

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

In the Matter of)
Wendolynn Tellez) NAL/Acct. No. MB-201841410003
Application for Renewal of License) FRN: 0008539470
KSAG(FM), Pearsall, Texas) Facility I.D. No. 165972
) BRH-20130401ACS
)
)
)

MEMORANDUM OPINION AND ORDER AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 10, 2018

Released: January 10, 2018

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us the application (Renewal Application) to renew the license of
KSAG(FM), Pearsall, Texas (Station), that was filed by Wendolynn Tellez (Tellez) on April 1, 2013.
Also before us is an Informal Objection (Objection) filed by Alpha Media Licensee, LLC (Alpha), on
November 7, 2016. In this Memorandum Opinion and Order and Notice of Apparent Liability (NAL),1
we deny the Informal Objection. However, we find that Tellez apparently willfully and repeatedly
violated Sections 73.1745(a) and 73.1635 of the Commission’s rules (Rules) during two different time
periods by operating the station at a variance from its licensed parameters without authority to do so.2
Based upon our review of the record before us, we find Tellez apparently liable for a monetary forfeiture
in the amount of eight thousand dollars (\$8,000). Upon resolution of the forfeiture matter, if there are no
other issues that would preclude grant of the Renewal Application, we intend to grant it.

II. BACKGROUND

2. We granted Tellez a license for the Station on January 21, 2011.3 The Station license
authorizes operations on Channel 277A. Tellez almost immediately took the Station off the air.4 It
remained silent until January 27, 2012.5 According to Tellez, the Station went silent “pending the filing
of an application to move to a new site.”6 When the Station resumed operations on January 27, 2012, it

1 This NAL is issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (Act),
and Section 1.80 of the Commission’s rules (Rules). See 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau
has delegated authority to issue the NAL under Section 0.283 of the Rules. See 47 CFR § 0.283.

2 See 47 CFR §§ 73.1745(a), 73.1635.

3 Broadcast Actions, Public Notice, Report No. 47410 (MB Jan. 26, 2011).

4 The Station went silent on January 28, 2011. See File No. BLSTA-20110208ADS.

5 Resumption of Operations (filed Jan. 29, 2012).

6 File No. BLSTA-20110208ADS. Tellez sought and obtained special temporary authority (STA) for this period of
silence. Id.

did so from a different site with facilities authorized in an STA granted on January 9, 2012.⁷ It operated for a little over a year but then went silent again on January 19, 2013.⁸ In seeking STA for this silence, Tellez indicated that the Station's licensed site was "no longer available." She also noted that she had requested a technical STA to operate from a "temporary site" but that staff had denied that request. Tellez went on to state that "[t]he Station is in the process of changing channels . . . , which will allow the station to resume operations at the site designated in the pending application for issuance of a construction permit" and requested STA for the station to remain silent while "processing is completed." We granted STA to for the Station to remain silent on September 13, 2013.⁹

3. Shortly after Tellez took the Station off the air for a second time, she filed a Petition for Rule Making in which she proposed to amend the FM Table of Allotments by substituting Channel 277A for vacant Channel 227A at Pearsall, Texas, in order to accommodate operation of the Station on Channel 227A. We granted her request and amended the FM Table of Allotments on July 19, 2013.¹⁰ On that same date, we granted Tellez a construction permit (2013 Permit) for facilities on Channel 227A.¹¹ The construction permit authorized the channel change that she referenced in her 2013 STA request and authorized Tellez to construct these facilities at a new location. The Station resumed operations on January 16, 2014, with the facilities authorized in the 2013 Permit.¹²

4. The Commission proceeded to auction the vacant allotment for Channel 277A at Pearsall, Texas.¹³ Alpha was the winning bidder and received a construction permit on November 19, 2015.¹⁴ The construction permit includes a condition prohibiting Alpha from commencing program tests "until program tests for KSAG(FM), Pearsall, TX, (Facility ID Number 165972) commence on channel 227A." It also states that a license will not be granted to Alpha "until a license is granted for KSAG(FM) on channel 227A."

5. Tellez failed to construct the facilities authorized in the 2013 Permit prior to its expiration on July 19, 2016. When she did not immediately file an application for a new construction permit, Alpha filed the Objection. Therein, Alpha requests that we "withhold renewal of the [S]tation's license until the channel change is made."¹⁵ Tellez subsequently applied for a new permit to construct facilities identical to those specified in the 2013 Permit. We granted the application and issued a new construction permit to Tellez on January 25, 2017.¹⁶

⁷ File No. BSTA-20120105AAU; *Wendolynn Tellez*, Letter Order (MB Jan. 9, 2012).

⁸ File No. BLSTA-20130128ABK.

⁹ *Wendolynn Tellez*, Letter Order (MB Sept. 13, 2013).

