

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

In the Matter of)

Delta Radio Corp.)

Licensee of Station KMPL (AM))

Sikeston, Missouri)

NAL Acct. No. 515KC0001

ORDER

Adopted: December 18, 1997

Released: December 23, 1997

By the Chief, Compliance and Information Bureau:

I. INTRODUCTION

1. Delta Radio Corp., licensee of Station KMPL(AM) (Petitioner), filed a Petition for Reconsideration, seeking review of the monetary forfeiture of \$8,000 issued pursuant to Section 503 of the Communications Act of 1934 as amended (Act), 47 U.S.C. § 503, and 1.80 of the Commission's rules, 47 C.F.R. § 1.80, for violating Sections 73.57, 73.61, 73.62, 73.1410, 73.1860 of the Commission's rules and the terms of the station's authorization. 47 C.F.R. §§ 73.57, 73.61, 73.62, 73.1410, and 73.1860. For the reasons provided below, the Bureau reduces its monetary forfeiture assessment to \$1,000.

II. BACKGROUND

2. On August 17, 1994, agents from the Compliance and Information Bureau's Kansas City Field Office inspected Station KMPL(AM), Sikeston, Missouri. On August 25, 1994, the Kansas City Field Office issued a Notice of Violation informing Petitioner that the inspection revealed that the station had been operating without tolerance of AM directional parameters and antenna pattern, and lacking adequate transmitter duty operator instructions. On September 14, 1994, the Petitioner submitted a response to the Notice of Violation, informing the Kansas City Field Office that all violations had been corrected. On December 30, 1994, the Kansas City Field Office issued a Notice of Apparent Liability (NAL) to Petitioner in the amount of \$8,000 for willful violation of Sections 73.57, 73.61, 73.62, 73.1410, 73.1860 of the Commission's rules and the terms of the station's authorization. 47 C.F.R. §§ 73.57, 73.61, 73.62, 73.1410, and 73.1860.

3. On January 30, 1995, Petitioner responded to the NAL. Petitioner states that the chief station operator checked the antenna calibration readings at the transmitter site, rather than using the remote antenna current calibration, which explains why the remote readings were not correct. Petitioner also states that the automatic alarm for the remote control metering was not

disconnected by station employees, which Petitioner claims is implied by the NAL. Instead, Petitioner claims that a contract engineer, who had been hired to install and maintain the alarm system, never in fact connected the alarms at the time of installation. In addition, Petitioner states that actual field strength measurements were within parameters shortly before the inspection, and that subsequent out of tolerance readings might have been related to a snake's carcass found in the power divider. With respect to the directional antenna system tolerances, Petitioner admits they were out of tolerance for a period of time during the chief operator's vacation but not for as long a period as cited in the NAL (six weeks). Petitioner claims that the transmitter duty operators were provided with instruction manuals and should have reported out of tolerance readings to the chief operator but they did not. Finally, Petitioner maintains that it cannot pay the fine for reasons of financial hardship.

4. On February 23, 1995, the Kansas City Field Office issued a Forfeiture Order (NOF) in the amount of \$8,000. The Forfeiture Order emphasizes that the Petitioner was given advance notice of the pending inspection. The Order states that Petitioner's claim that the violations were the responsibility of the chief operator or duty operators does not excuse the Petitioner of liability for the violations. Responding to the Petitioner's concern about showing that the automatic alarms were not disconnected at the request of station management, the Order states that this issue has no bearing on the Petitioner's liability for the forfeiture. The Order recites that Petitioner failed to sufficiently train its duty operators to recognize when out of tolerance conditions were occurring. With respect to the presence of the snake in the power divider coils, the Order states that the Petitioner's liability is not predicated on the out of tolerance condition that occurred as a result of this phenomenon, but rather on the Petitioner's failure to take corrective action once the out of tolerance condition occurred. Regarding Petitioner's claim that it is unable to pay the fine, the Order notes that Petitioner had sufficient gross income to pay the fine (as disclosed by its tax returns for three previous years). Finally, the Order denies Petitioner's claim that the violations were not willful and reiterates Petitioner's ultimate responsibility for the infractions.

5. On reconsideration, Petitioner asserts that the Bureau failed to take into account the nature and extent of the violations as required by Section 503(b) of the Act. In this regard, Petitioner again claims that the actual out of tolerance readings were caused by the snake's carcass, that this was a circumstance completely outside the licensee's control, and that this occurrence coincided with the chief station operator's vacation, and would have been discovered by the chief operator in the normal course of operation upon the operator's return from vacation. In addition, Petitioner argues that its failure to perform the required calibration of its remote monitoring equipment and train its duty operators are less serious violations than the actual out of tolerance conditions caused by the snake. Petitioner argues that these violations too would have been discovered by the chief operator upon his return from vacation. Petitioner again contends that the remote alarm issue was a factor behind the NAL, and particularly relates to the Bureau's determination that Petitioner's violations were willful. Citing its August 25, 1994, response to the Notice of Violation, Petitioner argues that the fine should be reduced or rescinded on the grounds that it took corrective action promptly to comply with the Commission's rules. Finally, Petitioner again maintains that it is financially unable to pay the forfeiture.

