

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

In the Matter of)	
)	
Mount Rushmore Broadcasting, Inc.)	File No.: EB-11-DV-0066
)	NAL/Acct. No.: 201232800002
Licensee of)	FRN: 0008230559
Station KZMX(AM), Hot Springs, SD)	Facility ID No.: 46713
Station KZMX-FM, Hot Springs, SD)	Facility ID No.: 46712

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 17, 2012

Released: May 18, 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 Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Stations KZMX(AM) and KZMX-FM (Stations), in Hot Springs, South Dakota, apparently willfully and repeatedly violated Sections 73.1125(a), 73.1125(e), 73.1225(a), and 73.1350(a) of the Commission's rules (Rules),¹ by failing to maintain a management or staff presence at the Stations' main studio, by failing to maintain a local telephone number in its community of license or a toll-free number for either station, by failing to make the Stations available for inspection, and by failing to operate Station KZMX-FM in accordance with the terms of the station's authorization. We conclude that Mount Rushmore is apparently liable for a forfeiture in the amount of twenty-one thousand, five hundred dollars (\$21,500).

II. BACKGROUND

2. On Tuesday, May 31, 2011, in response to a complaint, an agent from the Enforcement Bureau's Denver Office (Denver Office) attempted an inspection of the Station KZMX(AM) and Station KZMX-FM main studio, during regular business hours. The Stations' main studio is located approximately one mile north of Hot Springs, South Dakota, and is clearly marked in large letters "KZMX" and a sign on the front door reads "Mount Rushmore Broadcasting." The door to the main studio was locked and there was no staff or management present at the building. There was no contact information posted at the main studio location, consequently, the agent was unable to gain entrance to the main studio. The agent stayed at the main studio site for several hours, monitoring Station KZMX(AM), which was operating on the frequency 580 kHz, and Station KZMX-FM, which was operating on frequency 96.7 MHz.² The agent telephoned multiple phone numbers, including two published phone numbers associated with Mount Rushmore and the Stations several times, but none of his calls were answered.³ During the time the agent was at the main studio location, an individual identifying himself as

¹ 47 C.F.R. §§ 73.1125(a),(e), 73.1225(a), 73.1350(a).

² The agent observed that the modulation of Station KZMX-FM on the frequency 96.7 MHz was very weak, making the simulcast audio from the station difficult to hear.

³ There was no voicemail associated with any of the numbers and some of the numbers were disconnected or out of service.

a former employee stopped by the main studio location and informed the agent that no one had been present at the main studio for more than a year.

3. On June 1, 2011, during regular business hours, the Denver agent returned to the Station KZMX(AM) and Station KZMX-FM main studio and again attempted an inspection of the Stations' main studio. The agent stopped by the main studio several times throughout the day, during regular business hours. Each time, no employees were present and the agent was unable to gain access to the main studio. Both Stations were in operation and during each visit, the agent telephoned several phone numbers associated with the Stations but his calls were not answered. The agent then visited a non-affiliated business in the area owned by the president of Mount Rushmore. After being informed that the Mount Rushmore president was in the area, the agent left his business card with an employee who agreed to have the president contact the agent, however, the agent never heard from the president.

4. Also on June 1, 2011, the Denver agent inspected the Station KZMX-FM transmitter facility located approximately 1.3 miles from the Stations' main studio location. The agent observed that Station KZMX-FM was operating using a 4-bay, circularly polarized FM antenna, while a 4-bay horizontal FM antenna was on the ground near the KZMX-FM tower.⁴ According to the Station KZMX-FM license, it is authorized to operate using horizontal polarization only.⁵

5. In the morning of June 2, 2011, the Denver agent returned to the Stations' main studio location and again found it locked and with no personnel. The agent noted that Station KZMX(AM) was no longer on the air and that Station KZMX-FM was operating at reduced modulation. Later that day, an attorney for Mount Rushmore called the agent and informed the agent that he had filed a request with the Commission for special temporary authority to take the Stations off the air.⁶ The attorney stated that Mount Rushmore had taken Station KZMX(AM) off the air on June 1, 2011, and then later notified the agent that Station KZMX-FM was taken off the air on June 3, 2011.

III. DISCUSSION

6. Section 503(b) of the Communications Act of 1934, as amended (Act), 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.⁷ 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.⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this

⁴ A Denver Office inspection in 2005 revealed the same scenario - a circularly polarized FM antenna was in use by Station KZMX-FM while a 4-bay horizontal FM antenna lay on the ground nearby.

⁵ See File Number BMLH-19901010KC, granted February 7, 2007 (Station KZMX-FM License).

⁶ See File No. BLSTA - 20110602AAX, granted August 29, 2011 (KZMX(AM) STA Request); File No. BLSTA - 20110602AAV, granted August 29, 2011 (KZMX-FM STA Request). The justification given for the KZMX(AM) STA Request was that the "station was taken off the air because of equipment malfunctions." The justification given for the KZMX-FM STA Request was the "station equipment was damaged as a result of a lightning strike." See also File No. BLESTA-20120319AHW, granted April 18, 2012 (KZMX-FM STA Request granted until May 23, 2012); File No. BLESTA-20120319AHU, granted April 18, 2012 (KZMX(AM) STA Request granted until June 1, 2012). Both Stations resumed operations on April 27, 2012. See Resumption of Operations (KZMX(AM)), filed April 30, 2012; Resumption of Operations (KZMX-FM), filed April 30, 2012.

⁷ 47 U.S.C. § 503(b).

⁸ 47 U.S.C. § 312(f)(1).

definition of willful applies to both Sections 312 and 503(b) of the Act,⁹ and the Commission has so interpreted the term in the Section 503(b) context.¹⁰ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹¹ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹²

A. Main Studio Violations

7. Section 73.1125(a) of the Rules requires broadcast stations to maintain a main studio.¹³ The Commission has interpreted Section 73.1125 (also known as the “Main Studio Rule”) to require, among other things, that a licensee maintain a “meaningful management and staff presence” at its main studio.¹⁴ Specifically, the Commission has found that a main studio “must, at a minimum, maintain full-time managerial and full-time staff personnel.”¹⁵ Although management personnel need not be “chained to their desks” during normal business hours, they must “report to work at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a ‘home base.’”¹⁶ Section 73.1125(e) requires each AM, FM, TV and Class A TV broadcast station to “maintain a local telephone number in its community of license or a toll-free number.”¹⁷

8. On May 31, 2011, June 1, 2011, and June 2, 2011, when a Denver agent attempted to conduct an inspection at the Stations’ main studio during regular business hours, the agent was unable to

⁹ 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 act (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”).

¹⁰ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹¹ 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).

¹² 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.

¹³ 47 C.F.R. § 73.1125(a).

¹⁴ *Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026 (1988) (*Main Studio and Program Origination Rules*), *erratum issued*, 3 FCC Rcd 5717 (1988) (correcting language in n.29).

¹⁵ See *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615, 3616 & n.2 (1991) (*Jones Eastern*) (noting that, “This is not to say that the same staff person and manager must be assigned full-time to the main studio. Rather, there must be management and staff presence on a full-time basis during normal business hours to be considered ‘meaningful.’”), *clarified*, 7 FCC Rcd 6800 (1992) (*Jones Eastern II*). See also *Birach Broadcasting Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 2635 (Enf. Bur. 2010).

¹⁶ *Jones Eastern II*, 7 FCC Rcd at 6802.

¹⁷ 47 C.F.R. § 73.1125(e).

gain access to the main studio and there were no station personnel present. The agent made several phone calls to multiple telephone numbers associated with the Stations and the licensee, but there was no answer at any of the numbers and some of the numbers were out of service. Although Mount Rushmore filed for special temporary authority to take the Stations off the air after being contacted by the agent, neither that filing nor the ultimate receipt of such special temporary authority alleviates Mount Rushmore's obligations to comply with the Commission's main studio requirements.¹⁸ Accordingly, based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 73.1125(a) of the Rules by failing to maintain a full-time management and staff presence at the Station KZMX(AM) and Station KZMX-FM main studio during regular business hours, and by failing to maintain a local telephone number in the Stations' community of license or a toll-free number.

B. Failure to Make the Stations Available for Inspection

9. Section 73.1225(a) of the Rules requires that the "licensee of a broadcast station shall make the station available for inspection by representatives of the FCC during the station's business hours, or at any time it is in operation."¹⁹ On May 31, 2011, June 1, 2011, and June 2, 2011, a Denver agent attempted to inspect Station KZMX(AM) and Station KZMX-FM while they were in operation. Despite repeated attempts by the Denver agent to contact the Stations and the licensee, the stations were not made available to the agent for inspection.²⁰ Accordingly, based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 73.1225(a) of the Rules by failing to make Stations KZMX(AM) and Station KZMX-FM available for inspection by an FCC agent.

