

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

In re Application of)
SOUTHWEST COLORADO TV) Facility ID No. 61482
TRANSLATOR ASSOCIATION) NAL/Acct. No. 202141420021
For License to Cover) FRN: 0005765391
Television Translator Station K31CT) File No. 0000173420
Cortez, CO)

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 21, 2021

Released: December 21, 2021

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it the above-captioned application (Application) of Southwest Colorado TV Translator Association (Permittee), for a license to cover television translator station K31CT, Cortez, Colorado (Translator). In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL), we find that the Permittee apparently willfully violated section 74.788(b) of the Rules by failing to timely file a license to cover application, and willfully and repeatedly violated section 301 of the Act, 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 June 30, 2021, with an expiration date of July 13, 2021, in order to allow the Station to complete an on-channel digital conversion (flash-cut). However, Permittee not did file a covering license application by July 13, 2021,

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 § 74.788(b).

3 See 47 U.S.C. § 301.

4 See LMS File No. 0000143149.

and the Permit expired on its own terms that day pursuant to section 74.788(b) of the Rules.⁵ Permittee filed the Application on November 30, 2021, more than four months after completing construction and after the Permit expired. In the Application, Permittee includes a request that its late-filed Application be accepted and that it be allowed to continue to serve the public. In an amendment to the Application, filed December 14, 2021, the Permittee's Administrator supplied an affidavit attesting that the Station completed construction of its digital facilities and has been "operating in digital, continuously since July 8, 2021." Permittee also supplied documentation to demonstrate that the Station has been operating since that time.

III. DISCUSSION

3. *Proposed Forfeiture.* The Permittee failed to timely file a covering license application as required by section 74.788(b) of the Rules, and continued Translator operations with the permitted facilities after the Permit expired on July 13, 2021, before attempting to file the appropriate covering license application, and did not seek special temporary authority to operate with those facilities. In its Petition, Permittee stated that it completed construction of the Translator in accordance with the construction permit granted by the Commission and commenced operation of those facilities, on July 8, 2021. Permittee states that it "overlooked" filing the license to cover. It is well settled that applicants and licensees are responsible for the errors of their staff.⁶ Further, as a result of its late filing, Permittee also engaged in unauthorized operation in violation of section 301 of the Act for more than four months.

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 47 CFR § 74.788(b). We note that because the construction permit had not yet been canceled in LMS the Station was able to file a license to cover application against its expired permit. Cancellation of a station's construction permit and deletion of its call sign by Media Bureau (Bureau) staff in the Licensing and Management System (LMS) is an administrative function and does not constitute an official Commission action nor require any affirmative cancellation by the Commission. See *Media Bureau Reminds Remaining Low Power Television and Television Translator Stations that the July 13, 2021 Digital Transition Date and Other Important Deadlines are One Week Away*, Public Notice, DA 21-786 (rel. July 6, 2021); 47 CFR §74.788(b). As a result, failure by Bureau staff to cancel a construction permit in LMS does not result in an expired construction permit remaining valid.

⁶ See, e.g., *Roy E. Henderson*, Memorandum Opinion and Order, 33 FCC Rcd 3385, 3387-88, para. 6 (2018) (rejecting argument that licensee's engineer was to blame for station's unauthorized operations).

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).

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. 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 13, 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 television translator, the Translator is providing a secondary service.¹⁶ We will also treat the attachment to the Application as a request for waiver of section 74.788(b) of the Rules, grant the Permittee’s waiver request,¹⁷ reinstate the Permit, and 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.

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).

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 A waiver is appropriate where the particular facts would make strict compliance inconsistent with the public interest and deviation from the general rule would relieve hardship, promote equity, or produce a more effective implementation of overall policy on an individual basis. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1072 (1972); 47 CFR § 1.3 (waiver for good cause shown). Providing relief in instances where a licensee has failed to file an application for license to cover, but clearly completed construction prior to its authorized facility prior to the construction expiration date is consistent with Commission precedent. See e.g., *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 7153, 7157, para 11 (2011) (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). We find that based on the specific facts and circumstances presented here waiver is warranted. Notably, the Translator was previously a licensed analog facility and required by Commission rule to convert to digital operations. Not only did the Translator complete construction prior to its construction deadline, but according to Commission records the Translator has been continuously operational. Strict compliance with the rule would result in a loss of service to the public and be inconsistent with the public interest. We note that different facts could result in a different finding.

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,¹⁸ Southwest Colorado TV Translator Association 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 74.788(a) of the Commission's rules and section 301 of the Communications Act of 1934, as amended.¹⁹

8. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules,²⁰ that, within thirty (30) days of the release date of this *NAL*, Southwest Colorado TV Translator Association **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 CORES (the Commission's online payment system),²¹ or by wire transfer. Payments by check or money order to pay a forfeiture are no longer accepted. Below are instructions that payors should follow based on the form of payment selected:²²

- 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).²³ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Registration System (CORES) at <https://apps.fcc.gov/cores/userLogin.do>. To pay by credit card, log-in using the FCC Username associated to the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Manage Existing FRNs | FRN Financial | Bills & Fees" from the CORES Menu, then select FRN Financial and the view/make payments option next to the FRN. Select the "Open Bills" tab and find the bill number associated with the NAL/Acct. No. The bill number is the NAL Acct. No. (e.g., NAL/Acct. No. 1912345678 would be associated with FCC Bill Number 1912345678). After selecting the bill for payment, choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission's Registration System (CORES) at <https://apps.fcc.gov/cores/paymentFrnLogin.do>. 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 "Manage Existing FRNs | FRN Financial | Bills & Fees" on the CORES Menu, then select FRN Financial and the view/make payments option next to the FRN. Select the

¹⁸ 47 U.S.C. § 503(b); 47 CFR § 1.80.

¹⁹ 47 CFR § 74.788(b); 47 U.S.C. § 301.

²⁰ 47 CFR § 1.80.

²¹ Payments made using CORES do not require the submission of an FCC Form 159.

²² 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.

²³ Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

“Open Bills” tab and find the bill number associated with the NAL/Acct. No. The bill number is the NAL/Acct. No. (e.g., NAL/Acct. No. 1912345678 would be associated with FCC Bill Number 1912345678). Finally, 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 20554.²⁴ 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.²⁵ The written response must be filed with the Office of the Secretary, Federal Communications Commission, 45 L Street NE, Washington DC 20554, ATTN: Shaun Maher, Attorney, Video 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.²⁶ A courtesy copy should also be emailed to Shaun.Maher@fcc.gov to 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 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.²⁷

²⁴ See 47 CFR § 1.1914.

²⁵ 47 CFR §§ 1.16 and 1.80(g)(3).

²⁶ 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).

²⁷ See 47 U.S.C. 503(b)(2)(E); *Adrian Abramovich*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018).

13. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Southwest Colorado TV Translator Association, P.O. Box 1570, Cortez, CO 81321 and e-mailed to swcotv@swcotv.org.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau