

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

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|----------------------------------------------|---|-------------------------------|
| In the Matter of |) | Facility ID No. 93248 |
| |) | NAL/Acct. No. MB-200941410030 |
| Alaska Educational Radio System, Inc. |) | FRN: 0008610982 |
| |) | File No. BPED-20070516AAD |
| Licensee of KWMD(FM) |) | |
| Kasilof, Alaska |) | |
| |) | |

ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 22, 2009

Released: December 23, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration (“Petition”), filed on March 10, 2008, by Alaska Educational Radio System, Inc. (“AERS”). AERS seeks reconsideration of a February 5, 2008, letter decision (“Letter Decision”) by the staff of the Audio Division, Media Bureau, dismissing a contingent community of license minor change application for Station KWMD(FM), Kasilof, Alaska (“KWMD(FM)”), from Channel 213A at Kasilof to Channel 214A at Ridgeway, Alaska.¹ Alternatively, AERS requests waiver of Section 73.3573(g)(2) of the Commission’s Rules (“Rules”), which requires community of license change proposals to be mutually exclusive with an applicant’s currently licensed facilities.²

2. For the reasons set forth below, we deny the Petition and the waiver request. We also find AERS apparently liable for forfeiture in the amount of ten thousand dollars (\$10,000) for its apparent willful and repeated violations of Section 301 of the Communications Act of 1934, as amended (“Act”)³ and Section 73.1350(a) of the Rules⁴ for operating KWMD(FM) at variance from its license.

II. BACKGROUND

3. *Station History and STAs.* On July 26, 2000, AERS received a construction permit (“CP”) to construct a new noncommercial educational FM station at Kasilof.⁵ The Commission granted a license to cover these facilities on October 20, 2003.⁶ Soon after the license to cover was granted, a conflict with the owner of the transmitter site prompted AERS to submit four filings within three months: (1) on May 4, 2004, a Special Temporary Authority (“STA”) request for KWMD(FM) to remain silent;⁷

¹ File No. BPED-20070516AAD.

² 47 C.F.R. § 73.3573(g)(2).

³ 47 U.S.C. § 301.

⁴ 47 C.F.R. § 73.1350(a).

⁵ File No. BPED-19990427MB, expiration July 26, 2003.

⁶ File No. BLED-20030722ADR.

⁷ File No. BLSTA-20040504ACR (granted June 28, 2004; expired September 1, 2004). The May 4, 2004 STA application stated that KWMD had been “silent at all or most times since September, 2003.” AERS’ counsel

(2) on June 15, 2004, a CP application to operate KWMD(FM) at Ridgeway;⁸ (3) on June 18, 2004, an STA request to operate KWMD(FM) at Ridgeway with greatly reduced power;⁹ and (4) on August 24, 2004, a timely request for extension of KWMD(FM)'s authority to remain silent.¹⁰

4. AERS subsequently filed yet another STA request on September 28, 2005 ("September 2005 STA"), again to operate KWMD(FM) at Ridgeway with reduced power.¹¹ The September 2005 STA, granted on October 26, 2005, expired on January 26, 2006. AERS admits that, due to "an inadvertent oversight," it failed to seek STA renewals after 2006.¹² On February 13, 2008, nearly two years after the previous STA expired, it filed a request for an extension of the September 2005 STA.¹³ The extension request was denied on May 7, 2008.¹⁴ AERS filed its latest STA request that day ("May 2008 STA Request"), seeking temporary authority to operate from Ridgeway while AERS looked for a new transmitter site.¹⁵

5. *COL Applications.* On July 13, 2007, AERS filed three contingent minor change applications for KABN(FM), KWMD(FM), and KRAW(FM) (collectively, "COL Applications").¹⁶ In the COL Applications, AERS proposed to change the stations' frequencies, and to change the communities of license for KABN(FM) and KWMD(FM) to Ridgeway.¹⁷ Commission staff found that KABN(FM)'s proposed community of license change did not comply with the Rule requirement that the

Michael Couzens wrote in a follow-up email to the Commission that AERS representatives had operated under the assumption that noncommercial licensees did not have minimum hour requirements. Approximately nine months passed before AERS alerted the Commission to KWMD's silence.

⁸ File No. BPED-20040312AAA (granted July 30, 2004; expired July 30, 2007. Permit cancelled.)

⁹ File No. BSTA-20040621ACV (granted August 3, 2004; expired November 3, 2004). AERS' original CP authorized it to operate KWMD at Kasilof with effective radiated power ("ERP") of 0.5 kilowatts. The license to cover authorized .31 kW. CP BPED-20040312AAA authorized a change in transmitter site, a change in frequency and ERP of 4 kilowatts. This STA permits operation of KWMD with .31 kilowatts.