¹⁰ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Pearsall, Texas)*, Report and Order, DA 13-1603 (MB 2013).

¹¹ *Id.* Tellez had previously filed an application for a construction permit for facilities on Channel 227A. File No. BPH-20120814ABM.

¹² Resumption of Operations (filed Jan. 21, 2014).

¹³ *Auction of FM Broadcast Construction Permits Scheduled for July 23, 2015*, Public Notice, 30 FCC Rcd 3544 (WTB/MB 2015).

¹⁴ *Auction of FM Broadcast Construction Permits Closes*, Public Notice, 30 FCC Rcd 8313 (WTB/MB 2015); *Broadcast Actions*, Public Notice, Report No.48612 (MB Nov. 16, 2015) (granting File No. BNPH-20151013AIL).

¹⁵ Objection at 1.

¹⁶ *Broadcast Actions*, Public Notice, Report No. 48911 (MB Jan. 30, 2017) (granting BPH-20161219ADK).

III. DISCUSSION

A. Informal Objection

6. We deny the Informal Objection, which does not make any allegations relevant to our review of the renewal application.¹⁷ Indeed, Alpha does not actually request that we do anything other than withhold action on the renewal application until the Station moves to Channel 227A.¹⁸

7. We take this opportunity to clarify a few matters related to Alpha's situation. First, contrary to its assertion,¹⁹ Alpha can construct its station on Channel 277A at any time. Grant of Tellez's request to change the Station's channel "amend[ed] the table of allotments *and* modifie[d] [its] license to operate on the new channel."²⁰ Tellez may still operate the Station on Channel 277A while it constructs the Station's new facilities but those operations are "on an interim or 'implied Special Temporary Authority' basis" and are not entitled to any protection.²¹ Second, we affirm that, as Alpha notes, tolling is available.²² However, we caution Alpha that, to seek tolling, it must be able to demonstrate that "construction is complete and the station is ready for operation prior to the expiration of the permit."²³ Finally, we note that, in cases where one station "is unnecessarily impeding [another] station's ability to move or commence operations, the Commission has confirmed the staff practice of cancelling that "implied STA" and ordering the affected station to cease broadcasting on its old frequency.²⁴

¹⁷ Under Section 309(k)(1) of the Act, our review of renewal applications is limited to (1) whether the station has served the public interest, convenience, and necessity; (2) whether there have been no serious violations of the Act or the Rules; and (3) whether there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application. 47 U.S.C. § 309(k)(1).

¹⁸ Objection at 1.

¹⁹ Objection at 1 (asserting Alpha "has been unable to construct on [Channel] 277A while Station KSAG continues to occupy that channel").

²⁰ *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14855 n.22 (1998) (emphasis added). Indeed, we have clarified that the auction of a channel being vacated by a station due to grant of a channel change application can be scheduled "without regard" to when that station moves to its new channel because grant of the channel change application gives the station only an implied STA to operate on its old channel. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Markham, Ganado, and Victoria, Texas)*, Report and Order, 25 FCC Rcd 836, 838 n.15 (MB 2010).

²¹ *Id.* See also *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cumberland, Kentucky, Weber City, Glade Spring, and Marion, Virginia)*, Report and Order, 21 FCC Rcd 6431, 6432 para. 4 (MB 2006).

²² *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 para. 39 (1999) (stating that the Commission will permit tolling of construction deadlines "in circumstances where, for reasons beyond the control of a permittee, there is the failure of a Commission-imposed condition precedent to commencement of operation").

²³ *Id.*

²⁴ *Id.* at 17540 n. 55, citing *Stations KMEM(FM), Memphis, Missouri and KLBA(FM), Albia, Iowa*, reference 18000B3-DCD (M.M. Bur. May 26, 1995) (station whose frequency had been amended by virtue of a final Report and Order in allocations rule making proceeding ordered to cease broadcasting on its "old" frequency to accommodate commencement of operations of new station). See also, *Valleydale Broadcasting, LLC*, Letter Order, 31 FCC Rcd 8916, 8920-21 (MB 2016) (stating (1) "in channel substitution situations, 'the affected station has at best an 'implied STA' to remain on its old frequency until it is ready for operation on its new frequency,'" (2) "[u]nder our FM non-reserved band technical rules, stations operating with STAs—express or implied—are entitled to no protection from operating stations, construction permits, pending applications or subsequently filed applications," (3) "an implied STA is subject to summary cancellation if such action is necessary to accommodate

(continued...)

B. Proposed Forfeiture

8. We find that Tellez apparently willfully and repeatedly failed to comply with Sections 73.1745(a) and 73.1635 of the Rules. Section 73.1745(a) of the Rules requires licensees to operate pursuant to the terms contained in their authorizations.²⁵ In order for a station to operate at variance from such terms, the licensee must file and have granted either an application to modify its station authorization or a request for STA, the latter pursuant to Section 73.1635 of the Rules.²⁶ Here, Tellez operated the Station at a variance from its licensed parameters and without STA to do so on two different occasions. First, between July 9, 2012, and January 19, 2013, Tellez operated the Station with facilities authorized pursuant to an STA but did so after the STA expired. Second, Tellez failed to obtain STA to operate the Station at a variance from its licensed parameters when she returned the Station to the air on January, 16, 2014.

9. This NAL is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁷ 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.²⁸ 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,²⁹ and the Commission has so interpreted the term in the Section 503(b) context.³⁰ Section 312(f)(2) 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.”³¹

10. The Commission's Forfeiture Policy Statement and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$4,000 for operation at an unauthorized location.⁴⁵ Here, the Station operated at a variance from its licensed parameters for more than six months in 2012/2013. Further, it did the same in January 2014 when it resumed operations. Tellez gives no reason for her failure to request STA for these time periods. Accordingly, no reduction is warranted and we will impose a four thousand

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the operation of any FM station pursuant to its authorization,” and (4) “although construction permits involving channel substitutions often contain a special operating condition that prohibits operation on the new channel until the incumbent has vacated, we have in the past deleted such conditions when necessary to allow the commencement of operations on the new channel when the incumbent has been grossly tardy in implementing required facility modifications”); *Lieberman Broadcasting of Dallas License LLC*, Letter Order, 25 FCC Rcd 4765, 4767 (MB 2010) (noting that “STAs are not within the scope of assignments and allotments which receive protection under the FM non-reserved band technical rules” and that “stations operating with STAs—express or implied—are entitled to no protection from operating stations, construction permits, pending applications or subsequently filed applications”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Corona de Tucson, Sierra Vista, Tanque Verde and Vail, Arizona, Animas, Lordsburg and Virden, New Mexico)*, Memorandum Opinion and Order, 23 FCC Rcd 4792, 4796 para. 10 (MB 2008) (stating that “an ‘implied STA’ ... is subject to summary cancellation if necessary to accommodate the operation of any FM station pursuant to its authorization”).

²⁵ 47 CFR § 73.1745(a).

²⁶ 47 CFR § 73.1635.

²⁷ 47 U.S.C. § 503(b)(1)(B). See also 47 CFR § 1.80(a)(1).

²⁸ 47 U.S.C. § 312(f)(1).

²⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 para. 5 (1991)

³¹ 47 U.S.C. § 312(f)(2).

dollar (\$4,000) forfeiture for each violation. Accordingly, we propose a total forfeiture of eight thousand dollars (\$8,000).

IV. RENEWAL APPLICATION.

11. In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.³² That Section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.³³ If, however, the licensee fails to meet that standard, the Commission may deny the application—after notice and opportunity for a hearing under Section 309(e) of the Act—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”³⁴

12. We find that Tellez’s apparent violations of Sections 73.1745(a) and 73.1635 of the Rules do not constitute “serious violations” warranting designation for evidentiary hearing and that the proposed forfeiture constitutes a sufficient penalty for these apparent violations. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.³⁵ Further, we find that the Station served the public interest, convenience, and necessity during the subject license term. We will therefore grant the license renewal application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violations that would preclude grant of the Application.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission’s Rules, that Wendolynn Tellez is hereby NOTIFIED of her APPARENT LIABILITY FOR FORFEITURE in the amount of \$8,000 for her apparent willful and repeated violations of Sections 73.1745(a) and 73.1635 of the Commission’s Rules.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, Wendolynn Tellez SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to 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

³² 47 U.S.C. § 309(k).

³³ 47 U.S.C. § 309(k)(1).

³⁴ 47 U.S.C. § 309(k)(2), (k)(3).

³⁵ For example, we do not find here that Licensee's Station operation “was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies.” See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 para. 6 (1971). Nor do we find on the record here that “the number, nature and extent” of the violations indicate that “the licensee cannot be relied upon to operate [the Station] in the future in accordance with the requirements of its licenses and the Commission’s Rules.” *Id.* at 200 para. 10. See also *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

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. 20554.³⁶ Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, and MUST INCLUDE the NAL/Acct. No. referenced above.

17. The Bureau will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 respondent’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.

18. IT IS FURTHER ORDERED that, pursuant to Section 73.3526(e)(10) of the Commission’s Rules, that Cumulus Licensing, LLC, shall place a copy of this *NAL* in the public inspection file of Station KSAG(FM).

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Wendolynn Tellez, 2702 Pine Street, Laredo, Texas 78046, and her counsel, Dan. J. Alpert, Esq., 2120 N. 21st Road, Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division, Media Bureau

³⁶ See 47 CFR § 1.1914.