

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

|                  |   |                             |
|------------------|---|-----------------------------|
| In the Matter of | ) |                             |
|                  | ) | File No.: EB-10-MA-0198     |
| Durrant Clarke   | ) |                             |
|                  | ) | NAL/Acct. No.: 201132600007 |
| Miami, Florida   | ) |                             |
|                  | ) | FRN: 0020872792             |
|                  | ) |                             |

**FORFEITURE ORDER**

**Adopted:** January 31, 2012

**Released:** January 31, 2012

By the Regional Director, South Central Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of one thousand dollars (\$1,000) to Durrant Clarke (Mr. Clarke) for willful and repeated violation of Section 301 of the Commission's Act of 1934, as amended (Act).<sup>1</sup> The noted violations involved Mr. Clarke's operation of an unlicensed radio transmitter on the frequency 95.9 MHz from his business in Miami, Florida.

**II. BACKGROUND**

2. On May 19, 2011, the Enforcement Bureau's Miami Office (Miami Office) issued a Notice of Apparent Liability for Forfeiture (NAL)<sup>2</sup> to Mr. Clarke for operating an unlicensed radio transmitter on November 6 and 20, 2010. In view of the record evidence, the NAL proposed a forfeiture of \$10,000 against Mr. Clarke for violation of Section 301 of the Act.<sup>3</sup> Mr. Clarke submitted a response to the NAL admitting that he allowed someone to place radio equipment in his space but denying participation in the "breaking of any law."<sup>4</sup> Mr. Clarke also requested a reduction of the proposed forfeiture based on his inability to pay the forfeiture.

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<sup>1</sup> 47 U.S.C. § 301.

<sup>2</sup> *Durrant Clarke*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 6982 (Enf. Bur. 2011). A comprehensive recitation of the facts and history of this case can be found in the NAL and is incorporated herein by reference.

<sup>3</sup> 47 U.S.C. § 301.

<sup>4</sup> See Letter from Durrant Clarke to Steven DeSena, Resident Agent, Miami Office, Enforcement Bureau, dated May 28, 2011 (*NAL Response*).

### III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>5</sup> Section 1.80 of the Commission's rules (Rules),<sup>6</sup> and the *Forfeiture Policy Statement*.<sup>7</sup> In examining Mr. Clarke's response, Section 503(b)(2)(E) 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>8</sup> As discussed below, we have considered Mr. Clarke's response in light of these statutory factors and we reduce the forfeiture to \$1,000 based solely on his inability to pay.

4. As set forth in the *NAL*, agents from the Miami Office determined that an unlicensed radio station on the frequency 95.9 MHz operated from Mr. Clarke's business address in Miami, Florida on November 6 and 20, 2010. In his response to the *NAL*, Mr. Clarke states that he allowed "Brother Gary" to place "some sort of portable 'radio' system" in his business space in order "to spread the word of God" without any monetary compensation.<sup>9</sup> Mr. Clarke, however, admits that he: (1) knew the equipment was "radio" equipment; (2) allowed the equipment to be placed in his business space; and (3) turned the equipment on and off as directed by "Brother Gary."<sup>10</sup> Mr. Clarke also does not deny that he had control over the physical space in which the transmitter was located and acknowledged that he provided the electricity and internet access to the station.

5. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.<sup>11</sup> For the purposes of Section 301 of the Act, the word "operate" has been interpreted to mean both the technical operation of the station, as well as "the general conduct or management of a station as a whole, as distinct from the specific technical work involved in the actual transmission of signals."<sup>12</sup> In other words, the use of the word "operate" in Section 301 of the Act captures not just the "actual, mechanical manipulation of radio apparatus"<sup>13</sup> but also operation of a radio station generally.<sup>14</sup> To determine whether an individual is involved in the general conduct or management of the station, we can consider whether such individual exercises control over the station, which the Commission has defined to include "... any means of actual working control over the operation of the [station] in whatever manner exercised."<sup>15</sup>

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<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</sup> *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) (*Forfeiture Policy Statement*).

<sup>8</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>9</sup> *NAL Response* at 1.

<sup>10</sup> *Id.*

<sup>11</sup> 47 U.S.C. § 301.

<sup>12</sup> *See Campbell v. United States*, 167 F.2d 451, 453 (5th Cir. 1948) (comparing the use of the words "operate" and "operation" in Sections 301, 307, and 318 of the Act and concluding that the word "operate" as used in Section 301 of the Act means both the technical operation of the station as well as the general conduct or management of the station).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9747 (1995), *recon. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

6. As stated in the *NAL*, the fact that someone else also may have been involved in the station's operation does not make Mr. Clarke any less of a participant in the station's operation.<sup>16</sup> We have previously held that, because Section 301 of the Act provides that "no person shall use or operate"<sup>17</sup> radio transmission equipment, liability for unlicensed operation may be assigned to any individual taking part in the operation of the unlicensed station, regardless of who else may be responsible for the operation.<sup>18</sup> Moreover, the fact that he provided his services to "Brother Gary" for free has no bearing on whether Mr. Clarke had control over the station.<sup>19</sup> Together, the undisputed facts—that Mr. Clarke knowingly allowed someone to place radio equipment in his business space, paid for the electricity for the radio station, and turned the radio station on and off—show Mr. Clarke had control of the station, and thus was an operator of the station. The fact that Mr. Clarke did not intend to violate the law has no impact on whether his violations were willful, as he consciously committed the illegal acts.<sup>20</sup> Therefore, we find that Mr. Clarke willfully<sup>21</sup> and repeatedly<sup>22</sup> violated Section 301 of the Act by operating an unlicensed radio station.

7. With regard to an individual's or entity's inability to pay claim, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.<sup>23</sup> Based on our review of the financial documents provided by Mr. Clarke, we find that a reduction from \$10,000 to \$1,000 is warranted.<sup>24</sup>

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission's rules, Durrant Clarke **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one thousand dollars (\$1,000) for violations of Section 301 of the Act.<sup>25</sup>

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<sup>16</sup> *NAL* at 6984.

<sup>17</sup> 47 U.S.C. § 301.

<sup>18</sup> See, e.g., *Jean L. Senatus*, Forfeiture Order, 20 FCC Rcd 14418 at para. 11 (Enf. Bur. 2005); *Robert Brown*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13740 (Enf. Bur. 2010); *Loyd Morris*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13736 (Enf. Bur. 2010).

<sup>19</sup> See *Jhony Desinor*, Forfeiture Order, 19 FCC Rcd 14137 (Enf. Bur. 2004), *recon. dismissed* 21 FCC Rcd 7858 (Enf. Bu. 2006) (operator who did not receive any revenues from the station can still be held liable for station operations).

<sup>20</sup> See 47 U.S.C. § 312(f)(1). Section 312(f)(1) of the Act, which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, defines willful as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.

<sup>21</sup> *Id.*

<sup>22</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), 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."

<sup>23</sup> See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

<sup>24</sup> This forfeiture amount falls within the percentage range that our precedents have found acceptable. See *supra* note 23. If Mr. Clarke believes that paying this amount still presents financial difficulties, we note that he could always pursue an installment payment plan to lessen the immediate impact of the forfeiture.

<sup>25</sup> 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4).

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar 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 enforcement pursuant to Section 504(a) of the Act.<sup>26</sup> 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 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 with any questions regarding payment procedures at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. Mr. Clarke shall also send electronic notification to SCR-Response@fcc.gov on the date said payment is made.

10. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Durrant Clarke at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton  
Regional Director, South Central Region  
Enforcement Bureau

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<sup>26</sup> 47 U.S.C. § 504(a).