

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

In the Matter of

Gary M. Feldman

Miami, Florida

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File No.: EB-FIELDSCR-12-00002250

NAL/Acct. No.: 201332600002

FRN: 0010018281

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 21, 2013

Released: February 21, 2013

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Gary M. Feldman apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating unlicensed radio transmitters on the frequency 97.7 MHz in Miami, Florida. We conclude that Mr. Feldman is apparently liable for a forfeiture in the amount of twenty five thousand dollars (\$25,000).

II. BACKGROUND

2. On July 11, 2011, and May 9, 2012, agents from the Enforcement Bureau's Miami Office (Miami Office), in response to a complaint, used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 97.7 MHz to an FM transmitting antenna mounted on Mr. Feldman's residence in Miami, Florida. The agents determined that the signals on 97.7 MHz exceeded the limits for operation under Part 15 of the Commission's rules (Rules),² and therefore required a license. The Commission's records showed that no authorization was issued to Mr. Feldman or to anyone else for operation of an FM broadcast station at or near this address. While monitoring the station on May 9, 2012, agents heard the station broadcast the name of the website, "hot977fmmiami.com." Agents from the Miami Office confirmed that it was Mr. Feldman who registered the domain name for the unlicensed station's website.³

3. On May 16, 2012, agents from the Miami Office inspected the unlicensed radio station located at Mr. Feldman's residence. During the inspection, Mr. Feldman admitted to the agents that he was the only operator of the unlicensed radio station operating on the frequency 97.7 MHz. Mr. Feldman did not relinquish or destroy his radio station equipment. The agents warned Mr. Feldman that his actions violated the Act and the Rules and that he could face additional enforcement action for future unlicensed operations.

¹ 47 C.F.R. § 301.

² Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

³ See www.networksolutions.com/whois-search/hot977fmmiami.com (last visited May 9, 2012). The contact name listed with Network Solutions was "Gary Feldmann." Although the last name reflects two n's, we suspect that it is either a typographical error or a deliberate attempt to inject confusion and potentially evade future detection.

4. The following month, the agents from the Miami Office determined that, although Mr. Feldman may have ceased operating the unlicensed station from his Miami residence,⁴ he resumed his unlicensed operation from a commercial building in the same city. On June 13, 2012, agents from the Miami Office used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 97.7 MHz to an FM transmitting antenna mounted to a commercial building in Miami, Florida. While monitoring the station on June 13, 2012, agents heard the station broadcast the name of its website, “hot977fmmiami.com.” The agents determined that the signals on 97.7 MHz exceeded the limits for operation under Part 15 of the Rules,⁵ and therefore required a license. The Commission’s records still showed that no authorization was issued to Mr. Feldman or to anyone else for operation of an FM broadcast station at or near this address. The agents also later determined that Mr. Feldman previously was found in violation of Section 301 of the Act for operating an unlicensed radio station in Tampa, Florida, and was issued a \$10,000 forfeiture, which remains unpaid.⁶

III. DISCUSSION

5. Section 503(b) of the 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 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

⁴ The agents observed on June 13, 2012, that the FM transmitting antenna had been removed from Mr. Feldman’s residence in Miami, Florida.

⁵ See *supra* note 2.

⁶ See *infra* note 17.

⁷ 47 U.S.C. § 503(b).

⁸ 47 U.S.C. § 312(f)(1).

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.

A. Unlicensed Broadcast Operations

6. The evidence in this case establishes that Mr. Feldman violated Section 301 of the Act. 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.¹³ As the record shows, on July 11, 2011, and May 9, 2012, agents from the Miami Office determined that an unlicensed radio station on the frequency 97.7 MHz was operating from Mr. Feldman's residence in Miami, Florida. On May 16, 2012, the agent's visited Mr. Feldman's residence to inspect the radio transmitting equipment. At that time, Mr. Feldman admitted to the agents that he operated, and was the sole operator of, the unlicensed radio station, thereby confirming the violation. Thereafter, the agents warned him about the violation and instructed him to immediately cease the unlicensed operation.

7. Despite instructions to cease the unlicensed operation, the record shows that Mr. Feldman attempted to evade future detection by moving to a different location to resume the unlicensed operation. On June 13, 2012, the agents determined that the unlicensed radio station was operating on the same frequency, but that it was now operating from a different location—at a commercial building in Miami. The agents also confirmed, on the same date, that Mr. Feldman apparently had removed the FM transmitting antenna from his residence. Given Mr. Feldman's prior statement (on May 16, 2012) that he was the sole operator of the unlicensed station, we believe that he was the individual operating the unlicensed station at the commercial building.¹⁴ In addition, the evidence shows that, on both May 9 and June 13, 2012, the agents heard the unlicensed radio station on 97.7 MHz reference the same website for the station, "hot977fmmiami.com"; and that this domain name was registered by Mr. Feldman. Furthermore, a review of the Commission's records revealed that Mr. Feldman did not have a license to operate a radio station on the frequency 97.7 MHz at either of the aforementioned Miami locations (or any other location for that matter). Because Mr. Feldman consciously operated the station and did so on more than one day, the apparent violations of the Act were both willful and repeated. Based on the evidence before us, we find that Mr. Feldman apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.

B. Proposed Forfeiture Amount

8. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁵ 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.¹⁶ In doing so, we find that the violation in this case justifies a \$15,000 upward adjustment from the base forfeiture amount. As the record reflects, the Enforcement Bureau's

¹³ 47 U.S.C. § 301.

¹⁴ Even if Mr. Feldman denies operating the station, we believe that he otherwise had control over the general conduct or management of the station. For purposes of Section 301, 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." 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).

¹⁵ *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.

¹⁶ 47 U.S.C. § 503(b)(2)(E).

Tampa Office issued Mr. Feldman a Notice of Apparent Liability for Forfeiture for \$10,000 in February 2004 for operating an unlicensed radio station in Fort Myers, Florida, which eventually resulted in a collections action initiated by the U.S. Department of Justice for nonpayment (and the forfeiture remains unpaid).¹⁷ The fact that Mr. Feldman would again engage in unlicensed operations after being the subject of an enforcement action; continue to defy a court order requiring him to satisfy payment to the federal government; and then attempt to evade detection from FCC agents by moving his radio station from his residence to a commercial building after being reminded that his unlicensed operation contravened the Act, the Rules, and related Commission Orders, demonstrate not only the egregiousness of the violation, but also his deliberate disregard for the law. Based on the evidence before us, we find that an upward adjustment of \$15,000 is warranted.¹⁸ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Feldman is apparently liable for a forfeiture in the amount of \$25,000.¹⁹ We also caution Mr. Feldman that future violations may subject him to more severe enforcement action, including larger monetary forfeitures, criminal prosecution, and the *in rem* seizure of his equipment.²⁰

IV. ORDERING CLAUSES

9. 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, Gary M. Feldman is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty five thousand dollars (\$25,000) for violations of Section 301 of the Act.²¹

10. **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, Gary M. Feldman **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. 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. Gary M. Feldman will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

¹⁷ *Gary M. Feldman*, Notice of Apparent Liability for Forfeiture, NAL/Acct No. 200432700008 (Enf. Bur. rel. Feb. 4, 2004) (finding that Mr. Feldman violated Section 301 by operating an unlicensed radio station on the frequency 91.9 MHz in Fort Myers, Florida on March 5, 2003), *aff'd*, Forfeiture Order, 19 FCC Rcd 7185 (Enf. Bur. 2004) (affirming \$10,000 forfeiture and noting that Mr. Feldman had not paid the forfeiture nor filed a response). Because Mr. Feldman failed to pay the \$10,000 forfeiture resulting from the 2003 violation, the matter was referred to the U.S. Department of Justice for collections. The Justice Department filed collections action against Mr. Feldman in the U.S. District Court for the Southern District of Florida in 2005, and court records reflect that Mr. Feldman failed to respond to the Complaint, resulting in the entry of a default judgment against him. See *United States v. Feldman*, Case No. 05-21061-CIV-KING (S.D. FL Aug. 10, 2005). To date, Mr. Feldman has not paid the judgment.

¹⁸ See *Whisler Fleurinor*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 489 (Enf. Bur. 2012) (proposing \$25,000 forfeiture for repeat unlicensed operations, in violation of Section 301 of the Act, and after issuance of forfeiture order for multiple violations of the same), *aff'd*, Forfeiture Order, DA 13-175, 2013 WL 485239 (Enf. Bur. rel. Feb. 8, 2013).

¹⁹ We note that the proposed forfeiture relates to Mr. Feldman's apparent violations that occurred only within the past year.

²⁰ See 47 U.S.C. §§ 401, 501, 503, 510. *Accord Michael William Downer*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 7962, 7965, para. 8 (Enf. Bur. 2012). We note that the seriousness of the repeat violations in this case already justify potential referral of this matter to state and other federal authorities for additional enforcement action.

²¹ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²² 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.

12. 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. 20554.²³ 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.

13. 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.²⁴ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617 and include the NAL/Acct. No. referenced in the caption. Gary M. Feldman also shall e-mail the written response SCR-Response@fcc.gov.

14. 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.

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

²³ See 47 C.F.R. § 1.1914.

²⁴ 47 C.F.R. §§ 1.16, 1.80(f)(3).

15. **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 Gary M. Feldman at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Stephanie Dabkowski
Resident Agent
Miami Office
South Central Region
Enforcement Bureau