C. Failure to Operate in Accordance with Station Authorization

10. Section 73.1350(a) of the Rules states that "[e]ach licensee is responsible for maintaining and operating its broadcast station in a manner which complies with the technical rules . . . and in accordance with the terms of the station authorization."²¹ On June 1, 2011, a Denver agent inspected the transmitting facility of Station KZMX-FM and observed that the station was operating using a 4-bay, circularly polarized FM antenna; however, according to the Station KZMX-FM license, it is authorized to operate using horizontal polarization only.²² A prior Denver Office inspection showed this operation was ongoing for several years. Accordingly, based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 73.1350(a) of the Rules by failing to operate Station KZMX-FM in accordance with the terms of the station's authorization.²³

¹⁸ We note that the Commission's grants of silent authority for both Station KZMX(AM) and Station KZMX-FM state specifically that "the station's silent status does not suspend the licensee's obligation to comply with all other relevant Commission rules . . ." Letter from H. Taft Snowden, Audio Division, Media Bureau, Granting Silent Authority for KZMX(AM) to Jan Charles Gray, Mt. Rushmore Broadcasting, Inc., (Aug. 29, 2011) at 2; Letter from H. Taft Snowden, Audio Division, Media Bureau, Granting Silent Authority for KZMX-FM to Jan Charles Gray, Mt. Rushmore Broadcasting, Inc., (Aug. 29, 2011) at 2.

¹⁹ 47 C.F.R. § 73.1225(a).

²⁰ This failure by Mount Rushmore prevented the agent from doing any comprehensive inspection of the Stations' facilities and filings, including the Stations' Emergency Alert System equipment and Public Inspection Files.

²¹ 47 C.F.R. § 73.1350(a).

²² The Station KZMX-FM License authorizes operation using the following antenna: "Gates FMA-4A, 4 section, horizontally polarized."

²³ We note that Mount Rushmore was previously assessed a forfeiture for violating Section 73.1350 of the Rules while operating Station KZMX-FM. *See Mount Rushmore Broadcasting, Inc.*, Forfeiture Order, 17 FCC Rcd 21398 (Enf. Bur. 2002) *aff'd* 18 FCC Rcd 11446 (Enf. Bur. 2003) (assessing a \$3,000 forfeiture for violation of Sections

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D. Proposed Forfeiture Amount

11. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for violations of the main studio rule is \$7,000, the base forfeiture for failing to make a station available for inspection is \$7,000, and the base forfeiture amount for use of unauthorized equipment is \$5,000.²⁴ 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.²⁵ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we find no downward adjustments are warranted, but conclude that an upward adjustment is warranted because of the apparently lengthy duration of Mount Rushmore's failure to operate in accordance with the KZMX-FM station authorization and because Mount Rushmore had previously received a forfeiture for failing to operate Station KZMX-FM in accordance with its authorization.²⁶ Accordingly, we assess a forfeiture amount of \$7,500 rather than the base forfeiture amount to Mount Rushmore for use of unauthorized equipment which resulted in its failure to operate Station KZMX-FM in accordance with its authorization. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mount Rushmore is apparently liable for a total forfeiture in the amount of twenty-one thousand, five hundred dollars (\$21,500).

IV. ORDERING CLAUSES

12. 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, Mt. Rushmore Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-one thousand, five hundred dollars (\$21,500) for violations of Sections 73.1125(a), 73.1125(e), 73.1225(a) and 73.1350(a) of the Rules.²⁷

13. **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, Mt. Rushmore Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the 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 Account number and FRN referenced above. Payment by check or money order may be mailed to

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73.1350 and 73.1400 of the Rules by failing to operate Station KZMX-FM in compliance with the technical rules and in accordance with the terms of the station license, specifically, for failing to establish monitoring procedures and schedules to determine compliance with operating power and modulation levels and failing to have positive control of the transmitter).

²⁴ *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.

²⁵ 47 U.S.C. § 503(b)(2)(E).

²⁶ See *supra* note 23.

²⁷ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.1125(a),(e), 73.1225(a), 73.1350(a).

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. 20554.²⁸ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or E-mail: ARINQUIRIES@fcc.gov. Mt. Rushmore Broadcasting, Inc., will also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

15. 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 1.16 and 1.80(f)(3) of the Rules.²⁹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver Office, 215 S. Wadsworth Blvd., # 303, Lakewood, Colorado 80226, and include the NAL/Acct. No. referenced in the caption. Mt. Rushmore Broadcasting, Inc., also shall email the written response to WR-Response@fcc.gov.

16. 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.

17. **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 regular mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and Lee J. Peltzman, Shainis & Peltzman, Chartered, 1850 M Street, N.W., Suite 240, Washington, D.C. 20036, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

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

²⁸ See 47 C.F.R. § 1.1914.

²⁹ 47 C.F.R. §§ 1.16, 1.80(f)(3).