

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

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| <b>In the Matter of</b><br><br>FM Broadcast Station KNEC<br>Arnold Broadcasting Company, Inc.<br>Sterling, Colorado 80751 | )<br>)<br>)<br>)<br>)<br>) | <b>File No. EB-99-DV-446</b><br><br><b>NAL/Acct. No. 915DV0001</b> |
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**MEMORANDUM OPINION AND ORDER**

**Adopted: June 28, 2001**

**Released: July 5, 2001**

By the Commission:

1. In this Order, we grant in part and deny in part the January 31, 2001 application for review filed by Arnold Broadcasting Company, Inc. ("Arnold"), licensee of Station KNEC-FM, of the *Memorandum Opinion and Order*<sup>1</sup> issued by the Enforcement Bureau in this proceeding. Pursuant to Section 503(b) of the Communications Act of 1934, as amended ("the Act")<sup>2</sup>, and Section 1.80 of the Commission's Rules ("the Rules") the Enforcement Bureau ("EB") found Arnold liable for a monetary forfeiture in the amount of \$14,000 for willful violation of the following sections of the Rules: 11.35 (failure to install and maintain operable Emergency Alert System ("EAS") equipment), 73.1350 (failure to have a transmitter control system in place which would allow the transmitter to be shut down within three minutes of an event requiring shut down), 73.1820 (failure to make required entries into the station log), and 73.1870<sup>3</sup> (failure to designate and post the designation of a chief operator for the station). For the reasons discussed below, we reduce the forfeiture to \$10,000.

**BACKGROUND**

2. On May 19, 1999, agents of the Commission's Denver Field Office ("Denver Office") conducted a routine inspection of FM broadcast station KNEC. The agents found several violations, including those noted above. On June 7, 1999, the District Director of the Denver Office issued a Notice of Apparent Liability ("NAL") to Arnold in the amount of \$16,000 for violations of Sections 11.35, 11.61, 17.4, 73.1225, 73.1350, 73.1820, and 73.1870 of the Rules.<sup>4</sup> On February 9, 2000, after receiving a response from the licensee, the Enforcement Bureau issued a *Forfeiture Order*<sup>5</sup> which upheld the NAL.

3. On February 24, 2000, Arnold filed a Petition for Reconsideration ("Petition") of the

<sup>1</sup> *Arnold Broadcasting Company, Inc.*, 16 FCC Rcd 267 (Enf. Bur. 2001).

<sup>2</sup> 47 U.S.C. § 503(b).

<sup>3</sup> 47 C.F.R. §§ 1.80, 11.35, 73.1350, 73.1820, 73.1870.

<sup>4</sup> Although the Enforcement Bureau determined that Arnold violated all of the aforementioned sections of the Rules, it held Arnold liable only for violating Sections 11.35, 73.1350, 73.1820, and 73.1870, and issued a \$16,000 forfeiture for violating only those sections.

<sup>5</sup> *Arnold Broadcasting Company, Inc.*, 15 FCC Rcd 2704 (Enf. Bur. 2000).

*Forfeiture Order*. In its Petition, Arnold argued that the forfeiture amount should be substantially reduced. In the *Memorandum Opinion and Order*, released on January 5, 2001, the Enforcement Bureau reduced the forfeiture by \$2,000 to \$14,000 for Arnold's good faith effort to comply with the EAS rules by ordering EAS equipment.<sup>6</sup> In all other respects, the Bureau upheld the forfeiture.

4. On January 31, 2001, Arnold filed an application for review of the *Memorandum Opinion and Order*. In its application for review, Arnold again contends that the forfeiture should be set aside or the amount modified. In support of its contention, Arnold argues that (a) the forfeiture amount assessed for the failure to install and maintain operable EAS equipment is excessive; (b) the Commission impermissibly assessed separate forfeitures for not conducting EAS tests and not logging the EAS tests that it had not conducted; and (c) the forfeiture amount assessed for KNEC's failure to maintain the capability to shut down the transmitter within three minutes of an event requiring shutdown is excessive.

## DISCUSSION

### The Section 11.35 Violation

5. Section 11.35 of the Rules requires broadcast stations to have the necessary EAS equipment installed so that monitoring and transmitting functions are available during the times the station and systems are in operation. When Arnold began broadcast operations on April 12, 1999, it did not have the requisite EAS equipment installed and operational, in violation of Section 11.35. As a result, the Bureau assessed Arnold a total forfeiture of \$10,000, which included the \$8,000 base amount for this violation<sup>7</sup> and a \$2,000 upward adjustment. The Bureau imposed the upward adjustment because it deemed the violation to be particularly egregious, given that the principal of Arnold, Mr. William Arnold, had once served as a Local Emergency Communications Committee ("LECC") chairman. In its application for review, Arnold contends that it is contrary to the public interest to impose a forfeiture on a broadcaster for putting his station on the air before timely ordered EAS equipment has been delivered. We do not agree. The Rules are clear that EAS equipment must be installed and operational before broadcast operations begin. We believe that it is in the public interest to have broadcasters adhere to the Commission's EAS rules.<sup>8</sup> Arnold also asserts that the Bureau imposed the forfeiture for the EAS violation because Arnold failed to request a waiver of the EAS rules and not because operating KNEC without EAS equipment is a serious violation. Although Arnold further opines that it would most certainly have been granted a waiver of Section 11.35 had it sought one, the fact remains that Arnold did not seek, let alone obtain, a waiver. Similarly, the fact that Arnold might have obtained Special Temporary Authority ("STA") to operate without EAS equipment is irrelevant, as it did not seek, let alone obtain, such authority.

6. Arnold also takes issue with the \$2,000 upward adjustment to the \$8,000 base forfeiture amount for the Section 11.35 EAS violation. The Bureau based the upward adjustment upon the

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<sup>6</sup> The EAS equipment did not arrive before Arnold went on the air. Arnold proceeded to broadcast without the equipment and without obtaining a waiver.

<sup>7</sup> *The Commission's Forfeiture Policy Statement and Amendment to Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 13 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

<sup>8</sup> Section 11.35(a) provides that broadcast stations ... are responsible for ensuring that EAS Encoders, EAS Decoders and Attention Signal generating and receiving equipment used as part of the EAS are installed so that the monitoring and transmitting functions are available during the times the stations and systems are in operation.

egregiousness of the violation, given Mr. Arnold's prior service as a LECC chairman. Arnold contends that it is contrary to the Commission's *Forfeiture Policy Statement* to upwardly adjust the forfeiture amount for this reason. We agree that an upward adjustment for this violation is unwarranted in this case. Accordingly, we will eliminate the \$2,000 upward adjustment and reduce the total amount assessed for this violation to \$8,000.

### **The Section 73.1350(b) Violation**

7. The Bureau assessed Arnold a total \$4,000 forfeiture for the Section 73.1350(b) violation (failure to have a transmitter control system in place which would allow the transmitter to be shut down within three minutes of an event requiring shut down), which included the \$3,000 base amount for this violation and a \$1,000 upward adjustment. The Bureau adjusted the forfeiture amount upward by \$1,000 because it considered the violation to be particularly egregious given the potential for causing interference to other licensed stations should KNEC begin operating outside its authorized limits with no way of turning the transmitter off within three minutes in accordance with the Rules. Arnold claims that the imposition of a forfeiture for this violation of Section 73.1350(b) is contrary to established Commission policy and inconsistent with other recent enforcement actions. In support, Arnold asserts that 34 days after the staff issued the NAL for KNEC's violation of Section 73.1350(b), the Denver Office issued a Notice of Violation to Arnold for Station KFTM's violation of Section 73.1350(d) of the Rules, a rule which Arnold believes to be similar in purpose to Section 73.1350(b).<sup>9</sup> In the case of KFTM, however, the Commission took no further enforcement action once the violation was corrected.

8. The obligations imposed on licensees by Sections 73.1350(b) and 73.1350(d) are both important components of the regulatory scheme that ensures interference free broadcasting. However, the type of potential problem that Section 73.1350(b) contemplates is inherently more urgent than the type of problem addressed by Section 73.1350(d). Specifically, Section 73.1350(b) contemplates those circumstances in which a transmitter is so seriously malfunctioning that the Commission identifies it as causing harmful or catastrophic loss of telecommunications service. Such circumstances are deemed so critical that a broadcaster must be able to cease broadcasting within three minutes. Section 73.1350(d), on the other hand, contemplates a situation that results in incremental degradation of service, not complete disruption of service. In these less urgent circumstances, the broadcaster has greater latitude in addressing the problem; *i.e.*, the rule permits a correction period of up to three hours. Given the grave nature of the potential problems Section 73.1350(b) seeks to avoid, we conclude that the staff properly exercised its discretion in issuing a forfeiture to KNEC for its violation of the rule. Further, we find no inconsistency in that action and the subsequent decision to issue only a Notice of Violation to KFTM for its violation of Section 73.1350(d).

9. Arnold also argues, however, that all violations of the transmitter control rules carry with them the potential for interference, and therefore, this potential is taken into account in the base forfeiture amount for transmitter control violations. For this reason, Arnold believes that the \$1,000 upward adjustment imposed for violating this rule should be set aside absent a finding that Arnold's violation of the rule was, in some way, more egregious than a routine failure to comply with the rule. We agree.

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<sup>9</sup> Section 73.1350(d) provides that:

In the event that a broadcast station is operating in a manner that is not in compliance with the technical rules set forth elsewhere in this part or the terms of the station authorization, and the condition is not listed in paragraph (e) of this section, broadcast operation must be terminated within three hours.

Accordingly, based upon the facts of this case, an upward adjustment to the base forfeiture amount for this violation is not warranted.

### **The Section 73.1820 Violation**

10. The Enforcement Bureau's *Forfeiture Order* included a \$1,000 forfeiture amount for willfully violating Section 73.1820(a) of the Rules, which requires entry into the station log of each test and activation of the EAS and any entries not specifically required by Section 73.1820(a), but required by the instrument of authorization or elsewhere in Part 73 of the Rules. Arnold argues that although the Enforcement Bureau claims in the reconsideration *MO&O* that it did not assess a separate forfeiture for Arnold's failure to log the EAS tests that it did not conduct and could not have conducted because it lacked the necessary EAS equipment, this is not correct. Arnold points out that the reconsideration *MO&O* states that it was fined \$1,000 for violating Section 73.1820 and that the original *Forfeiture Order* states that Arnold violated Section 73.1820(a) by "failing to make ... EAS logs available to FCC representatives upon request." Arnold further asserts that no other violation of Section 73.1820 is cited in either Order, therefore, the \$1,000 forfeiture for violating Section 73.1820 can only be attributed to the fact that Arnold failed to log the EAS tests that it did not conduct. After reviewing the record, we conclude that it does not support imposition of a monetary forfeiture for violation of Section 73.1820(a) of the Rules. Accordingly, we reduce the total forfeiture amount by \$1,000.

### **ORDERING CLAUSES**

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 1.115(c) of the Rules, 47 C.F.R. § 1.115(c), Arnold Broadcasting Company, Inc.'s application for review of the *Memorandum Opinion and Order* for NAL No. 915DV0001 **IS GRANTED IN PART AND DENIED IN PART**.

12. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, Arnold Broadcasting Company, Inc. must pay the amount of ten thousand dollars (\$10,000) within thirty (30) days of the release date of this Order. Payment may be made by check or money order, drawn on a U.S. financial institution, payable to the Federal Communications Commission.<sup>10</sup> The remittance should be marked "NAL Acct. No. 915DV0001" and mailed to the following address:

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

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

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<sup>10</sup> Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Requests for installment plans should be mailed to: Chief, Revenue & Receivables Operations Group, 445 Twelfth Street, S.W., Washington, DC 20554.

13. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by certified mail, return-receipt requested, to Arnold Broadcasting Company, Inc., P.O. Box 830, 803 West Main, Sterling, Colorado 80751 and to its counsel David Tillotson, Esq., 4606 Charleston Terrace, N.W., Washington, DC 20007-1911.

**FEDERAL COMMUNICATIONS COMMISSION**

Magalie Roman Salas  
Secretary