeiture to \$11,000 is warranted.

IV. ORDERING CLAUSES

20. **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, Ely Radio, LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$11,000 for repeatedly violating Section 303(q) of the Act, and Sections 17.51(a), 17.47(a), 17.48, and 17.57 of the Rules.³⁵

21. 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.³⁶ 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. Ely Radio, LLC, shall also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

³⁵ 47 U.S.C. §§ 303(q), 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.47(a), 17.48, 17.51.

³⁶ 47 U.S.C. § 504(a).

22. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Ely Radio, LLC, at its address of record, and Peter Gutmann, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau