

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

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|----------------------------|---|-----------------------------|
| In the Matter of |) | |
| |) | |
| Jose Torres |) | File No.: EB-08-PA-0180 |
| |) | NAL/Acct. No.: 200932400002 |
| Licensee of Station N3TX |) | FRN: 0001831825 |
| Philadelphia, Pennsylvania |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 2013

Released: March 19, 2013

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order (MO&O), we grant in part and deny in part the Petition for Reconsideration (Petition) filed by Jose Torres, licensee of amateur radio station N3TX in Philadelphia, Pennsylvania.¹ Mr. Torres seeks reconsideration of the *Forfeiture Order* issued by the Enforcement Bureau's Northeast Region (Northeast Region) on May 16, 2011.² The *Forfeiture Order* imposed a monetary forfeiture against Mr. Torres in the amount of \$4,000 for willful and repeated operation of his amateur radio station on an unauthorized frequency in violation of Section 1.903(a) of the Commission's rules (Rules).³ For the reasons set forth below, the Petition is granted in part and denied in part and the forfeiture amount is reduced to three thousand five hundred dollars (\$3,500).

II. BACKGROUND

2. On January 6, 2009, the Enforcement Bureau's Philadelphia Office (Philadelphia Office) issued a *Notice of Apparent Liability for Forfeiture (NAL)* in the amount of \$4,000 to Mr. Torres for apparently willfully and repeatedly operating his amateur radio station on the unauthorized frequency 26.71 MHz at his residence in violation of Section 1.903(a) of the Rules.⁴ On February 17, 2009, Mr. Torres met with agents in the Philadelphia Office to respond to the apparent findings in the *NAL*.⁵ During the meeting, Mr. Torres claimed that he was not at home during the alleged unauthorized operations on April 17, 2008,

¹ See *Jose Torres*, Petition for Reconsideration (June 15, 2011) (on file in EB-08-PA-0180) (Petition).

² *Jose Torres*, Forfeiture Order, 26 FCC Rcd 6813 (Enf. Bur., Northeast Region 2011) (*Forfeiture Order*), *aff'g*, *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932400002 (Enf. Bur., Philadelphia Office, rel. Jan. 6, 2009) (*NAL*). A comprehensive recitation of the facts and history of this case can be found in the *NAL* and *Forfeiture Order* and is incorporated herein by reference.

³ 47 C.F.R. § 1.903(a).

⁴ *NAL*, *supra* note 2. See 47 C.F.R. § 1.903(a).

⁵ Mr. Torres requested the meeting based on an alleged language barrier and his inability to properly refute in writing the findings in the *NAL*. Two FCC agents and the Philadelphia Office's Spanish-speaking Office Assistant were present during the meeting. Mr. Torres's statements were recorded with his consent. See *Forfeiture Order*, 26 FCC Rcd at 6814, n.7.

and June 2, 2008. In the *Forfeiture Order*, the Northeast Region considered and found no merit in this argument, affirmed the findings in the *NAL*, and assessed a \$4,000 forfeiture.⁶

3. In the Petition, Mr. Torres claims that the forfeiture should be cancelled or reduced because he did not admit to operating his amateur radio station on 26.71 MHz and the Northeast Region erred in concluding that he did.⁷ In addition, Mr. Torres reiterates his claims made in his response to the *NAL* that he was not at home on April 17, 2008, and June 2, 2008, when the alleged unauthorized transmissions on 26.71 MHz occurred.⁸ Finally, Mr. Torres submits new financial information in support of his request for cancellation or reduction based on his inability to pay the forfeiture amount.⁹

III. DISCUSSION

4. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹⁰ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.¹¹ As discussed below, we find that Mr. Torres's Petition fails to demonstrate a material error in the *Forfeiture Order* and reiterates arguments previously presented to and rejected by the Northeast Region. We therefore deny reconsideration of the Petition on this basis. We do, however, find that reconsideration of Mr. Torres's ability to pay the forfeiture amount is warranted based on newly submitted financial documentation. We therefore affirm the Northeast Region's finding that Mr. Torres willfully and repeatedly operated on an unauthorized frequency in violation of Section 1.903(a) of the Rules, but reduce the forfeiture amount to \$3,500.

5. First, we reject Mr. Torres's claim that we committed a material error because we incorrectly concluded "for the first time" in the *Forfeiture Order* that he admitted to operating his amateur station on 26.71 MHz without authorization. In the *Forfeiture Order*, the Northeast Region did not state that Mr. Torres admitted to the unauthorized operations on April 17, 2008, and June 2, 2008, at issue in the current proceeding. Rather, the Northeast Region noted that Mr. Torres admitted to operating on 26.71 MHz without authorization in response to a *Notice of Violation* issued by the Philadelphia Office in 2007.¹² In the *Forfeiture Order*, the Northeast Region concluded that Mr. Torres operated on an unauthorized frequency based on evidence obtained by agents from the Philadelphia Office. Specifically, the agents determined that unauthorized transmissions on 26.71 MHz were emanating from Mr. Torres's residence on

⁶ *Forfeiture Order*, *supra* note 2.

⁷ Petition at 2.

⁸ *Id.* at 4–6.

⁹ *Id.* at 6.

¹⁰ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, (Enf. Bur. 2000), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹¹ *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257.

¹² We reached this conclusion based on Mr. Torres's statement in his *NOV Response* that "[w]ith this writing respond I agree to the Notice listed above. I fully understand the violation. According to my license N3TX I will transmit where I'm authorized, at the Extra Class portion only." See *Forfeiture Order*, 26 FCC Rcd at 6813, para. 2. See also *Jose Torres*, Notice of Violation, NOV No. V20083240007 (Enf. Bur., Philadelphia Office, rel. Jan. 3, 2008) (*NOV*); *Jose Torres*, Response to NOV (on file in EB-08-PA-0180) (*NOV Response*).

April 17, 2008, and June 2, 2008.¹³ Second, to the extent Mr. Torres claims in his Petition that he was not at home on those days, the Northeast Region previously considered and rejected that claim and reconsideration therefore is not warranted on this basis. We therefore decline to cancel or reduce the forfeiture on these grounds and affirm the Northeast Region's finding that Mr. Torres willfully and repeatedly violated Section 1.903(a) of the Rules by operating on an unauthorized frequency.

6. Mr. Torres reasserts his claim that the forfeiture would pose a financial hardship and submits updated financial information. Having reviewed Mr. Torres's newly submitted documentation, we find sufficient basis to reduce the forfeiture to \$3,500, an amount within the range determined by the Bureau to not be excessive.¹⁴ However, we caution Mr. Torres that a party's inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.¹⁵ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.¹⁶ Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Mr. Torres's financial circumstances.

¹³ In addition, during the 2008 investigation, agents recognized Mr. Torres's voice from the 2007 investigation. In his Petition, Mr. Torres mistakenly believes that the Northeast Region stated in the *Forfeiture Order* that it confirmed by listening to audio recordings that it was his voice on recordings taken during the 2008 investigation. See Petition at 3. The *Forfeiture Order* states "[t]he voice that the agents heard during the transmissions on April 17, 2008, and June 2, 2008, is the same voice that agents heard, and that Torres conceded was his, on December 11, 2007." *Forfeiture Order*, 26 FCC Rcd at 6814, para. 5. The reference to Mr. Torres conceding the voice was his relates to his admission in response to the 2007 *NOV*. That is, during the 2007 investigation, agents inspected Torres's station and obtained audio recordings of the unauthorized transmissions. See *Forfeiture Order*, 26 FCC Rcd at 6813, n.4. Based on the recordings from 2007, and Mr. Torres's admission to the 2007 *NOV*, agents concluded that by admitting to the operation on 26.71 MHz on December 11, 2007, he was therefore admitting that it was his voice that agents heard on December 11, 2007. Accordingly, agents concluded that the voice they heard in 2008 was the same voice they heard "and that Mr. Torres conceded was his" in 2007.

¹⁴ 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).

¹⁵ See 47 U.S.C. § 503(b)(2)(E) (requiring 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).

¹⁶ *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., Northeast Region 2010) (reducing forfeiture based on inability to pay, but warning that future violations of the same kind may not be reduced due to financial circumstances); *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur., Western Region 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay) (petition for reconsideration pending); *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). See *Michael W. Perry*, Forfeiture Order, 27 FCC Rcd 2281, 2284, para. 8 (2012) (reducing forfeiture based on inability to pay, but warning that future violations of the same kind may not be reduced due to financial circumstances).

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended,¹⁷ and Section 1.106 of the Commission's rules,¹⁸ that the Petition for Reconsideration filed by Jose Torres **IS GRANTED IN PART AND DENIED IN PART**.

8. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,¹⁹ Jose Torres **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of three thousand five hundred dollars (\$3,500) for violations of Section 1.903(a) of the Commission's rules.

9. 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 Memorandum Opinion and Order.²⁰ 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.²¹ Jose Torres shall send electronic notification of payment to NER-Response@fcc.gov on the date said payment is made.

10. 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.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.

¹⁷47 U.S.C. § 405.

¹⁸47 C.F.R. § 1.106.

¹⁹47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²⁰47 C.F.R. § 1.80.

²¹47 U.S.C. § 504(a).

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

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.

11. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by First Class Mail and Certified Mail, Return Receipt Requested, to Jose Torres at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

²³ See 47 C.F.R. § 1.1914.