

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

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|---------------------|---|----------------------------|
| In the Matter of |) | |
| |) | |
| Bernabe Moreno |) | File No: EB-10-NY-0185 |
| |) | NAL/Acct. No: 201132380004 |
| Passaic, New Jersey |) | FRN: 0019865922 |
| |) | |

FORFEITURE ORDER

Adopted: February 22, 2013

Released: February 22, 2013

By the Regional Director, Northeast 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 Bernabe Moreno for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (Act).¹ The noted violations involved Mr. Moreno's operation of an unlicensed radio transmitter on the frequency 102.3 MHz in Passaic, New Jersey.

II. BACKGROUND

2. On February 11, 2011, the Enforcement Bureau's New York Office issued a Notice of Apparent Liability for Forfeiture (*NAL*) for ten thousand dollars (\$10,000) to Mr. Moreno for operating an unlicensed radio station in Passaic, New Jersey.² At the time of the inspection, Mr. Moreno admitted to FCC agents that he owned and operated the station.³ In response to the *NAL*, Mr. Moreno clarifies his initial admissions to the agents and requests cancellation or reduction of the forfeiture.⁴ Specifically, Mr. Moreno now states that he was not the owner of the station, but was just "in charge" of the station. Mr. Moreno further states that the owner (who he identifies simply as "Casique") never informed him that the station was unlicensed.⁵ Mr. Moreno also asserts that he is unable to pay the proposed forfeiture based on his financial circumstances.⁶

¹ 47 U.S.C. § 301.

² *Bernabe Moreno*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 1355 (Enf. Bur. 2011) (*NAL*). A comprehensive recitation of the facts and history of this case can be found in the *NAL* and is incorporated herein by reference.

³ *Id.* at 1355, para. 3. Mr. Moreno also demonstrated control over the station by turning off the station at the agents' request. *Id.*

⁴ Letter from Bernabe Moreno to the New York Office, Northeast Region, Enforcement Bureau (March 7, 2011) (on file in EB-10-NY-0185) (*NAL* Response).

⁵ *See id.*

⁶ *See id.*

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁷ Section 1.80 of the Commission's rules (Rules),⁸ and the *Forfeiture Policy Statement*.⁹ In examining Mr. Moreno'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.¹⁰ After considering Mr. Moreno's response in light of these statutory factors, we deny his request for cancellation of the forfeiture, but grant his request for a forfeiture reduction based on his inability to pay claim.

4. We affirm the *NAL*'s finding that Mr. Moreno violated 301 of the Act. Section 301 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.¹¹ For the 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."¹² In other words, the use of the word "operate" in Section 301 captures not just the "actual, mechanical manipulation of radio apparatus,"¹³ but also operation of a radio station generally.¹⁴ Thus, even if Mr. Moreno is now denying ownership of the unlicensed station, he still can found in violation of Section 301 because—by Mr. Moreno's own admission in his response—he was "in charge" of the station and was hired by the station's owner to program the station's music.¹⁵ As such, Mr. Moreno consciously operated and/or otherwise was involved in the general conduct or management of the unlicensed station.¹⁶ Furthermore, the fact that the station's owner did not advise Mr. Moreno that the station was unlicensed does not excuse the violation. In this respect, it is well established that the Commission does not consider ignorance of the law or reliance on erroneous or misleading advice from

⁷ 47 U.S.C. § 503(b).

⁸ 47 C.F.R. § 1.80.

⁹ *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), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁰ 47 U.S.C. § 503(b)(2)(E).

¹¹ 47 U.S.C. § 301.

¹² *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).

¹³ *Id.*

¹⁴ *Id.* See also 47 U.S.C. § 307(c)(1). 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." See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9747 (1995), *recons. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

¹⁵ *NAL Response* at 1. In addition, it does not appear that Mr. Moreno is denying his initial admission to the agents that he operated the station, which separately confirms a Section 301 violation.

¹⁶ See, e.g., *Donald J. Payne*, Forfeiture Order, 22 FCC Rcd 10776 (Enf. Bur. 2007) (holding that "liability for unlicensed operation may be assigned to any individual participating in the operation of the unlicensed station, regardless of who else may be responsible for the operation").

third parties as mitigating circumstances that justify cancellation or reduction of a forfeiture, and we see no reason to depart from that long-established policy in this case.¹⁷ We therefore conclude that Mr. Moreno willfully and repeatedly violated Section 301 of the Act by operating radio transmission equipment without the required Commission authorization.

5. Mr. Moreno also requests cancellation or reduction of the forfeiture based on his inability to pay. With regard to an individual 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.¹⁸ Based on the financial documents provided by Mr. Moreno, we find sufficient basis to reduce the forfeiture to \$1,000.¹⁹ However, we caution Mr. Moreno that a party's inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.²⁰ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.²¹ Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Mr. Moreno's financial circumstances.

IV. ORDERING CLAUSES

6. 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, Bernabe Moreno **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one thousand dollars (\$1,000) for violations of Section 301 of the Act.²²

¹⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387, para. 3 (1991) (holding that ignorance of the law or inadvertent mistakes are not mitigating circumstances that can serve to justify a forfeiture reduction). *Accord Dexter Blake*, Memorandum Opinion and Order, 27 FCC Rcd 15087 (Enf. Bur. 2012), *aff'd in part*, Forfeiture Order, 25 FCC Rcd 10038 (Enf. Bur. 2010) (finding that misleading advice from third parties does not constitute a mitigating circumstances that justifies cancellation or reduction of a forfeiture); *Paisa 2 Car and Limousine Service, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 14423, 14424, para. 5 (Enf. Bur. 2011) (declining to cancel forfeiture based on licensee's claim that it did not know that it was operating on unauthorized frequency).

¹⁸ 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).

¹⁹ This forfeiture amount falls within the percentage range that the Commission has previously found acceptable. *See supra* note 18.

²⁰ See 47 U.S.C. § 503(b)(2)(E) (requiring the Commission to 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 such other matters as justice may require).

²¹ See *Whisler Fleurinor*, Forfeiture Order, DA 13-175 (Enf. Bur. rel. Feb. 8, 2013) (finding that violator's demonstrated inability to pay was outweighed by repeated operation of an unlicensed radio station); *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur. 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued operation at variance with its construction permit constituted an intentional and continuous violation, which outweighed permittee's evidence concerning its ability to pay the proposed forfeitures).

²² 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4).

7. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Forfeiture Order.²³ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁴ Bernabe Moreno shall send electronic notification of payment to NER-Response@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁵ 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.

8. 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. 20554.²⁶ 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.

²³ 47 C.F.R. § 1.80.

²⁴ 47 U.S.C. § 504(a).

²⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁶ See 47 C.F.R. § 1.1914.

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

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt
Regional Director
Northeast Region
Enforcement Bureau