

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

In the Matter of)	
)	
Mt. Rushmore Broadcasting, Inc.)	File No.: EB-FIELDWR-12-00003594
)	NAL/Acct. No.: 201332800004
Licensee of Station KMLD(FM))	FRN: 0008230559
Casper, Wyoming)	Facility ID No.: 11927
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: February 27, 2013**Released: February 28, 2013**

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

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Mt. Rushmore Broadcasting, Inc. (Mount Rushmore), licensee of Station KMLD(FM) in Casper, Wyoming, apparently willfully and repeatedly violated Section 73.3526 of the Commission's rules (Rules),¹ by failing to maintain a complete public inspection file. We conclude that Mount Rushmore is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). In addition, we direct Mount Rushmore to submit, no later than thirty (30) calendar days from the date of this NAL, a statement, signed under penalty of perjury, attesting to its compliance with the Commission's public inspection file requirements, for Station KMLD(FM).²

II. BACKGROUND

2. On Wednesday, August 17, 2011, an agent from the Enforcement Bureau's Denver Office (Denver Office) conducted an inspection of Station KMLD(FM). The Denver agent reviewed the Station KMLD(FM) public inspection file and found that Station KMLD(FM) was missing twenty-three (23) consecutive quarters of issues/programs lists, *i.e.*, all quarterly issues programs lists since the Commission granted the Station's renewal application on September 28, 2005.³ When queried by the Denver agent, Station KMLD(FM) personnel were unable to locate any issues/programs lists for the current license period other than four documents.

III. DISCUSSION

3. 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

¹ 47 C.F.R. § 73.3526.

² 47 C.F.R. §§ 1.16, 73.3526.

³ See Application for Renewal of License for Station KMLD(FM), File Number BRH-20050601BGX, granted September 28, 2005.

order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁴ 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.⁵ 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,⁶ and the Commission has so interpreted the term in the Section 503(b) context.⁷ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁸ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁹

A. Failure to Maintain a Complete Public Inspection File

4. Section 73.3526(a)(2) of the Rules requires broadcast stations maintain for public inspection a file containing materials listed in that section.¹⁰ Section 73.3526(c)(1) of the Rules specifies that the file shall be available for public inspection at any time during regular business hours,¹¹ and Section 73.3526(e)(12) of the Rules specifically requires licensees to place in their public inspection file for each calendar quarter, a list of programs that have provided the station’s most significant treatment of community issues during the preceding three month period.¹² This list is known as the issues/programs lists and must include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. Copies of the issues/programs lists must be retained in the public inspection file until final action has been taken on the station’s next license renewal application.¹³ The renewal of the Station KMLD(FM) license was granted on September 28, 2005, and expires October 1, 2013. At the time of the August 17, 2011, inspection, the Station KMLD(FM) public inspection file was missing twenty-three (23) consecutive quarters of radio issues/programs lists. The file contained no lists since the station’s 2005 renewal was granted. Based on the evidence before us, we find that Mount Rushmore apparently willfully and repeatedly violated Section 73.3526 of the Rules by failing to maintain the issues/programs lists and make them available in the Station’s public inspection file.

⁴ 47 U.S.C. § 503(b).

⁵ 47 U.S.C. § 312(f)(1).

⁶ 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 . . .”).

⁷ 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).

⁸ 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).

⁹ 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.

¹⁰ 47 C.F.R. § 73.3526(a)(2).

¹¹ 47 C.F.R. § 73.3526(c)(1).

¹² 47 C.F.R. § 73.3526(e)(12).

¹³ *Id.*

B. Proposed Forfeiture Amount and Reporting Requirement

5. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for violation of the public file rules is \$10,000.¹⁴ 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.¹⁵ 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 long duration of Mount Rushmore's failure to create and make available issues/programs lists in the Station KMLD(FM) public inspection file, which has continued for the entire length of the current license term.¹⁶ Accordingly, we propose a forfeiture amount of \$15,000 rather than the base forfeiture amount. 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 forfeiture in the amount of fifteen thousand dollars (\$15,000).

6. We further order Mount Rushmore to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Mount Rushmore, stating that it is operating Station KMLD(FM) in compliance with Section 73.3526 of the Rules,¹⁷ and detailing the specific actions taken by Mount Rushmore to come into compliance. This statement must be provided to the Denver Office at the address listed in paragraph 9 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

IV. ORDERING CLAUSES

7. 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 fifteen thousand dollars (\$15,000) for violation of Section 73.3526 of the Rules.¹⁸

8. **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 and Order, 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 *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.

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ See 47 C.F.R. § 1.80(b)(5), Note to Paragraph (b)(5): Section II. Adjustment Criteria for Section 503 Forfeitures (establishing "repeated or continuous violation" as an upward adjustment factor). We also note that Mount Rushmore has previously been assessed a forfeiture for violating Section 301 of the Act by operating an unlicensed STL. See *Mount Rushmore Broadcasting, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 19804 (Enf. Bur. 2003) (forfeiture paid).

¹⁷ 47 C.F.R. § 73.3526.

¹⁸ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.3526.

9. **IT IS FURTHER ORDERED** that Mt. Rushmore Broadcasting, Inc., **SHALL SUBMIT** a written statement, as described in paragraph 6, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado 80226. Mount Rushmore shall also e-mail the written statement to WR-Response@fcc.gov.

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. Mount Rushmore shall send electronic notification of payment to 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.¹⁹ 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. 20554.²⁰ 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.

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 1.16 and 1.80(f)(3) of the Rules.²¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 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.

¹⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁰ See 47 C.F.R. § 1.1914.

²¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

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 and Order shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to Mt. Rushmore Broadcasting, Inc., at 218 N. Wolcott Street, Casper, Wyoming 82601-1923, and to its counsel, Lee J. Peltzman, Esq., Shainis & Peltzman, Chartered, 1850 M Street, NW, Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

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