III. DISCUSSION

6. Although Petitioner blames the out of tolerance conditions on "the snake problem," as the Forfeiture Order emphasized, the Petitioner's liability was predicated on its failure to take corrective action once the out of tolerance condition developed. While such unusual events may happen, and in this case happened coincidental with the chief operator's vacation, the out of tolerance conditions were allowed to continue until detected during the August 17, 1994, inspection. Petitioner's claim that the out of tolerance conditions would have been discovered by the chief operator upon return from vacation is speculative and irrelevant to the conditions which existed at the time of inspection. Likewise, Petitioner's claim that the required calibration of the remote metering equipment and training of the transmitter duty operators would have been performed by the chief operator upon discovering the out of tolerance conditions does not absolve Petitioner of liability for the continuing out of tolerance conditions that were found to exist in the August 17, 1994 inspection. Inasmuch as the petitioner failed to raise new arguments on these issues, the forfeiture may not be reduced or cancelled on the grounds discussed above.

7. However, Petitioner raises two issues, also presented previously, that, upon further consideration, warrant reduction of the forfeiture. In its response to the NAL, Petitioner contends that the automatic alarm for the remote control metering was not disconnected at the request of station management, as stated in the NAL, but instead never was connected by the engineer that installed the system. Although the Forfeiture Order explained that the automatic alarm issue had no bearing on the issue of liability, but was simply mentioned to show that the alarm was available but not used, Petitioner contends that the initial determination that station management had disconnected the alarm was a substantial factor in issuing the NAL. In fact, the automatic alarm was mentioned a total of five times, three times expressly, emphasizing that the alarms reportedly had been disconnected at the request of station management. Although the NAL did not apportion the total forfeiture amount according to the particular violation, it appears that the automatic alarm disconnection had some significant bearing on the forfeiture amount in this case, and the amount, therefore, should be reduced.

8. Secondly, on reconsideration, Petitioner submits additional proof that it is unable to pay the assessed forfeiture, and contends that it will suffer substantial financial hardship if it is forced to pay the total amount assessed. Although the Forfeiture Order discussed Petitioner's financial information but did not reduce the fine, Petitioner now argues that the reliance upon gross income does not accurately reflect the manner in which a business operates. In this connection, Petitioner contends that focusing on gross income -- or the money coming in -- is irrelevant if a business is spending more than that amount just to keep operating. Petitioner submits that the station has been operating at a loss for the tax years submitted (1992 - 1994), that the station is suffering a rapidly increasing loss in net worth, and that this situation is typical of small market broadcasters like itself. We agree. The Commission has considered market size in reducing forfeitures issued to broadcasters in small markets, see Benito Rish, 10 FCC Rcd 2861, 2862 (1995); and Liability of Sitka Broadcasting Company, Inc., 70 FCC 2d 2375 (1979), and, persuaded by Petitioner's further arguments on this issue, will consider the small market size in this case to warrant reduction of the forfeiture amount. Accordingly, we are reducing the

monetary forfeiture to \$1,000 based on the particular facts of this case.

IV. ORDERING CLAUSES

9. **IT IS ORDERED THAT**, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Sections 1.80 and 1.106 of the Rules, 47 C.F.R. §§ 1.80, 1.106, the Petition for Reconsideration is **GRANTED** in part and the monetary forfeiture is **REDUCED**. Petitioner has thirty (30) days from the date of release of this Order in which to appeal this decision pursuant to Section 1.115 of the rules. 47 C.F.R. § 1.115.

10. **IT IS FURTHER ORDERED** that Delta Radio Corp., licensee of Station KMPL (AM), must pay the forfeiture amount of one thousand dollars (\$1,000) within thirty (30) days of the release of this *Order*. Payment may be made by check or money order payable to the Federal Communications Commission. Payment may also be made by credit card with appropriate documentation¹ Please place NAL/Acct. No. 515KC0001 on the remittance and mail to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by certified mail, return receipt requested, to Delta Radio Corp. and its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION



Richard D. Lee
Chief, Compliance and Information Bureau

¹ Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules. For information regarding credit card payments, contact the Chief, Billings and Collections at (202) 418-1995.