

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

In the Matter of	)	
	)	
KAGM-FM Joint Venture	)	File No.: EB-FIELDWR-12-00001024
	)	NAL/Acct. No.: 201232800008
Owner of Antenna Structure No. 1231632	)	FRN: 0008899247
Strasburg, CO	)	
	)	
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: September 19, 2012**

**Released: September 20, 2012**

By the District Director, Denver Office, Western Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that KAGM-FM Joint Venture (KJV), owner of antenna structure number 1231632 located by Strasburg, Colorado (the Antenna Structure), apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act)<sup>1</sup> and Sections 17.47(a) and 17.51(a) of the Commission's rules (Rules)<sup>2</sup> by failing to (1) monitor the Antenna Structure lighting on a daily basis, and (2) exhibit any obstruction lighting on the Antenna Structure after sunset. We conclude that KJV is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000).

**II. BACKGROUND**

2. On the night of February 27, 2012, an agent from the Enforcement Bureau's Denver Office (Denver Office) inspected the Antenna Structure and observed that all of the lights on the Antenna Structure were extinguished.<sup>3</sup> The agent contacted KJV's Managing Partner, who stated that KJV was not aware of the extinguishment.

3. On April 13, 2012, the Denver Office issued a letter of inquiry (LOI) to KJV.<sup>4</sup> In its reply, KJV acknowledged that it owned the Antenna Structure and admitted that it was not aware of the Antenna Structure's lighting extinguishment until contacted by the Denver Office agent on the evening of February

<sup>1</sup> 47 U.S.C. § 303(q).

<sup>2</sup> 47 C.F.R. §§ 17.47(a), 17.51(a).

<sup>3</sup> On February 27, 2012, the agent contacted the Federal Aviation Administration (FAA) and learned that the FAA had not been notified of a light outage on the Antenna Structure and that a Notice to Airmen (NOTAM) had not been issued for the Antenna Structure. See 47 C.F.R. § 17.48 (requiring owners of registered antenna structures that have been assigned lighting specifications to report immediately to the FAA any observed or otherwise known extinguishment of any flashing obstruction light not corrected within 30 minutes). The FAA issued the initial NOTAM for the Antenna Structure that night, after being contacted by the Denver agent.

<sup>4</sup> See Letter of Inquiry from Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau, to KAGM-FM Joint Venture (Apr. 13, 2012) (on file in EB-FIELDWR-12-00001024).

27, 2012.<sup>5</sup> KJV claimed that an administrative error resulted in non-payment of the electric bill, and that the power to the Antenna Structure was consequently disconnected on November 9, 2011, resulting in the extinguishment of the Antenna Structure's lighting.<sup>6</sup> KJV also stated that the power was restored to the Antenna Structure on March 5, 2012, and that they had instituted a daily monitoring procedure to observe the lights on the Antenna Structure.<sup>7</sup>

### III. DISCUSSION

4. Section 503(b) of the Act,<sup>8</sup> provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. 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.<sup>9</sup> 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,<sup>10</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>11</sup> The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.<sup>12</sup> The term "repeated" means the commission or omission of such act more than once or for more than one day.<sup>13</sup>

#### A. Failure to Exhibit Required Obstruction Lighting on the Antenna Structure and Failure to Monitor Antenna Structure Lighting

5. 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.<sup>14</sup> Section 17.51(a) of the Rules

<sup>5</sup> See Letter from Andrew Guest, General Partner, KAGM-FM Joint Venture, to Nikki P. Shears, District Director, Denver Office, Western Region, FCC Enforcement Bureau (May 4, 2012) (on file in EB-FIELDWR-12-00001024) (*LOI Response*).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at 1–2.

<sup>8</sup> 47 U.S.C. § 503(b).

<sup>9</sup> 47 U.S.C. § 312(f)(1).

<sup>10</sup> H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the [A]ct (e.g., section 503) . . . . As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission's application of those terms . . . .").

<sup>11</sup> See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

<sup>12</sup> See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

<sup>13</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under section 503(b) 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." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 9.

<sup>14</sup> 47 U.S.C. § 303(q).

requires all red obstruction lighting to be exhibited from sunset to sunrise unless otherwise specified.<sup>15</sup> Section 17.47(a) of the Rules states that owners of antenna structures “(1) shall make an observation of the antenna structure’s lights at least once each 24 hours either visually . . . to insure that all such lights are functioning properly as required; or alternatively (2) shall provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner . . . .”<sup>16</sup>

6. The Antenna Structure is 95 meters above ground in overall height and is required to be painted and lit.<sup>17</sup> On the night of February 27, 2012, an agent from the Denver Office observed that all of the lights on the Antenna Structure were extinguished. According to KJV, the light outage occurred when the power to the Antenna Structure was disconnected on November 9, 2011, due to non-payment of its electric bills. KJV also stated that it was not aware of the light outage and consequently did not report the outage to the FAA until after the Denver Office agent notified KJV of the extinguishment on February 27, 2012. However, had KJV been observing the Antenna Structure’s lights as required by the Commission’s rules, it would have known of the extinguishment. Moreover, KJV should have known that the lights on the Antenna Structure were extinguished when the power to the Antenna Structure was disconnected. KJV’s lack of knowledge of the extinguishment underscores its failure to monitor the structure for outages. Thus, based on the evidence before us, we find that KJV apparently willfully and repeatedly violated Section 303(q) of the Act and Sections 17.47(a) and 17.51(a) of the Rules by failing to (1) monitor the Antenna Structure lighting on a daily basis, and (2) exhibit required red obstruction lighting on the Antenna Structure after sunset.

## B. Proposed Forfeiture Amount

7. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed lighting and/or marking is \$10,000.<sup>18</sup> In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, 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>19</sup> KJV stopped paying the electric bills for the Antenna Structure resulting in the extinguishment of the lights on the Antenna Structure. KJV’s lack of knowledge concerning the light outage on the Antenna Structure shows its failure to engage in daily monitoring of the structure. KJV’s failure to take any action to correct the light outage or notify the FAA of the extinguishment until after the Denver agent notified KJV of the extinguishment renders KJV’s actions egregious. Given the duration of the extinguishment and the potential public safety hazard caused by such an outage, we find that KJV’s actions warrant an upward adjustment to the base forfeiture of \$5,000.<sup>20</sup> Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that KJV is apparently liable for a total forfeiture in the amount of \$15,000.

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<sup>15</sup> 47 C.F.R. § 17.51(a).

<sup>16</sup> 47 C.F.R. § 17.47(a).

<sup>17</sup> See Antenna Structure Registration database for antenna structure number 1231632. See also 47 C.F.R. § 17.21 (requiring antenna structures more than 60.96 meters in height to be painted and lighted). See also FAA Study # 2004-ANM-238-OE.

<sup>18</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) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

<sup>19</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>20</sup> See *Telava Wireless, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 3239 (Enf. Bur. 2012) (forfeiture of \$15,000 proposed when antenna structure registrant takes no action to correct antenna structure light outage, until notified by an Enforcement Bureau field office, despite receiving electric bills showing no electricity being consumed at the site by the structure).

#### 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 of the Commission's rules, KAGM-FM Joint Venture is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Section 303(q) of the Act and Sections 17.47(a) and 17.51(a) of the Commission's rules.<sup>21</sup>

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, KAGM-FM Joint Venture **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. KAGM-FM Joint Venture shall send electronic notification of payment to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov) on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>22</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>23</sup> If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.<sup>24</sup> Mail the written statement to Federal Communications

<sup>21</sup> 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.47(a), 17.51(a).

<sup>22</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>23</sup> See 47 C.F.R. § 1.1914.

<sup>24</sup> 47 C.F.R. §§ 1.16, 1.80(f)(3).

Commission, Enforcement Bureau, Western Region, Denver Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, CO 80226, and include the NAL/Acct. No. referenced in the caption. KAGM-FM Joint Venture shall also email the written response to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov).

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 (GAAP); 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 both Certified Mail, Return Receipt Requested, and First Class Mail, to KAGM-FM Joint Venture, 1644 Omni Blvd., Mount Pleasant, SC 29466.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears  
District Director  
Denver Office  
Western Region  
Enforcement Bureau