

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

In re Application of
JUAN ALBERTO AYALA
for License to Cover Construction Permit for FM
Translator Station K262BP, Conner, California
Facility I.D. No. 144609
NAL/Acct. No. MB201241410045
FRN: 0017503137
File No. BLSTA-20110701ACV
File No. BLFT-20110705ACB

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 26, 2012

Released: December 26, 2012

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the July 12, 2011, Petition for Reconsideration ("Petition"), and the October 18, 2011, Supplement to Petition for Reconsideration ("Supplement") filed by Juan Alberto Ayala ("Ayala"), licensee of FM Translator Station K262BP, Conner, California ("Station"). In the Petition Ayala sought reconsideration of the Commission's letter dated June 8, 2011, finding that the Station had been silent for over twelve consecutive months and, accordingly, that the Station's license had expired pursuant to Section 312(g) of the Communications Act. In the Supplement, Ayala responded to inquiries propounded in the Commission's September 14, 2011, letter. In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL"), we find that Ayala apparently willfully violated Sections 74.14 and 74.1231(g) of the Rules, by failing to timely file a Form 350 application before initiating program tests, by operating the Station without authorization for seven months before filing its Form 350 license application, and by originating programming in excess of that allowed by the Rules. Based upon our review of the facts and circumstances before us, we conclude that Ayala is apparently liable for a monetary forfeiture in the amount of eleven thousand dollars (\$11,000).

1 Juan Alberto Ayala, Letter, Ref. No. 1800B3-DW (MB June 8, 2011) ("Expiration Letter").

2 47 U.S.C. § 312(g).

3 Juan Alberto Ayala, Letter, Ref. No. 1800B3 (MB Sept. 14, 2011) ("Inquiry Letter").

4 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 (the "Rules"). See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80. The Bureau has delegated authority to issue the NAL under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

5 See 47 C.F.R. §§ 74.14, 74.1231(g).

II. BACKGROUND

2. On March 13, 2003, Ayala applied for an original construction permit for the Station. The construction permit application was granted March 3, 2005. Ayala applied for a license to cover the construction permit on February 29, 2008, and the license application was granted on March 13, 2008. The Station originally rebroadcast station KCRY(FM), Mojave, California. On February 24, 2010, the Station went off the air due to the loss of its transmitter site. Ayala applied for a new site,⁶ and simultaneously sought Special Temporary Authorization (“STA”) for the Station to remain silent.⁷ The staff granted STA until October 13, 2010. A new construction permit for the Station was issued on November 22, 2010 (“2010 Permit”), specifying that the Station would re-transmit the signal of primary station KZAV(FM), Avenal, California.

3. According to Declarations filed with the Petition and Supplement, Ayala completed construction of the modified Station at the new permitted site and began broadcast operations on December 1, 2010.⁸ However, at that time he did not file FCC Form 350 for a license to cover the 2010 Permit, nor did he otherwise notify the Commission of the resumption of broadcast operations. Accordingly, in the June 8, 2011, Expiration Letter, the Commission informed Ayala that the Station license expired as a matter of law on February 24, 2011, and that the call sign K262BP was deleted.⁹ Ayala timely filed the Petition, and additionally filed a July 1, 2011, request for STA,¹⁰ seeking permission to continue operations under the 2010 Permit, pending formal reinstatement of the Station License.¹¹ The Petition and STA request were followed by a July 5, 2011, FCC Form 350 application for license to cover the permitted facilities.¹² Ayala provided declarations with the Petition indicating that the Station had been constructed at the new permitted site on December 1, 2010, and had been transmitting from that site since that time.¹³ Ayala admitted, however, that he had not filed an application for license to cover. He further attached a letter indicating that the owner of station KAFY(AM), Bakersfield, California, had given permission for the re-transmission of that station’s signal.¹⁴

4. Shortly after notifying Ayala of the expiration of the Station license, the Commission received a Request for Order directing the Station to Cease and Desist from Further Broadcast Operations (“Objection”), filed on June 3, 2011, by Force Broadcasting, LLC (“Force”), licensee of station KLHC(AM), Bakersfield, California. Force noted that there was no evidence in the Commission’s

⁶ Ayala’s first application for a new site, File No. BPFT-20100310ACP, was dismissed due to prohibited contour overlap with station KMQA(FM), East Port, California. *Juan Alberto Ayala*, Letter (MB June 9, 2010). Ayala filed a second application on July 29, 2010, File No. BPFT-20100729ABD, which was granted on November 22, 2010.

⁷ File No. BLSTA-20100310ACO.

⁸ *See, e.g.*, Declaration of Juan Alberto Ayala, dated July 6, 2011, paragraphs 5-6 (“Ayala July Declaration”); Letter Declaration of Elena Hernandez, dated July 7, 2011, fourth unnumbered paragraph (“Hernandez Declaration”). Both declarations are attached to the Petition. *See also* Declaration of Juan Alberto Ayala, included in Attachment 1 to Supplement (“Ayala October Declaration”), paragraph 4.

