

Federal Communications Commission

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

In the Matter of)
Mt. Rushmore Broadcasting, Inc.) File Numbers: EB-08-DV-0166
KRAL(AM)) EB-08-DV-0169
Rawlins, Wyoming) NAL/Acct. No.: 200932800003
Facility ID # 46736) FRN: 0008230559
KIQZ(FM))
Rawlins, Wyoming)
Facility ID # 46737)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: December 10, 2008

By the District Director, Denver District Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Mt. Rushmore Broadcasting, Inc. ("Mt. Rushmore"), licensee of stations KRAL(AM) and KIQZ(FM) serving Rawlins, Wyoming, apparently willfully and repeatedly violated Section 11.35(a) of the Commission's Rules ("Rules") by failing to ensure the operational readiness of the KRAL(AM) and KIQZ(FM) Emergency Alert System ("EAS") equipment; Section 73.3526 of the Rules, by failing to maintain a complete public inspection file for KRAL(AM) and KIQZ(FM); and Sections 1.903(a), 1.947(a), and 74.532(e) of the Rules by failing to operate station WHB734, an aural studio-transmitter-link ("STL"), from its licensed location. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), that Mt. Rushmore is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000).

II. BACKGROUND

2. On April 10, 2008, agents from the Enforcement Bureau's Denver District Office conducted an inspection of KRAL(AM) and KIQZ(FM) at the stations' main studio location of 2346 W. Spruce Street, in Rawlins, Wyoming. The inspection revealed that the EAS receive system utilized by both KRAL(AM) and KIQZ(FM) was not operational. The agents reviewed the KRAL(AM) and KIQZ(FM) EAS logs and observed that the all of the EAS entries were logged as Required Weekly Test ("RWT") transmitted by KRAL(AM) and KIQZ(FM) from October 31, 2007 to April 1, 2008. In response to questions from the Denver agents, Mt. Rushmore staff stated that the station was only transmitting the RWT. The staff claimed their understanding of the EAS equipment testing requirements was to transmit the RWT once a week and make a log entry. Therefore, the station did not observe or log the reception of any EAS activations or test. A physical inspection of the EAS equipment showed no evidence from the EAS encoder/decoder's printouts of any EAS activations or test being received.

1 47 C.F.R. §§ 11.35(a), 73.3526, 1.903(a), 1.947(a), and 74.532(e).

2 47 U.S.C. § 503(b).

3. Also on April 10, 2008, the FCC agents inspected the aural studio-to-transmitter link ("STL"), call sign WHB734, operating on a center frequency of 950.000 MHz, from the Mt. Rushmore studio at 2346 Spruce Street in Rawlins, Wyoming. The coordinates of the Mt. Rushmore studio are approximately 41° 47' 04" north latitude, 107° 15' 49" west longitude. At the time of the inspection, station WHB734 was operating from these coordinates. According to the WHB734 station authorization, the licensed coordinates are 41° 47' 18.8" north latitude, 107° 14' 33.1" west longitude with a physical street address of 415 West Buffalo Street, in Rawlins, Wyoming.

4. On April 11, 2008, the Denver agents returned to the Mt. Rushmore studio. The agents suggested that the Mt. Rushmore manager contact the stations' primary (LP-1) and secondary (LP-2) assignments to request an EAS test. KRAL(AM) and KIQZ(FM) are located in Carbon County, Wyoming. According to the Wyoming State Plan for the Emergency Alert System at the time of the inspection, with the most recent update noted on May 25, 2007, the LP-1 and LP-2 assignments were KUWR-FM and NOAA, respectively.³

5. The FCC agents also conducted an examination of the public inspection files for KRAL(AM) and KIQZ(FM) with the stations' manager on April 11, 2008. Among the items reviewed, the agents requested the quarterly radio issues/programs list for all quarters beginning from the term of the last renewal on October 1, 2005. The manager was unable to locate these items within the KRAL(AM) and KIQZ(FM) public inspection files.

6. When the inspections were completed on April 11, 2008, the agents reviewed the violations with the stations' manager. During the review, the agents informed the manager of the location violations found with the WHB734 station license. The manager stated that the WHB734 STL had been relocated from the 415 West Buffalo Street studio location to the 2346 Spruce Street Studio more than a year prior to the inspection. On April 11, 2008, station WHB734 continued transmitting on a center frequency of 950.000 MHz.

7. On December 10, 2008, a review of the Commission's databases reflected neither a change in the coordinates nor a change in the fixed location address for station WHB734. Additionally, there were no applications pending in the system for modifications to correct the licensing errors the agents communicated to Mt. Rushmore.

III. DISCUSSION

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

³ Mt. Rushmore's station manager contacted KUWR-FM to request the transmission of an EAS test. It was revealed that Mt. Rushmore's stations could not receive KUWR-FM's transmissions due to the great distance. KUWR-FM informed Mt. Rushmore that the translator in the adjacent town of Sinclair, WY, could be received in Rawlins, however, the translator had lost power during the storm that was in effect at the time of the inspection and would be out of service until at least the next day. Contact with NOAA was made but no complete EAS test was transmitted. Due to a combination of inclement weather, equipment problems, and available personnel with each of the assigned stations, no EAS test could be generated to troubleshoot the problems with Mt. Rushmore's EAS equipment.

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...."

(continued...)

means the commission or omission of such act more than once or for more than one day.⁵

9. The Rules provide that every AM and FM broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to not participate.⁶ The EAS provides the President and state and local governments with the capability to provide immediate and emergency communications and information to the general public.⁷ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.⁸ Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station.

10. Section 11.35 of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders and Attention Signal generating and receiving equipment is installed and operational so that the monitoring and transmitting functions are available during the times the station is in operation. Broadcast stations must also determine the cause of any failure to receive required monthly and weekly EAS tests, and must indicate in the station's log why any required tests were not received and when defective equipment is removed and restored to service.⁹ Section 11.52(d) of the Rules requires broadcast stations to monitor at least two EAS sources.¹⁰ The monitoring assignments of each broadcast station are specified in the State EAS Plan and FCC Mapbook. The requirement that stations monitor at least two EAS sources ensures redundancy of the EAS system in the event one of the sources fails.

11. Section 11.61(a)(1) and (2) of the Rules requires broadcast stations to (a) receive monthly EAS tests from designated local primary EAS sources and retransmit the monthly test within 60 minutes of its receipt and (b) conduct tests of the EAS header and EOM codes at least once a week at random days and times.¹¹ The requirement that stations monitor, receive and retransmit the required EAS tests ensures the operational integrity of the EAS system in the event of an actual disaster. Appropriate entries must be made in the broadcast station log as specified in Sections 73.1820 and 73.1840, indicating reasons why any tests were not received or transmitted.¹²

12. On April 11, 2008, the inspection and investigation by the Denver agents revealed that the EAS equipment for KRAL(AM) and KIQZ(FM) was apparently not operational because no evidence

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See Southern California Broadcasting Co., 6 FCC Rcd 4387 (1991).

⁵ 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."

⁶ 47 C.F.R. §§ 11.11 and 11.41.

⁷ 47 C.F.R. §§ 11.1 and 11.21.

⁸ 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

⁹ 47 C.F.R. § 11.35(a) and (b).

¹⁰ 47 C.F.R. § 11.52(d).

¹¹ 47 C.F.R. § 11.61. The required monthly and weekly tests are required to conform to the procedures in the EAS Operational Handbook. *See also, Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, 17 FCC Rcd 4055 (2002) (effective May 16, 2002, the required monthly EAS test must be retransmitted within 60 minutes of receipt).

¹² 47 C.F.R. §§ 73.1820 and 73.1840.

was found demonstrating the functionality of the equipment to receive tests and alerts from the assigned EAS LP-1 and LP-2 stations. Mt. Rushmore staff acknowledged that the stations did not utilize the EAS equipment to receive the required RMTs. Additionally, Mt. Rushmore failed to document in the EAS logs the lack of functionality of the EAS equipment for receipt of EAS transmissions. Mt. Rushmore was aware that EAS equipment was required for both stations, but failed to ensure the functionality of the equipment as required by the Rules. Therefore, we find that Mt. Rushmore's violation was willful. Mt. Rushmore's violation occurred on more than one day; therefore, the violation was repeated. Based on the evidence before us, we find that Mt. Rushmore apparently willfully and repeatedly violated Section 11.35(a) of the Rules by failing to ensure the operational readiness of the EAS equipment at KRAL(AM) and KIQZ(FM).

13. Section 73.3526(a)(2) of the Rules requires that every licensee of an AM and FM station licensee shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(10) and paragraphs (e)(12) through (e)(14) of this section as well as paragraph (e)(16) of this section.¹³ Further, as required by Section 73.3526(b), the public inspection file shall be maintained at the station's main studio location.¹⁴

14. Section 73.3526(e)(12) of the Rules requires licensees to place in their public inspection file, for each calendar quarter, a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period.¹⁵ This list is known as the radio issues/programs list and copies of the lists must be maintained in the file until final action has been taken on the station's next renewal application. The public inspection files for KRAL(AM) and KIQZ(FM) were missing quarterly radio issues/program lists for all quarters during the license term, which began on October 1, 2005. Therefore, Mt. Rushmore failed to comply with Section 73.3526(e)(12) of the Rules.

15. Mt. Rushmore was aware of the requirement to have a complete public inspection file for KRAL(AM) and KIQZ(FM) given its response in the renewal applications, FCC Form 303-S, filed June 1, 2005.¹⁶ In Section III, Question 3, for each station, Mt. Rushmore certified that the public inspection file had the proper documentation as required by Section 73.3526. Therefore, Mt. Rushmore's violation is willful. The station manager indicated he did not know the whereabouts of the material missing from the public inspection files, and no evidence could be found that the missing material was ever in place. This exclusion applied to at least two consecutive quarters of materials; therefore, Mt. Rushmore's violation is repeated. Where lapses occur in maintaining the public inspection file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee's rule violation.¹⁷ Based on the evidence before us, we find that Mt. Rushmore apparently willfully and repeatedly violated Section 73.3526 of the Rules by failing to ensure a complete public inspection file was properly maintained at the main studio location.

16. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service and with a valid authorization granted by the Commission.¹⁸ Section 1.947(a) of the Rules requires that all major modifications as defined in Section 1.929 of the Rules require prior Commission approval.¹⁹ Section 1.929(d)(1)(i) of the Rules defines one of the major actions as "any change in transmit antenna location

¹³ 47 C.F.R. § 73.3526(a)(2).

¹⁴ 47 C.F.R. § 73.3526(b).

¹⁵ 47 C.F.R. § 73.3526(e)(12).

¹⁶ See Mt. Rushmore's renewal applications for KRAL(AM) and KIQZ(FM), File Nos. BR-200500601BCT and BRH-20050601BCQ, respectively. Both applications were granted on September 28, 2005.

¹⁷ See *Padre Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999).

¹⁸ 47 C.F.R. § 1.903(a).

¹⁹ 47 C.F.R. § 1.947(a).

by more than 5 seconds in latitude or longitude for fixed point-to-point facilities."²⁰ Section 74.532(e) of the Rules states that each aural broadcast auxiliary station will be licensed at a specified transmitter location to communicate with a specified receiving location, and the direction of the main radiation lobe of the transmitting antenna will be a term of the station authorization.²¹ At the time of the inspection on April 10, 2008, Mt. Rushmore was found operating radio station WHB734 from a location inconsistent with the station's authorized coordinates and street address. The distance separating the point of operation from that of the license was greater than 1.1 miles (specifically, a difference of approximately 15 seconds of latitude and approximately 76 seconds of longitude). The licensee's station manager acknowledged the licensing inaccuracies, noting that station WHB734 had been operating from this location for over a year; therefore, the violation was willful. Station WHB734 was observed operating from the incorrect location on April 10 and 11, 2008. The violation occurred for more than one day, therefore, it was repeated. Based on the evidence before us, we find that Mt. Rushmore apparently willfully and repeatedly violated Sections 1.903(a), 1.947(a), and 74.532(e) of the Rules by failing to operate station WHB734 from its licensed location.

17. 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 EAS equipment installed but not operational is \$8,000, public file violations is \$10,000 and for the operation of a station from an unauthorized location is \$4,000.²² 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, 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 offenses, ability to pay, and other such matters as justice may require.²³ Because the KRAL(AM) and KIZQ(FM) public inspection files were partially complete, we conclude that a reduction in the base forfeiture amount for the public file violation to \$4,000 is appropriate for each station is appropriate. Applying the Forfeiture Policy Statement, Section 1.80, and the statutory factors to the instant case, we conclude that Mt. Rushmore is apparently liable for a \$20,000 forfeiture.

18. We note that, as of the date of this NAL, the Commission databases continue to reflect neither a change in the coordinates nor a change in the fixed location address for station WHB734. Consequently, we require Mt. Rushmore to report to the Denver Office, no more than thirty (30) days following the release of this Order how it achieved compliance with Section 1.903(a) of the Rules for station WHB734. Mt. Rushmore's report must be submitted in the form of an affidavit signed by an officer or director of Mt. Rushmore.

IV. ORDERING CLAUSES

19. 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, Mt. Rushmore Broadcasting, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for violations of 11.35(a), 73.3526, 1.903(a), 1.947(a), and 74.532(e).²⁴

20. **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, Mt. Rushmore

²⁰ 47 C.F.R. § 1.929(d)(1)(i).

²¹ 47 C.F.R. § 11.35(a), 73.3526, 1.903(a), 1.947(a) and 74.532(e).

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

²³ 47 U.S.C. § 503(b)(2)(E).

²⁴ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 11.35(a), 73.3526, 1.903(a), 1.947(a), and 74.532(e).

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Broadcasting, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

21. **IT IS FURTHER ORDERED** that, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Mt. Rushmore Broadcasting, Inc., **SHALL FILE** with the Denver Office, the information required in paragraph 18, above.

22. 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. 20554.²⁵ Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Mt. Rushmore Broadcasting, Inc. will also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

23. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, Colorado, 80226, and must include the NAL/Acct. No. referenced in the caption.

24. 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.

25. **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 Mt. Rushmore Broadcasting, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears
District Director
Denver District Office
Western Region
Enforcement Bureau

²⁵ See 47 C.F.R. § 1.1914.