

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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Return Receipt Requested

**In the Matter of**

New Wave Broadcasting, L.P.	)	
Licensee of Radio Station KPOI-FM	)	File No. EB-02-HL-038
1833 Kalakaua Avenue, Suite 500	)	NAL/Acct No. 200232860001
Honolulu, Hawaii 96815	)	FRN # 0005-3920-22

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Released:** May 16, 2002

By the Enforcement Bureau: Honolulu Resident Agent Office

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that New Wave Broadcasting, L.P., ("New Wave"), licensee of station KPOI-FM, Honolulu, Hawaii, has apparently willfully and repeatedly violated Section 11.61(a)(1)(v) of the Commission's Rules,<sup>1</sup> by failing to retransmit the Emergency Alert System ("EAS") Required Monthly Test ("RMT"). We conclude, pursuant to Section 503(b) of the Communications Act, as amended ("Act"),<sup>2</sup> that New Wave is apparently liable for a forfeiture in the amount of two thousand dollars (\$2,000).

**II. BACKGROUND**

2. On June 1, 2001, an Agent of the FCC's Honolulu Resident Agent Office monitored radio station KPOI-FM on 97.5 MHz, between the times of 11:15 a.m. HST and 12:00 p.m. HST. The Agent observed that KPOI-FM did not retransmit the EAS RMT initiated by the Hawaii State Civil Defense at approximately 11:15 a.m. HST.

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<sup>1</sup> 47 C.F.R § 11.61(a)(1)(v).

<sup>2</sup> 47 U.S.C. § 503(b).

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3. An Official Notice of Violation (“NOV”) was issued on June 4, 2001 to New Wave for failure to retransmit the EAS RMT within fifteen minutes of receipt, in violation of Section 11.61(a)(1)(v) of the Commission’s Rules.<sup>3</sup> New Wave responded to the NOV on June 15, 2001, admitted that they violated Section 11.61(a)(1)(v) due to an operator error, and stated that action was being taken to ensure all personnel were aware of proper EAS procedures.

4. Ten months later, on April 1, 2002, an Agent of the FCC’s Honolulu Resident Agent Office again monitored radio station KPOI-FM on 97.5 MHz, between the times of 11:10 a.m. HST and 12:30 p.m. HST. The Agent observed that KPOI-FM did not retransmit the EAS RMT initiated by the Hawaii State Civil Defense at approximately 11:14 a.m. HST.

5. On April 3, 2002, an Agent of the FCC’s Honolulu Resident Agent Office inspected radio station KPOI-FM, located at 1833 Kalakaua Avenue, Suite 500, Honolulu, Hawaii. During the inspection, the Agent requested that the operator on duty transmit a Required Weekly Test (“RWT”) to ensure the EAS unit was working properly. The operator attempted to initiate the RWT, but was unable to transmit the test on 97.5 MHz due to improperly set audio levels.

### III. DISCUSSION

6. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.<sup>4</sup> The term “willful” as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.<sup>5</sup> The term “repeated” means the commission or omission of an act more than once.<sup>6</sup>

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<sup>3</sup> 47 C.F.R § 11.61(a)(1)(v).

<sup>4</sup> 47 U.S.C. §503(b).

<sup>5</sup> Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>6</sup> 47 U.S.C. §312(f)(2).

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7. Section 11.61(a)(1)(v) of the Commission's Rules requires that monthly EAS tests be retransmitted within 15 minutes of receipt by broadcast stations in an EAS Local Area or State.<sup>7</sup> Based on the evidence before us, we find that on June 1, 2001 and April 1, 2002, New Wave willfully and repeatedly violated Section 11.61(a)(1)(v) of the Commission's Rules<sup>8</sup> by failing to retransmit the EAS monthly test. In addition, we find that the KPOI-FM EAS encoder was functionally inoperative at the time of inspection on April 3, 2002, as it was initially unable to generate an over-the-air EAS test.

8. Pursuant to *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines ("Forfeiture Policy Statement")*<sup>9</sup>, the base forfeiture amount for failure to have EAS equipment installed or operational is \$8,000. The *Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the Commission's rule requiring timely retransmission of the monthly EAS tests. Therefore we must determine what an appropriate amount should be for this violation.<sup>10</sup> It is necessary to retransmit the monthly EAS tests to ensure the operational integrity of the EAS system in the event of an actual disaster. The requirement that stations retransmit the monthly EAS tests is similar in both nature and severity to other required operational readiness checks. As failure to make measurements or conduct required monitoring carries a base forfeiture amount of \$2,000, pursuant to the *Forfeiture Policy Statement*, the forfeiture will be assessed in the amount of \$2,000.

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<sup>7</sup> 47 C.F.R. § 11.61(a)(1)(v). Effective May 16, 2002, the Commission's Rules require monthly EAS tests to be retransmitted within 60 minutes of receipt of the required monthly test message. *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, EB Docket No. 01-66, *Report and Order*, FCC 02-64 (Feb. 26, 2002); 67 Fed Reg 18502 (April 16, 2002)

<sup>8</sup> 47 C.F.R. § 11.61(a)(1)(v).

<sup>9</sup> 12 FCC Rcd 17087 (1997), recon. denied 15 FCC Rcd 303 (1999).

<sup>10</sup> The fact that the *Forfeiture Policy Statement* does not specify a base amount does not indicate that no forfeiture should be imposed. The *Forfeiture Policy Statement* states that "any omission of a specific rule violation from the...[*Forfeiture Policy Statement*]...should not signal that the Commission considers any unlisted violation as nonexistent or unimportant." *Forfeiture Policy Statement*, 12 FCC Rcd at 17,099. See e.g., *American Tower Corporation*, 16 FCC Rcd 1282 (2001).

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#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>11</sup> and Sections 0.111, 0.311 and 1.80 of the Commission's Rules,<sup>12</sup> New Wave Broadcasting, L.P., is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of two thousand dollars (\$2,000) for violating Section 11.61(a)(1)(v) of the Commission's Rules.<sup>13</sup>

10. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's Rules,<sup>14</sup> within thirty days of the release date of this NOTICE OF APPARENT LIABILITY New Wave Broadcasting, L.P., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. 200232860001 and the FRN # 000 5-3920-22.

12. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Technical and Public Safety Division, 445 12<sup>th</sup> Street, S.W., Washington, DC 20554 and must include the NAL/Acct. No. 200232860001.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner'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.

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<sup>11</sup> 47 U.S.C. § 503(b).

<sup>12</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80.

<sup>13</sup> 47 C.F.R. § 11.61(a)(1)(v).

<sup>14</sup> 47 C.F.R. § 1.80.

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14. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operation Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>15</sup>

15. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail Return Receipt Requested to New Wave Broadcasting, L.P. at 1833 Kalakaua Avenue, Suite 500, Honolulu, Hawaii 96815.

FEDERAL COMMUNICATIONS COMMISSION

Ryan T. Hagihara  
Honolulu Resident Agent

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<sup>15</sup> See 47 C.F.R. § 1.1914.