⁹ *See supra* note 1. Public notice of the cancellation of the original license (File No. BLFT-20080229ADN) was given on June 13, 2011. *Broadcast Actions*, Public Notice, Report No. 47506 (MB June 13, 2011).

¹⁰ File No. BLSTA-20110701ACV.

¹¹ *Id.*, Exhibit 38.

¹² File No. BLFT-20110705ACB.

¹³ *See* Ayala July Declaration and Hernandez Declaration.

¹⁴ Letter from Nelson F. Gomez, President, La Favorita Radio Network (“La Favorita”), licensee of station KAFY(AM), to Dan J. Alpert, Esq., dated July 6, 2001, attached as part of Attachment 1 to Petition (“Gomez Letter”).

records that the Station had returned to the air, nor that Ayala had filed FCC Form 350, which is a prerequisite to initiating program tests under both the terms of the 2010 Permit and the Rules.¹⁵ Force went on to allege that (1) the Station was nevertheless broadcasting, without authorization; (2) the Station was originating “much, if not all, of its programming” in violation of the Rules; (3) the Station was retransmitting the programming of station KAFY(AM), Bakersfield, California, rather than station KZAV(FM); (4) there were no transmitting facilities at the Station’s licensed coordinates, although the station was transmitting without authorization from its new permitted site; and (5) the transmissions from the permitted site were overmodulated, and causing interference to radio stations on adjacent channels.¹⁶ In response to the Objection, on September 14, 2011, the Commission sent Ayala the Inquiry Letter, requesting that he respond within 20 days to the allegations submitted by Force in its Objection.¹⁷ In the Inquiry Letter, the Commission also reminded Ayala that he currently had no authorization to operate the Station.

5. In his Supplement, Ayala admitted that, in “certain isolated instances,” “a party” put programming on the translator separate from that on the primary station, KAFY(AM).¹⁸ He also admitted to the overmodulation concern raised by Force, but stated that that, too, had been corrected.¹⁹ Finally, Ayala stated that the Station was taken off the air after being instructed to do so by the Commission, but produced further evidence that the Station had been constructed and operated at the permitted site.²⁰

6. In its Response to the Supplement dated December 1, 2011, Force provided evidence of at least four instances, between September 27 and October 3, 2011, of programming being originated on the Station. It also states that programming ceased on October 5, 2011, although it documented instances of a dead carrier signal being transmitted in October and November 2011. Force also suggests that some of the evidence produced by Ayala demonstrates that Ayala is not in control of the Station, and that Pastor Elena Hernandez, by virtue of her actions in securing KAFY(AM)’s authorization to rebroadcast on the Station and by ordering and paying for the new Station transmitter and its installation, may be the real party in interest in the Station.

III. DISCUSSION

7. *Expiration of License under Section 312(g) / Unauthorized Operation.* It appears, from the evidence adduced by both Ayala and Force, that the Station returned to broadcast operations on or about December 1, 2010, with the facilities specified in the 2010 Permit. However, it is also undisputed that Ayala failed to file FCC Form 350, for license to cover the 2010 Permit, prior to commencing program tests, in violation of both the Rules and the terms of the construction permit,²¹ and moreover that the Station operated without authorization from on or about December 1, 2010, until July 5, 2011, when it

¹⁵ Objection at 2. See 47 C.F.R. § 74.14.

¹⁶ Objection at 2-4 and Exhibits 3 and 4.

¹⁷ In the Inquiry Letter, the staff stated that while Ayala should address the issue of overmodulation of the Station signal, it need not address any interference issues, finding that they were not properly raised by Force. Inquiry Letter at 2-3 n.14.

¹⁸ Ayala October Declaration, paragraph 4.

¹⁹ *Id.*, paragraph 5.

²⁰ *Id.*, paragraph 2 and Exhibits.

²¹ The 2010 Permit specifically provides that “[p]rior to commencing program test operations, FM Translator or FM Booster permittee must have on file at the Commission, FCC Form 350, Application for an FM Translator or FM Booster Station License, pursuant to 47 C.F.R. Section 74.14.”

filed its license application.²² Thus, Ayala failed to file a required form and operated for seven months without an instrument of authorization. We tentatively conclude, then, that Ayala was in violation of Section 74.14 of the Rules.

8. *Program Origination.* Although some of the evidence presented by Force is less than persuasive as to whether the Station originated programming, we find that the Burchfield and Ochoa Declarations, as well as Ayala's admission that "a party" originated programming on the Station separately from that broadcast on the primary station, establish that the Station at times originated programming in excess of that allowed by the Rules. We therefore tentatively conclude that Ayala was in violation of Section 74.1231(g) of the Rules.

9. *Other Alleged Violations.* Force alleges that Ayala failed to request an extension of STA when that authorization expired on October 10, 2010. While we do not approve of Ayala's failure to request proper authorization to remain silent, we find that the almost two month period of additional silence is less of a problem than the larger apparent violation of failing to notify us of the Station's return to the air, noted above. Likewise, we find that while such notification was tardy, Ayala's documentary evidence is minimally sufficient, under Section 74.1284(b) of the Rules, to advise us of La Favorita's written consent to re-transmit the KAFY(AM) signal on the Station.²³ We also find Force's complaints that Ayala's response to the Inquiry Letter was late and that the Station did not cease broadcasting until October 5, 2011, approximately two weeks after the date the Inquiry Letter was mailed, to be of little significance. With regard to Force's allegation that Pastor Elena Hernandez, rather than Ayala, is the real party in interest in the Station, we find that the evidence Force references, at most, suggests that Pastor Hernandez was interested in the rebroadcast of her program originating on station KAFY(AM), and therefore facilitated the initiation of Station service under the 2010 Permit. It does not, however, raise a substantial and material question of fact regarding whether Ayala was in control of Station policies pertaining to personnel, programming, and finance. Of more concern to us is the Ayala October Declaration, in which Ayala appears to allude to programming originating on the Station without his knowledge. Although Ayala promises not to allow such activity in the future, we nonetheless admonish him for his apparent lack of control over Station programming, and remind him that a licensee is fully responsible for all programming broadcast over his station, and that should we grant the license application he will be responsible for Station policies regarding all programming, personnel, and finance.

10. *Proposed Forfeiture.* 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.²⁴ 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.²⁵ 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,²⁶ and the Commission has so interpreted the term in the Section 503(b) context.²⁷

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(6) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form, and \$10,000 for

²² See Ayala July Declaration, paragraphs 4-5.

²³ See Gomez Letter; 47 C.F.R. § 74.1284(b).

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

²⁵ 47 U.S.C. § 312(f)(1).

²⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

operation without an instrument of authorization for the service.²⁸ 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.”²⁹

12. In this case, Ayala was on notice that Commission procedures required him to file FCC Form 350 prior to initiating program tests, as he had done so previously,³⁰ but failed timely to file his application. Moreover, Ayala operated the Station for seven months without proper authorization, and only filed his license application after receipt of the Commission’s Expiration Letter. However, because Ayala holds a license to operate the Station, this apparent violation is not comparable to “pirate” operations, which typically are subject to forfeitures in the full amount of \$10,000. Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture for failure to file a required form in the full base amount of \$3,000, but reduce the proposed forfeiture for unauthorized operation from the \$10,000 base amount to \$4,000.

13. Section 1.80(a) of the Rules provides that a monetary forfeiture may be assessed against any person found to have willfully or repeatedly failed to comply with any rule, regulation, or order issued by the Commission under the Communications Act.³¹ Neither the *Forfeiture Policy Statement* nor Section 1.80 of the Rules specifically sets a base forfeiture amount for an FM translator’s originating programming in excess of the limits prescribed in Section 74.1231(g) of the Rules. However, they do set a base forfeiture amount of \$4,000 for “unauthorized emissions.”³² As noted above, it is uncontested that unauthorized programming originated on the Station, apparently without Ayala’s knowledge or control. Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the full base amount of \$4,000.

14. As discussed above, we do not find that any of the other alleged violations rise to the level of proposing a forfeiture. We further find that grant of the license application would be in the public interest, convenience, and necessity. We will therefore grant the license application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violations that would preclude grant of the application. In the meantime, because Ayala has on file with the Commission FCC Form 350, under Section 74.14 of our Rules and the terms of the 2010 Permit he has authority to commence program test operations. We therefore dismiss as moot Ayala’s application for Special Temporary Authorization to operate the Station pending grant of the license application, finding that the Station is authorized to operate under program test authority.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that Juan Alberto Ayala IS HEREBY

²⁸ 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)(6), note to paragraph (b)(6), Section I.

²⁹ 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)(6).

³⁰ See File No. BLFT-20080229ADN.

³¹ 47 C.F.R. § 1.80(a)(2).

³² *Id.* § 1.80(b)(6).

NOTIFIED OF HIS APPARENT LIABILITY FOR FORFEITURE in the amount of \$11,000 for his apparent willful violation of Sections 74.14 and 74.1231(g) of the Commission's Rules.

16. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this *NAL*, Juan Alberto Ayala SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment of the proposed forfeiture must be made by credit card, check, or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at 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, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If 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).³³ Ayala will also send electronic notification, on the date said payment is made, to Lisa.Scanlan@fcc.gov.

18. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 respondent'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.

20. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³⁴

21. IT IS FURTHER ORDERED that the Petition for Reconsideration filed July 12, 2011, by Ayala IS GRANTED to the extent set forth herein, that the call sign K262BP IS REINSTATED, and that Juan Alberto Ayala may operate FM Translator Station K262BP, Conner, California, under program test authority, pending final action on his pending license application, File No. BLFT-20110705ACB.

³³ See 47 C.F.R. § 1.1914.

³⁴ *Id.*

22. IT IS FURTHER ORDERED that a copy of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Juan Alberto Ayala, 8500 North Stemmons Freeway, Suite 5050, Dallas, TX 75214, and to his attorney of record, Dan J. Alpert, Esq., Law Office of Dan J. Alpert, 2120 North 21st Road, Arlington, VA 22201.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau