

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

In re Application of
Potter Radio, LLC
For License to Cover
FM Translator Station K236CT
Pawhuska, Oklahoma
Facility ID No. 201601
NAL/Acct. No. MB-202141410036
FRN: 0012537544
File No. 0000155321

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 18, 2021

Released: August 18, 2021

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it the above-captioned application (Application) of Potter Radio, LLC (Permittee), for a license to cover FM translator station K236CT, Pawhuska, Oklahoma (Translator). In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL),1 we find that the Permittee apparently willfully violated section 73.35982 of the Rules by failing to timely file a License to Cover Application, and willfully and repeatedly violated section 301 of the Act,3 by engaging in unauthorized operation of the Translator after its construction permit had expired. Based upon our review of the facts and circumstances before us, we conclude that the Permittee is apparently liable for a monetary forfeiture in the amount of three thousand five hundred dollars (\$3,500).

II. BACKGROUND

2. The Bureau issued Permittee a construction permit for the Translator on January 4, 2018, with an expiration date of January 4, 2021 (Permit). On August 4, 2020, Permittee requested six months of additional time in which to construct the Translator, citing construction delays caused by the COVID-19 pandemic, and the Bureau extended the Permit until July 4, 2021.4 However, Permittee not did file a covering license application by July 4, 2021, and the Permit expired on its own terms that day pursuant to section 73.3598(e) of the Rules.5 On July 23, 2021, Permittee filed a "Petition for Reconsideration of Cancellation of Construction Permit" (Petition), demonstrating that the Translator was constructed prior to the expiration of the Permit. The staff treated the Petition as a request for waiver of section 73.3598 of

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 C.F.R. § 73.3598.

3 See 47 U.S.C. § 301.

44 Letter from John C. Trent, Esq., Putbreso Hunsaker & Trent, P.C., to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2020).

5 47 CFR § 73.3598(e) ("Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.").

the Rules, granted the waiver, reinstated the Permit, and afford Permittee until August 13, 2021, to file a covering license application for the Permit.⁶ Permittee filed the Application on August 2, 2021.

III. DISCUSSION

3. *Proposed Forfeiture.* The Permittee failed to timely file a covering license application as required by section 73.3598(e) of the Rules, and continued Translator operations with the permitted facilities after the Permit expired on July 4, 2021, before attempting to file the appropriate covering license application, and did not seek special temporary authority to operate with those facilities. Thus, Permittee engaged in unauthorized operation for nearly a month in violation of section 301 of the Act.

4. This *NAL* is issued pursuant to section 503(b)(1)(B) of the Act. Under that provision, a person who is found 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.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 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.”¹¹

5. The Commission's *Forfeiture Policy Statement* and section 1.80(b)(10) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.¹² The guidelines also specify a base forfeiture amount of \$10,000 for construction and/or operation without an instrument of authorization for the service.¹³ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in section 503(b)(2)(E) of the Act, including “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.”¹⁴

⁶ Email from James Bradshaw, Deputy Chief, Audio Division, FCC Media Bureau, to Cary S. Tepper, Esq., Tepper Law Firm, LLC (July 30, 2021, 11:08 EDT). *See also Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153, 7157, para 11 (2011) (*Clear Channel*) (upholding as proper the Bureau’s practice of processing a late-filed covering license application for facilities fully completed by the construction deadline through the waiver process); *Cranesville Block Company, Inc.*, Letter Order, 27 FCC Rcd 2018, 2019-20 (MB 2012) (dismissing a petition for reconsideration of an expired construction permit as procedurally improper and treating it instead as a request for waiver).

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

⁸ 47 U.S.C. § 312(f)(1).

⁹ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁰ *See Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recon. denied*, Memorandum Opinion and Order, 7 FCC Rcd 3454 (1992).

¹¹ 47 U.S.C. § 312(f)(2).

¹² *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), *recon. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(10), note to paragraph (b)(10), Section I.

¹³ A broadcast station requires an authorization from the Commission to operate. *See* 47 U.S.C. § 301.

¹⁴ 47 U.S.C. § 503(b)(2)(E); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 CFR § 1.80(b)(4).

6. Based on our review of the facts and circumstances, we tentatively find that a \$7,000 base forfeiture is appropriate.¹⁵ Licensee failed to file a timely covering license application for the Translator and engaged in unauthorized operation of the Translator after the permit expired on July 4, 2021. Taking into consideration all of the factors required by section 503(b)(2)(E) of the Act and the *Forfeiture Policy Statement*, we will reduce the forfeiture from the base amount to \$3,500 because, as a translator, the Translator is providing a secondary service.¹⁶ We will grant the Application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violation that would preclude grant of the Application.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,¹⁷ Potter Radio, LLC, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of three thousand five hundred dollars (\$3,500) for its apparent willful violation of section 73.3598 of the Commission's rules and section 301 of the Communications Act of 1934, as amended.

8. **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*, Potter Radio, LLC, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),¹⁸ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:¹⁹

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).²⁰ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.

¹⁵ See, e.g., *WKLC, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 26 FCC Rcd 11001 (MB 2011) (proposing \$7,000 forfeiture for violation of section 73.3598 of the Rules and section 301 of the Act). See also *Clear Channel*, 26 FCC Rcd at 7157 ("We note that the staff may also issue Notices of Apparent Liability for 'failure to file a required form' as authorized by Section 503(b)(1)(B) of the Communications Act of 1934, as amended (the 'Act') and Section 1.80 of the Rules, for such violations of covering license application filing deadlines or take other enforcement action.").

¹⁶ See, e.g., *Pirate Media Group, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 34 FCC Rcd 12280 (MB 2019) (reducing \$3,000 base forfeiture to \$1,500 for untimely filed renewal application filed by FM translator station).

¹⁷ 47 U.S.C. § 503(b); 47 CFR § 1.80.

¹⁸ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹⁹ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

²⁰ Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by credit card must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the “Pay by Credit Card” option. Please note that there is a dollar limitation on credit card transactions, which cannot exceed \$24,999.99.
- Payment by ACH must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

10. Any request for making full payment over time under an installment plan should be sent to: Associate Managing Director—Financial Operations, Federal Communications Commission, 45 L Street, N.E., Washington, DC 20554.²¹ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

11. Any written response seeking reduction or cancellation of the proposed forfeiture must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(g)(3) of the Commission’s rules.²² The written response must be filed with the Office of the Secretary, Federal Communications Commission, 45 L Street NE, Washington DC 20554, ATTN: Albert Shuldiner, Chief, Audio Division, Media Bureau, and **MUST INCLUDE** the NAL/Acct. No. referenced above. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.²³ A courtesy copy emailed to Alexander.Sanjenis@fcc.gov will assist in processing the response.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.

12. The Commission 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. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we have

²¹ See 47 CFR § 1.1914.

²² 47 CFR §§ 1.16 and 1.80(g)(3).

²³ Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Filing*, Public Notice, 35 FCC Rcd 2788 (2020).

discretion to not reduce or cancel the forfeiture if other prongs of section § 503(b)(2)(E) of the Communications Act of 1934, as amended, support that result.²⁴

13. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Potter Radio, LLC, c/o Kevin Potter, 1200 SE Frank Phillips Blvd., Bartlesville, OK, and to its counsel, John C. Trent, Esq., Putbrese, Hunsaker, and Trent, PC, 200 South Church Street, Woodstock, VA 22664.

FEDERAL COMMUNICATIONS COMMISSION

Albert Shuldiner
Chief, Audio Division
Media Bureau

²⁴ See 47 U.S.C. 503(b)(2)(E); *Adrian Abramovich*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018).