

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

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| In the Matter of |) | |
| |) | |
| Sam Bushman |) | File Number EB-01-DV-388 |
| |) | NAL/Acct. No. 200232800003 |
| Licensee of Station KNAK(AM) |) | FRN 0003-7785-45 |
| Delta, Utah |) | |
| Facility ID #35207 |) | |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: May 17, 2002

By the District Director, Denver Office, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Sam Bushman, licensee of Station KNAK, in Delta, Utah, apparently willfully and repeatedly violated Section 73.49 of the Commission's Rules ("Rules")¹ by failing to provide an effective locked fence enclosing the station's antenna structure. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),² that Sam Bushman is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. During a routine inspection on August 16, 2001, FCC Agents from the Denver Office inspected the registered antenna structure for AM station KNAK, in Delta, Utah (ASR# 1065027), licensed to Sam Bushman. The agents found the gate to the fence enclosing the AM antenna structure lying on the ground, completely detached from the fence.

3. On December 27, 2001, the Denver Office issued a Notice of Violation ("NOV") to Sam Bushman for the violations observed on August 16, 2001, including the violation of the AM transmission system fencing requirements in Section 73.49 of the Commission's Rules. On January 18, 2002, the Denver Office received both a fax and e-mail reply to the NOV. Mr. Bushman stated that the gate had collapsed due to "vandals and/or strong wind gusts," and that he was in the process of having the gate repaired. On March 5, 2002, the Denver Office received photographs via e-mail from Mr. Bushman of the completed repairs to KNAK's gate and fence enclosing the antenna structure.

¹ 47 C.F.R. § 73.49.

² 47 U.S.C. § 503(b).

4. The December 27, 2001, NOV was the second NOV issued by the Denver Office to Sam Bushman for a violation by station KNAK of the AM transmission system fencing requirements. On May 26, 1999, during an inspection of station KNAK, an Agent from the Denver Office found the east side of the fence enclosing this same antenna structure in poor repair with a large hole in the fence. A NOV was issued to Sam Bushman on June 4, 1999, for multiple violations, including Section 73.49. Mr. Bushman responded on June 28, 1999, and provided photographic proof of the repairs.

III. DISCUSSION

5. 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 willfully or repeatedly 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.³ The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.⁴

6. Section 73.49 of the Rules states in part that "[a]ntenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures." KNAK's license describes the antenna system as a series-excited radiator. A "series excited" radiator may also be described as a "series fed" radiator. The AM transmission fencing requirements thus apply to station KNAK. The May 26, 1999, inspection of the KNAK antenna structure found the fence enclosing the antenna structure broken on the east side allowing access to the radiating tower. The August 16, 2001, inspection of the KNAK antenna structure revealed that the gate on the fence enclosing the antenna structure was not attached, therefore allowing access to the radiating tower. Effective base fencing is an important safety requirement. AM series-fed antenna structures radiate energy that renders any physical contact with the antenna structure itself extremely dangerous. In addition, AM antenna structures are capable of generating radio frequency fields at the base of the antenna structure that may exceed the Commission's maximum permissible exposure guidelines. Effective base fencing is thus important to prevent possible contact with the radiating structure and excessive radio frequency radiation exposure.

7. Based on the evidence before us, we find that Sam Bushman, licensee of station KNAK failed to enclose the AM transmission system with an effective locked fence or other enclosure in willful and repeated violation of Section 73.49 of the Rules. The base forfeiture amount set by *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, ("*Forfeiture Policy Statement*"),⁵ and Section 1.80 of the Commissions Rules,⁶

³ 47 U.S.C. § 503(b).

⁴ 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). Section 312(f)(2), which also applies to Section 503(b), provides: "[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."

⁵ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁶ 47 C.F.R. § 1.80.

for failure to comply with AM tower fencing is \$7,000. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,⁷ which include the nature, circumstances, extent, and gravity of the violation(s), and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require. Applying the *Forfeiture Policy Statement* and the statutory factors to the instant case, a \$7,000 forfeiture is warranted.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,⁸ and Sections 0.111, 0.311 and 1.80 of the Commission's Rules,⁹ Sam Bushman is hereby NOTIFIED of an APPARENT LIABILITY FOR A FORFEITURE in the amount of seven thousand dollars (\$7,000) for violation of Section 73.49 of the Rules, 47 C.F.R. §73.49.

9. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's Rules,¹⁰ within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Sam Bushman SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

10. 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 must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption.

11. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Technical and Public Safety Division, 445 12th Street, S.W., Washington, D.C. 20554 and must include the NAL/Acct. No. referenced in the caption.

12. 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 ("GAAP"); 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.

13. 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. 20554.¹¹

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ 47 U.S.C. § 503(b).

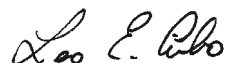
⁹ 47 C.F.R. §§ 0.111, 0.311, 1.80.

¹⁰ 47 C.F.R. § 1.80.

¹¹ See 47 C.F.R. § 1.1914.

14. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail # 7001 0320 0002 9702 4092, Return Receipt Requested, to Sam Bushman, P. O. Box 636, 315 East 300 South, Delta, UT 84624.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Leo E. Cirbo". The signature is written in a cursive style with a large initial 'L'.

Leo E. Cirbo
District Director, Denver Office