¹⁰ File No. BLSTA-20040824AGX (granted August 26, 2004; expired February 26, 2005).

¹¹ File No. BSTA-20050928AJX (expired January 26, 2006). AERS stated in its September 2005 STA that it had resumed broadcasting from the Ridgeway facility on June 19, 2005 (*See* File No. BSTA-20050928AJX, Exhibit 24) (apparently the Station was silent from January 26, 2005, until June 19, 2005). By its own admission, AERS waited nearly four months before filing the September 2005 STA. *See* File No. BRED-20050929AAP, Exhibit 6 (noting that its last STA to operate from Ridgeway was granted on August 3, 2004 (with a November 3, 2004 expiration), and that "due to oversight" it had failed to file an extension request until September, 2005).

¹² Petition at 2.

¹³ BESTA-20080213ADM (denied).

¹⁴ Staff denied this request because the extension was based on an expired STA. *See* Letter from Charles N. Miller, Engineer, Audio Division, Media Bureau, to Lewis Leonard, Alaska Educational Radio System, Inc. (May 7, 2008).

¹⁵ File No. BSTA-20080508ACJ (accepted for filing May 9, 2008).

¹⁶ File Nos. BPED-20070516AAD, BPED-20070516AAB and BPED-20070516AAC, respectively. On January 24, 2008, AERS requested STA to continue operations at Ridgeway pending the community of license change to Ridgeway. Staff denied the application because the requested contour extended substantially beyond KWMD's licensed contour at Kasilof. (*See* Letter from Charles N. Miller, Engineer, Audio Division, Media Bureau, to Lewis Leonard, Alaska Educational Radio System, Inc. (Jan. 28, 2008.))

¹⁷ Petition at 3. The COL Applications were an attempt to "bring an existing operation into compliance with the rules." *Id.*

proposed facilities be mutually exclusive with the station's currently licensed facilities. Therefore, the staff dismissed the COL Applications.¹⁸ AERS subsequently filed the instant Petition.¹⁹

III. DISCUSSION

6. *Petition for Reconsideration.* The Commission will consider a petition for reconsideration only when the petitioner demonstrates that there was a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.²⁰ AERS has not met this burden.

7. AERS states in the Petition that the Commission erred in its evaluation of the COL Applications because it misunderstood AERS' proposal.²¹ In evaluating the COL Applications under Section 73.3573(g) of the Rules,²² Commission staff compared the proposed facility at Ridgeway to KABN(FM)'s currently licensed facilities at Kasilof and concluded that they were not mutually exclusive. AERS claims that the staff instead should have compared the proposed facilities with those from which it was currently operating at Ridgeway. AERS argues that, had it taken this approach, the staff would have concluded that the facilities were mutually exclusive, and now urges us to adopt such an approach when reconsidering KWMD(FM)'s dismissed community of license change application.

8. Section 73.3573(g) of the Rules states that "facilities specified by the applicant at the proposed community of license must be mutually exclusive ...with the applicant's current facilities"²³ AERS argues that a portion of the Commission's 2006 Report and Order on city of license modifications²⁴ supports its claim that the Ridgeway facilities can be "current facilities" for purposes of Section 73.3573 of the Rules.²⁵ However, the excerpt pertains to permittees' "current permitted facilities" (emphasis added), which AERS lacks because the permit had expired by the time the Commission evaluated the COL Applications.²⁶ Assuming *arguendo* that AERS had a current temporary authorization to operate either KWMD(FM) or KABN(FM) from Ridgeway when it filed the COL Applications, using STA facilities as the basis for a permanent community of license change runs contrary to the nature of STA. STA is not a means by which a licensee/permittee may enhance its facility or make operation more convenient for the broadcaster. Special Temporary Authorities by nature are temporary

¹⁸ 47 C.F.R. § 73.3573(g)(2). See Letter from Rodolfo F. Bonacci, Assistant Chief, Audio Division, Media Bureau, to Alaska Educational Radio System, Inc. (Feb. 5, 2008) (citing 47 C.F.R. 73.3517(e), which states that dismissal of any one of the related applications as unacceptable will result in the dismissal of all the related applications).

¹⁹ AERS shortly thereafter filed the May 2008 STA Request for permission to operate from the same facilities as those proposed in the dismissed COL Application. File No. BSTA-20080508ACJ, Attachment 24. AERS claimed that KWMD and KABN(FM)'s operations were in jeopardy due to the dismissal of the COL Application. It further stated that the "best course is to resume operation at the existing site, while steps are taken to design a new move (with new location if necessary) that will be fully within the rules and regulations..." *Id.*

²⁰ 47 C.F.R. § 1.106(b)(2).

²¹ Petition at 1.

²² 47 C.F.R. § 73.3573(g).

²³ 47 C.F.R. § 73.3573(g).

²⁴ See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services* Report and Order, 21 FCC Rcd 14212, 14219 (2006) ("2006 COL R&O"). The excerpt reads: "Accordingly, any application proposing a community of license change filed by a permittee that has not built its current permitted facilities and that is not mutually exclusive with either the applicant's built and operating facilities or its original allotment shall be returned as unacceptable for filing."

²⁵ 47 C.F.R. § 73.3573.

²⁶ The permit (File No. BPED-20040312AAA) expired July 30, 2007. The Commission denied the COL Applications on February 5, 2008.

and are not intended for extended use.²⁷ Because AERS has not made any showing of error in the Letter Decision, nor has it presented any new facts of which the staff was unaware at the time it made its decision to deny the COL Applications, we deny the Petition.

9. In the alternative, AERS asks us to waive Section 73.3573(g)(2) of the Rules to allow KWMD(FM) to change its community of license to Ridgeway despite the fact that its proposal is not mutually exclusive with its current licensed facilities at Kasilof.²⁸ AERS asserts that it has operated KWMD(FM) at Ridgeway for years and may have to cease operation if the waiver is not granted. It maintains that a waiver grant would allow it to continue a service it has provided “for years” and to “bring an existing operation into compliance with the rules.”²⁹ The Commission allows waiver of any Rule if the public interest warrants deviation from the Rules.³⁰ Waiver is warranted when the policy underlying the rule is better served by waiver than rule compliance.³¹ We do not find that the public interest is served by a waiver in this case.

10. The Commission enacted Section 73.3573 of the Rules to allow stations to change community of license without opening their applications to competition.³² This requirement was established in order to ease applicants’ ability to propose new communities of license without compromising the station’s allotment or interference protection.³³ We do not find this to be a circumstance in which the reason for the rule is better served via waiver. The longevity of KWMD(FM)’s STA (and later, unauthorized) operation at Ridgeway does not create any right to continue such operation.³⁴ In addition, AERS’ public interest waiver arguments do not overcome the Commission’s broader duty to ensure allotments are protected from interference and are awarded fairly and equitably in the public interest. We therefore deny AERS’ waiver request.

11. *Notice of Apparent Liability.* 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

²⁷ See 47 C.F.R. § 73.1635. See *Communications and Control, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5428, 5434 (2000) and *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 14569, 14649 and 14653 (1998) (grant of STA does not confer permanent right to operate).

²⁸ 47 C.F.R. § 73.3573(g)(2).

²⁹ Petition at 3.

³⁰ See, *Rivers, L.P. c/o Frank Jazzo, Esq.*, Letter, 23 FCC Rcd 4523 (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Rivers Letter*”).

³¹ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1156-57 (DC Cir. 1969) (Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies set forth by the rule).

³² See *Rivers Letter*, 23 FCC Rcd at 4523 (interpreting the 1989 *Community of License Report and Order* as protecting applicants’ existing authorizations while allowing applicants to propose new communities of license without opening said applications to competition). See *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870, 4873 (1989). See also 2006 *COL R&O*, 21 FCC Rcd at 14219 (stating, “Accordingly, we will amend the Commission’s rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and television tables of allotments, and modification of its license accordingly, without placing its existing authorization at risk. The procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment and will not apply to nonadjacent channel upgrades” (citations omitted)).

³³ *Rivers Letter*, 23 FCC Rcd at 4523 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330-33 (1945) (“*Ashbacker*”).

³⁴ See 47 C.F.R. § 73.1635. See also n. 27, *supra*.

authorization.³⁵ Recent filings indicate that AERS has not operated KWMD(FM) in accordance with the Rules and the Act since the September 2005 STA expired on January 26, 2006.³⁶ Nevertheless, despite the absence of STA or any other authority, the Petition contains multiple admissions of continued operation without authorization at Ridgeway. First, it admits that, due to “an inadvertent oversight,” AERS failed to seek STA renewals after 2006;³⁷ second, it reveals that KWMD(FM) has been operating from the Ridgeway tower “for years”³⁸ and third, it states that filing the COL Applications was an attempt to “bring an existing operation into compliance with the rules.”³⁹ Finally, the May 2008 STA Request indicates that AERS decided, despite the COL Applications’ dismissal, to continue broadcasting KWMD(FM) from Ridgeway.⁴⁰ Given these admissions, we find that Licensee apparently willfully and repeatedly violated Section 301 of the Act and Section 73.1350 of the Rules by engaging in unauthorized operation of the Station from at least January 2006 to the present.

