

Federal Communications Commission

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

In the Matter of)	
)	
Ely Radio, LLC)	File Number: EB-08-SF-0039
)	
Antenna Structure Owner)	NAL/Acct. No.: 200932960001
Winnemucca, NV)	FRN: 0014848899
ASR # 1005854)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: October 31, 2008

By the District Director, San Francisco District Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Ely Radio LLC ("Ely"), owner of antenna structure number 1005854, in Winnemucca, Nevada, apparently repeatedly violated Section 303(q) of the Communications Act of 1934, as amended, ("Act"),¹ and Section 17.51(a) of the Commission's Rules ("Rules")² by failing to exhibit the structure's red obstruction lighting from sunset to sunrise; and by failing to make observations of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights, a violation of Section 17.47(a) of the Rules.³ Ely's failure to make the required observations of the lighting on the antenna structure resulted in its failure to notify the nearest Flight Service Station of the Federal Aviation Administration ("FAA") of the outage of the flashing obstruction lights, a violation of Section 17.48 of the Rules.⁴ Finally, Ely apparently repeatedly failed to immediately notify the Commission of a change in ownership information for antenna structure number 1005854, a violation of section 17.57 of the Commission's Rules ("Rules").⁵ We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁶ that Ely is apparently liable for a forfeiture in the amount of thirteen thousand dollars (\$13,000).

II. BACKGROUND

2. Antenna structure number 1005854 is an antenna tower of 61.8 meters (202.7 feet) in height above ground. According to the antenna structure registration ("ASR") for antenna structure

¹ 47 U.S.C. § 303(q).

² 47 C.F.R. § 17.51(a).

³ 47 C.F.R. § 17.47(a).

⁴ 47 C.F.R. § 17.48.

⁵ 47 C.F.R. § 17.57.

⁶ 47 U.S.C. § 503(b).

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1005854, the structure is required to be painted and lit in accordance with specific Chapters of the FAA Advisory Circular for Obstruction Marking and Lighting.⁷ Specifically, the structure is required to be painted,⁸ and have, at its top, a flashing beacon equipped with two lamps and red filters, along with at least two lamps enclosed in red obstruction light globes⁹ located on a level at approximately one-half the overall height of the tower.¹⁰ The lights on antenna structure number 1005854 are required to burn continuously or be controlled by a light sensitive device.¹¹

3. On March 11, 2008, in response to a complaint that the red beacon lighting on the antenna structure used to broadcast KWNA(AM) was out, a San Francisco agent determined that the structure was antenna structure number 1005854, registered to Sheen Broadcasting Company. The agent then contacted the Federal Aviation Administration ("FAA") Flight Service Station to determine if the tower light outage had been reported and if a Notice to Airmen ("NOTAM") had been issued for the structure. The FAA reported that there were no NOTAMs on file for antenna structure number 1005854 and advised that they would issue a NOTAM for the structure. The San Francisco agent then contacted the Winnemucca Police department and asked them to make an observation of antenna structure 1005854. At approximately 9:00 p.m. PDT, a Winnemucca Police officer drove to antenna structure 1005854 and observed no lights illuminated on the antenna structure.

4. On March 12, 2008, a San Francisco agent inspected antenna structure number 1005854, located at 5130 Weikel Drive in Winnemucca, Nevada.¹² The agent observed that at 8:10 p.m. PDT, no lights were illuminated on antenna structure number 1005854.¹³

5. On March 13, 2008, the San Francisco agent inspected station KWNA(AM) at the KWNA(AM) transmitter address of 5130 Weikel Drive, in Winnemucca, Nevada, and the KWNA(AM) studio address of 355 West Fourth Street, Winnemucca. The San Francisco agent interviewed the owner of Ely and the general manager and the programming director of KWNA(AM). The Ely and KWNA(AM) management told the San Francisco agent that for about the past two months, when the flasher beacon rotated, there was noise getting into the audio of the KWNA(AM), so they shut off the lights on antenna structure number 1005854. They further told the San Francisco agent that they were unable to determine if this was a grounding problem or antenna tuning problem, so they kept antenna structure lights off until they could fix the problem. Ely's owner stated that he spoke to the FAA a year ago and notified the FAA over the past two months about the outage, but did not make any entries in the station log to memorialize this. Ely's owner also stated that he believed that antenna structure number 1005854 was less than 200 feet in height and that the airport does not have a control tower. Ely's owner further stated that he wanted to move the antenna structure to a new location. The KWNA(AM) programming director was also contacted by the owner of the previous licensee of KWNA(AM), Sheen Broadcasting Company ("Sheen"), about the light outage on the antenna structure. Ely and KWNA(AM)

⁷ FAA Circular Number 70/7460-1J, Chapters 3, 4, 5 and 13.

⁸ FAA Circular Number 70/7460-1J, Chapters 3 and 13.

⁹ FAA Circular Number 70/7460-1J, Chapters 4, 5 and 13.

¹⁰ FAA Circular Number 70/7460-1J, Appendix 1, Figure 11.

¹¹ FAA Circular Number 70/7460-1J, Chapters 5 and 13.

¹² The agent noted that unlike the street address listed, the latitude and longitude data shown on the antenna structure registration for antenna structure 1005854 did not correspond to its actual location.

¹³ According to the U.S. Naval Observatory, sunset in Winnemucca, Nevada, occurred at 5:55 p.m., PDT, on March 12, 2008.

management also told the San Francisco agent that Ely leases the land, building and tower from Sheen; that there is no agreement between the two parties concerning who monitors the lights; and that they believe that the lights work by photocell. The KWNA(AM) management also stated that they did not notify Sheen when they turned the lights off on antenna structure number 1005854.

6. Later on March 13, 2008, the San Francisco agent interviewed Sheen. Sheen stated that he had received several complaints about the lighting on antenna structure number 1005854 being out during the previous six to nine months and that he was aware that there was heliport less than a mile from the antenna structure. Sheen also stated that he rents the land and transmitter building to Ely for KWNA(AM), but that all of the assets and equipment to operate KWNA(AM), including antenna structure number 1005854, were sold to Ely as of December 1, 2006.

7. Still on March 13, 2008, at 7:30 p.m. PDT, the San Francisco agent met with the KWNA(AM) general manager at the KWNA(AM) transmitter site. The lights on the antenna structure were not functioning. The KWNA(AM) general manager switched on the power to antenna structure number 1005854, and the San Francisco agent observed that the lights on the antenna structure were functioning. As no noise was heard in the KMNA(AM) audio, the general manager left the lights on the structure on.¹⁴

8. On March 17, 2008, Sheen faxed to the San Francisco agent a copy of the Asset Purchase Agreement by and between Sheen Broadcasting Co., Seller, and Ely Radio LLC, Buyer, for the sale and purchase of stations KWNA AM and FM, Winnemucca, Nevada (“Sales Agreement”). Section 2 of the Sales Agreement states that the “Seller will sell, assign, transfer, convey and deliver to buyer . . . [a]ll tangible personal property and fixtures owned by Seller used or useful in the operation of the station.” Section 2.4 and Section 2.5 of the Sales Agreement detail the real property lease and [a] lease on the building owned by the Seller which is used as the Station’s studios and offices” Section 3 of the Sales Agreement details the “Excluded Assets” and antenna structure number 1005854 is not listed.

9. On June 26, 2008, the San Francisco Office issued Letters of Inquiry to both Ely and Sheen asking each if they were the owner of antenna structure number 1005854 and if they were aware of the registration, painting and lighting requirement for antenna structure 1005854. In their responses, both Ely and Sheen denied ownership of antenna structure number 1005854. Ely stated that the Sales Agreement “did not include the transmitter site or tower” and that Ely intended to relocate the station to a new transmitter site with a “shorter ¼-wave tower.” Ely also stated that it has paid rental checks to Sheen every month and that Sheen remains the owner of the tower and transmitter site used by KWNA(AM). Ely further stated that the owner of Sheen Broadcasting Company continues to occupy the residence on the transmitter site; that “it made sense for him to retain responsibility and for observing and ensuring compliance with the FAA and FCC lighting and other tower requirements;” that the light switches are on his property; and that Mr. Sheen “never brought to [Ely’s] attention that that the tower was not lit properly.” Sheen responded to the Letter of Inquiry stating that Sheen had sold all of its business assets and equipment to operate KWNA(AM) and KWNA-FM to Ely as of December 1, 2006; that Sheen Broadcasting Company ceased to exist on January 1, 2007; and that Sheen “is leasing a building and ground to [Ely] for the AM transmitter and the tower in question.”

III. DISCUSSION

10. 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

¹⁴ On March 20, 2008, the KWNA(AM) general manager contacted the San Francisco Office and stated that they would do visual observations of the lighting on antenna structure number 1005854.

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. The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.¹⁵ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹⁶

11. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.¹⁷ Section 17.51 of the Rules states that all red obstruction lighting shall be exhibited from sunset to sunrise unless otherwise specified.¹⁸ According to its ASR record, antenna structure number 1005854 is required to have, at its top, a flashing beacon equipped with two lamps and red filters, along with at least two lamps enclosed in red obstruction light globes located on a level at approximately one-half the overall height of the tower.¹⁹ Section 17.47(a) requires that the owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications shall make an observation of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure.²⁰ Section 17.48 of the Rules requires the owner of an antenna structure to report immediately by telephone or telegraph to the nearest Flight Service Station or office of the FAA any observed or otherwise known extinguishment or improper functioning or any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes.²¹ Section 17.57 of the Rules requires the owner of an antenna structure to immediately notify the Commission, using FCC Form 854, upon any change in structure height or change in ownership information.²²

12. On March 11, 2008, a San Francisco agent, in response to complaints concerning lighting outages on antenna structure number 1005854 in Winnemucca, Nevada, contacted the FAA Flight Service Station and found that Ely had not reported the outages, requiring the San Francisco agent to request the issuance of NOTAM.²³ A Winnemucca Police officer confirmed after sunset on March 11, 2008, the lights on antenna structure number 1005854 were not functioning. On March 12, 2008, and March 13, 2008, a San Francisco agent observed antenna structure number 1005854 after sunset and found that the lights on the structure were extinguished. In an interview with Ely and KWNA(AM) management, the San Francisco

¹⁵ 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).

¹⁶ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) 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."

¹⁷ 47 U.S.C. § 303(q).

¹⁸ 47 C.F.R. § 17.51(a).

¹⁹ FAA Circular Number 70/7460-1J, Chapters 4 and 5.

²⁰ 47 C.F.R. § 17.47(a).

²¹ 47 C.F.R. § 17.48.

²² 47 C.F.R. § 17.57.

²³ The San Francisco agent's request to issue a NOTAM was done to protect the public safety, given that the FAA-mandated lighting on the structure was not functioning and that the antenna structure was therefore a potential hazard to air navigation. We caution antenna structure owners, however, that it is incumbent upon them, and not a third party, to notify the FAA of any extinguishments or malfunctioning lights.

agent was advised that the lights on antenna structure number 1005854 had been turned off by KWNA(AM) personnel because of noise that was being made by the lighting mechanism. In other words, Ely and KWNA(AM) personnel had control over antenna structure 1005854 and its lighting, as evidenced by their ability to switch the lighting on and off to conform to their operation of KWNA(AM). Although the owner of Ely told the agent that the FAA had been advised of the outage, the agent could find no evidence of such a notification, nor were there any notations in the KWNA(AM) logs concerning the outage. Additionally, Ely and KWNA(AM) management acknowledged that they did not perform daily observations of the lighting on antenna structure number 1005854.

13. Although Ely argues that it is not the owner of antenna structure number 1005854, and that it leases the antenna structure from Sheen, the former licensee of KWNA(AM), we conclude that the preponderance of the evidence suggests otherwise. In the Sales Agreement, Sheen conveyed to Ely “[a]ll tangible personal property and fixtures owned by Seller used or useful in the operation of the station.”²⁴ As Ely continues to use antenna structure number 1005854 to broadcast KWNA(AM), there is no doubt that the structure, whether it is considered a fixture or personal property, is used or is useful in the operation of KWNA(AM). Additionally, the lease in question, according to the Sale Agreement, covers only the real property of the transmitter site and the building used for the KWNA(AM) studios and offices.²⁵ Further, Ely’s continued use of antenna structure number 1005854 for the operation of KWNA(AM), as described above, demonstrates its access to control the antenna structure as well as the lighting on the antenna structure.

14. Ely’s failure to monitor the lights on antenna structure number 1005854 resulted in its failure to notify the FAA Flight Service Station of the outage of the flashing obstruction lights, which are required to be exhibited from sunset to sunrise. Additionally, Ely purchased station KWNA(AM) and its assets from KWNA(AM)’s former owner in 2006, yet the ownership information for antenna structure number 1005854 has not yet been updated. All of these violations occurred on more than one day, therefore, they were repeated. Based on the evidence before us, we find that Ely apparently repeatedly violated Section 303(q) of the Act, and Sections 17.51(a), 17.47(a), 17.48 and 17.57 of the Rules, by failing to maintain the required red obstruction lighting on antenna structure with registration number 1005854; by failing to monitor, either visually or through an automatic monitoring system, the antenna structure’s lights; failing to report the extinguishment of the flashing obstruction lighting; and by failing to immediately notify the Commission of a change in ownership information on antenna structure number 1005854.

15. 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*”), and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed lighting and/or marking of an antenna structure is \$10,000, and the base forfeiture amount for failing to file required forms or information is \$3,000.²⁶ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, and history of prior

²⁴ A “fixture” is defined as “[a]n article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the real property That which is fixed or attached to something permanently as an appendage, and not removable.” *Black’s Law Dictionary*, West Publishing (Sixth Edition 1990).

²⁵ We note that Ely also maintained control of the lights on the antenna structure and we are troubled by its statement, in its response to the Letter of Inquiry, that Sheen did not notify Ely of problems with the lighting on structure, when Ely’s owner had previously told the San Francisco agent that he and his staff had turned the lights off on purpose and had notified the FAA.

²⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. §1.80.

offenses, ability to pay, and other such matters as justice may require.²⁷ Applying the *Forfeiture Policy Statement*, Section 1.80, and the statutory factors to the instant case, we conclude that Ely is apparently liable for a \$13,000 forfeiture.

16. We note that Ely's failure to notify the Commission of its ownership of antenna structure number 1005854 has not been corrected. Consequently, we will require Ely to send to the San Francisco Office, within thirty days of the release of the NAL, evidence that it has updated the antenna structure registration for antenna structure number 1005854, along with a copy of the FCC Form 854 filed to update the registration.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's Rules, Ely Radio, LLC, is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of thirteen thousand dollars (\$13,000) for violations of Section 303(q) of the Act, and Sections 17.47(a), 17.48, 17.51(a), and 17.57 of the Rules.²⁸

18. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Ely 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.

19. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Ely Radio, LLC, **SHALL FILE** with the San Francisco Office, the information required in paragraph 16, above.

20. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁹ Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Ely Radio, LLC, will also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

21. The response to the NAL, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, San Francisco Office, 5653 Stoneridge Drive, Suite 105, Pleasanton, California, 94588 and must include the NAL/Acct. No. referenced in the caption. An electronic copy shall

²⁷ 47 U.S.C. § 503(b)(2)(E).

²⁸ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 17.47(a), 17.48, 17.51(a), 17.57.

²⁹ See 47 C.F.R. § 1.1914.

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be sent to WR-Response@fcc.gov.

22. 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.

23. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Ely Radio, LLC, at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Thomas Van Stavern
District Director
San Francisco District Office
Western Region
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