12. This NAL is issued pursuant to Section 503(b)(1)(B) of the Act.⁴¹ 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.⁴² 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.⁴³ 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,⁴⁴ and the Commission has so interpreted the term in the Section 503(b) context.⁴⁵ 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.”⁴⁶

13. In determining the appropriate forfeiture amount, we must consider the factors enumerated in the Commission’s *Forfeiture Policy Statement* and 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.”⁴⁷

³⁵ See 47 U.S.C. § 301; 47 C.F.R. § 73.1350.

³⁶ File No. BSTA-20050928AJX.

³⁷ Petition at 2.

³⁸ Petition at 3.

³⁹ *Id.*

⁴⁰ File No. BSTA-20080508ACJ, Attachment 24. AERS wrote, “Licensee concluded [after the Commission’s denial of the COL Application] that the best course is to resume operation at the existing site [Ridgeway], while steps are taken to design a new move (with new location if necessary) that will be fully within the rules and regulations or, if not, with such waivers as may be required with a detailed public interest justification.”

⁴¹ 47 U.S.C. § 503(b)(1)(B).

⁴² *Id.* See also 47 C.F.R. 1.80(a)(1).

⁴³ 47 U.S.C. § 312(f)(1).

⁴⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁴⁵ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁴⁶ 47 U.S.C. § 312(f)(2).

⁴⁷ 47 U.S.C. § 503(b)(2)(D); 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 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

14. Here, AERS has operated KWMD(FM) at the Ridgeway facility without authorization since 2006. While we are barred by the statute of limitations from issuing a forfeiture for violations occurring before the license for KWMD(FM) was renewed on February 24, 2006, we may consider KWMD(FM)'s history of unauthorized broadcasts from Ridgeway and other apparent Rule violations when determining the proposed forfeiture amount.⁴⁸ Thus, 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 \$10,000 amount for AERS' willful and repeated violations of Section 301 of the Act and Section 73.1350 of the Rules.⁴⁹

IV. CONCLUSION.

15. For the reasons discussed above, we deny the Petition and the waiver request. We also propose a forfeiture of \$10,000 for operation of KWMD(FM) at the Ridgeway facility from January 26, 2006, to the present.

16. Accordingly, IT IS ORDERED that Alaska Educational Radio System, Inc.'s March 10, 2008, Petition for Reconsideration IS DENIED.

17. IT IS FURTHER ORDERED that Alaska Educational Radio System, Inc. must either resume operations from its authorized Kasilof site or file an appropriate request for silent authority within thirty days of the release date of this Order.

18. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act⁵⁰ and Sections 0.111, 0.311 and 1.80 of the Rules,⁵¹ Alaska Educational Radio System, Inc. IS hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars (\$10,000) for the willful and repeated violation of Section 301 of the Act and Section 73.1350 of the Rules.

19. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules,⁵² within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Alaska Educational Radio System, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

20. 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.

⁴⁸ In assessing a forfeiture, Section 503(b)(2)(D) of the Act requires that we take into account "any history of prior offenses." However, Section 503(b)(6) of the Act prohibits us from imposing a forfeiture for any violations that occurred prior to the date of commencement of the current term of license. (47 U.S.C. § 503(b)(2)(D)) Here, we consider three instances of operation of KWMD at a variance from its license prior to the station's license renewal. First, between September 2003, and June 2004, it appears that KWMD was, for the most part, silent. *See* n.7, *supra*. However, AERS failed to file an STA or a notice to the Commission to reflect the station's silent status, as required by Sections 73.1635 and 73.1740 of the Rules. (47 C.F.R. § 73.1635 and 47 C.F.R. § 73.1740). Second, KWMD was apparently silent between February 26, 2005, and June 19, 2005, again without seeking a silent STA or providing notice to the Commission, as required by Section 73.1740 of the Rules. (47 C.F.R. § 73.1635 and 47 C.F.R. § 73.1740). *See* n.11, *supra*. Finally, AERS apparently operated KWMD's unauthorized facilities at Ridgeway without Commission authorization from June 19, 2005, until October 26, 2005, in violation of Section 301 of the Act. (47 U.S.C. § 301). *See* n.11, *supra*.

⁴⁹ 47 U.S.C. § 301. 47 C.F.R. § 1.80.

⁵⁰ 47 U.S.C. § 503(b).

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

⁵² 47 C.F.R. § 1.80.

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. Alaska Educational Radio System, Inc. will also send electronic notification on the date said payment is made to Jacqui.Johnson@fcc.gov and JoAnn.Lucanik@fcc.gov.

21. 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.

22. 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.

23. 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 Alaska Educational Radio System, Inc., c/o Lewis Leonard, P.O. Box 75, Girdwood, AL 99587-0075.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau