

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

In the Matter of)	
)	
A-O Broadcasting Corporation)	File No. EB-01-DV-334
)	
Former Licensee of Station KTMN(FM) ¹)	NAL/Acct. No. 200332800001
Cloudcroft, New Mexico)	FRN # 0005-0204-74
Facility ID #89049)	

FORFEITURE ORDER

Adopted: December 22, 2003

Released: December 29, 2003

By the Commission:

I. Introduction

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to A-O Broadcasting Corporation (“A-O”), former licensee² of FM radio station KTMN, Cloudcroft, New Mexico, for willful and repeated violation of Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Commission’s Rules (“Rules”).³ The noted violations involve A-O’s failing to comply with radio frequency radiation (“RFR”) maximum permissible exposure (“MPE”) limits applicable to transmitters on towers, failing to have EAS equipment installed and operating, failing to maintain a main studio and failing to have adequate transmission system control.

2. On November 18, 2002, the Commission issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to A-O for a forfeiture in the amount of twenty-eight thousand dollars (\$28,000).⁴ A-O filed its response to the *NAL* on December 18, 2002.

II. Background

3. On October 29, 2001, the FCC’s Denver, Colorado Field Office (“Denver Office”) received a complaint alleging that FM broadcast station KTMN in Cloudcroft, New Mexico, was not operating at its authorized power and was not in compliance with the FCC’s RFR tower guidelines due to the

¹ The Commission’s data base now lists the station call sign as “DKTMN” to reflect its deletion.

² On January 3, 2003, the Media Bureau notified A-O by letter that its license for station KTMN expired on November 7, 2002, pursuant to Section 312(g) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 312(g), because of that station’s failure to transmit broadcast signals for a consecutive 12 month period. *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (Media Bureau 2003) (license forfeited and call sign deleted). By its letter of March 11, 2003, the Media Bureau denied A-O’s petition for reconsideration. *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 3818 (Media Bureau 2003). An application for review of that action is pending.

³ 47 C.F.R. §§ 1.1310, 11.35, 73.1125, and 73.1400.

⁴ *A-O Broadcasting, Inc.*, 17 FCC Rcd 24184 (2002).

antenna's low radiation center above ground level ("AGL"). KTMN was authorized to operate on frequency 97.9 MHz with an effective radiated power ("ERP") of 100 kW operating with a center of radiation equal to 18 meters AGL.⁵ The station license for KTMN also included the following special operating conditions: (1) "If the licensee makes any changes in facilities via modifications of license application in accordance with 47 C.F.R. 73.1690(c), the subsequent Form 302-FM, application for license, must include a revised RF field showing to demonstrate continued compliance with the FCC guidelines"; (2) "Warning signs which describe the radiofrequency electromagnetic ("RF") field hazard must be posted at appropriate intervals. These signs must be at least 8 meters distant from the base of the tower. Measures must be taken so that persons who are authorized access to the site are not exposed to levels in excess of the FCC guidelines"; and (3) "The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guidelines."⁶

4. On November 14, 2001, FCC agents from the Denver Office conducted an inspection of the KTMN transmitting facility in Cloudcroft, New Mexico. The agents found that the KTMN transmitting antenna was side mounted approximately 13 meters AGL on a United States Forest Service ("USFS") fire lookout tower at the authorized location. The top bay of the antenna was level with the lookout platform. RFR warning signs were placed on a 2.5 meter tall ground fence approximately three meters from the base of the tower. The lookout tower was in a gated and locked area approximately 30 meters from Forest Service Road 175 ("FSR 175"). The agents also noted that numerous vehicles used FSR 175 during the time that the agents were at the KTMN site.

5. When the agents arrived at the transmitter site, the station was not operating. KTMN's owner told the agents that the station had been off the air for one week, following a November 7, 2001, electrical surge which affected the programming capabilities of KTMN. Upon the agents' request, the owner turned the transmitter on to 40% of the authorized power and transmitted an unmodulated carrier. The owner was not able to achieve 100% authorized power and admitted the most the station ever achieved was about 60% of the authorized power. At 40% of the authorized power, the agents found publicly accessible areas outside the fence surrounding the lookout tower that significantly exceeded the FCC's RFR MPE limits for the general population. The agents also found numerous areas on the stairway of the lookout tower in excess of both the public and the occupational MPE limits. Inside the lookout platform, RFR fields exceeded the public MPE limits. In particular, using spatially averaged techniques to measure the RFR fields, the agents found the following:

<u>Location</u>	<u>RFR as Measured by Agents (mW/cm²)</u>	<u>RFR Public MPE Limit (mW/cm²)⁷</u>	<u>% Over RFR Public MPE Limit</u>
20 to 60 feet from tower base	0.63	0.2	315
Lookout tower stairway	3.0 ⁸	0.2	1500
Lookout platform area	0.7	0.2	350

6. The temporary special use permit issued by the USFS to the owner of A-O expressly provided USFS personnel unrestricted access to the structure. In addition, the agents spoke with USFS

⁵ The Media Bureau (formerly the Mass Media Bureau) granted A-O's application for a license to cover the construction permit for Station KTMN on October 5, 2001 (File No. BLH-20010924AAM).

⁶ File No. BLH-20010924AAM.

⁷ This is the MPE limit for the general population set forth in Section 1.1310 of the Rules for radio stations operating in the frequency range 30-300 MHz. KTMN is licensed to operate on 97.9 MHz.

⁸ This value was the maximum limit of the meter, Narda 8718 and Type 8722 probe combination.

personnel and determined that USFS rangers with access to the lookout tower stairway and platform had no training with respect to RFR and no knowledge of RFR exposure potential from the radio transmitting antenna mounted just a few feet from their fire lookout.

7. The agents also found that KTMN had no main studio, had no EAS equipment installed and did not have adequate transmission system control. Although KTMN's owner claimed the transmitter building was the temporary main studio, the agents observed that the transmitter building was within a locked fence and, therefore, not accessible to the public; and that there was little room, if any, for more than one person to move around in the building. Additionally, the owner stated that he visited the site every day, or every other day, but had no other personnel present at the transmitter site when he was not there. The owner told the agents that a permanent studio was being constructed in downtown Alamogordo, but the building was undergoing renovation. The agents observed EAS equipment in a box in the transmitter building, but no EAS equipment was installed or operational. The owner told the agents that he had no monitoring equipment or remote control for the station, but that he would monitor the station on a consumer-grade portable receiver at his residence in Alamogordo to confirm the station was on the air.

8. By letter dated November 20, 2001,⁹ A-O notified the Commission that KTMN ceased transmitting on November 7, 2001, as a result of a transient failure of the station's computer and would remain silent in order to complete improved studio facilities and to make some adjustments to its transmitting facilities. On March 14, 2002, approximately four months after KTMN suspended operations, A-O filed a request (amended on June 10 and 21, 2002) with the Media Bureau for special temporary authority ("STA") for KTMN to remain silent. In its STA request, A-O stated that, in November 2001, the Denver Office determined that KTMN's transmitting antenna on the USFS lookout tower created a risk of excessive RF exposure to nearby persons; that on March 4, 2002, the USFS requested that the transmitter and antenna bays be removed from the authorized site; and that it was negotiating with the USFS to relocate the transmitter to a new site. On June 25, 2002, the Media Bureau granted A-O an STA for KTMN to remain silent through November 7, 2002. On August 22, 2002, A-O filed an application seeking authorization to relocate the transmitter for KTMN to a new site.¹⁰ This application was granted on September 30, 2002. Following the termination on November 7, 2002, of A-O's license for KTMN by the Media Bureau, A-O filed an application for a license to operate at its new site on April 30, 2003, and for renewal of that license on July 3, 2003. These applications were not acceptable for filing because there was no currently authorized station warranting a covering license or a license renewal. Accordingly, on July 31, 2003, the Media Bureau dismissed both of these applications as inadvertently accepted for filing.¹¹

9. On November 18, 2002, the Commission issued a *NAL* to A-O for a forfeiture in the amount of twenty-eight thousand dollars (\$28,000) for willful and repeated violation of Sections 1.1310, 11.35, 73.1125 and 73.1400 of the Rules. In its response, filed on December 18, 2002, A-O seeks reduction or cancellation of the proposed monetary forfeiture. A-O argues that it did not willfully violate any FCC rule; that the violations alleged in the *NAL*, "do not relate to silent stations"; that A-O's actions "complied substantially" with Sections 1.1310, 11.35, 73.1125 and 73.1400 of the Rules; that "the inspection was not conducted in accordance with the Rules"; that A-O is unable to pay any forfeiture amount whatsoever; that A-O has a record of overall compliance; that A-O acted in good faith; that A-O was not required to have EAS equipment installed because it was within a 60 day grace period; that

⁹ The Commission received this letter on January 9, 2002.

¹⁰ File No. BPH-20020822AAC.

¹¹ A-O's petition for reconsideration of those dismissals is now before the Media Bureau. (File Nos. BLH-20030703ACD and BRH-20030703ACC). See also note 2, *supra*.

KTMN's transmitter site is "not readily accessible to the public"; that the Commission cannot now penalize A-O for violation of the RFR rules after having reviewed A-O's RFR analysis; and that the Commission "articulated no rational basis" for specifying a \$10,000 base forfeiture amount for violation of Section 73.1310 of the Rules.

III. Discussion

10. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹² Section 1.80 of the Rules,¹³ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). In examining A-O's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁴

11. As demonstrated below, there is no basis for A-O's claim that it has "complied substantially" with Sections 1.1310, 11.35, 73.1125 and 73.1400 of the Rules. Additionally, we reject A-O's contention that, because KTMN was silent at the time of the inspection, the violations alleged in this proceeding are inapplicable to KTMN. The violations of Section 1.1310 of the Rules occurred between October 5 and November 7, 2001, while KTMN was operating. The violations of Sections 11.35, 73.1125 and 73.1400 were continuous violations that began when KTMN was granted a license by the Commission on October 5, 2001, and operated the station and were continuing at the time of our inspection on November 14, 2001.¹⁵

12. The violations discussed in this order either occurred on more than one day or continued for more than one day. Accordingly, we find below that they are repeated.¹⁶

13. We also find no basis for A-O's claim that it "committed no willful violation of any Commission rule." As we stated in the *NAL*, the "term 'willful' as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly."¹⁷ As demonstrated below, A-O knowingly committed the acts leading to the violations discussed in this *Forfeiture Order*

¹² 47 U.S.C. § 503(b).

¹³ 47 C.F.R. § 1.80.

¹⁴ 47 U.S.C. § 503(b)(2)(D).

¹⁵ We need not discuss whether the violations of Sections 11.35, 73.1125 and 73.1400 apply to KTMN's period of silence because, in any event, these violations existed throughout KTMN's period of operation from October 5 to November 7, 2001.

¹⁶ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

¹⁷ *NAL* at 24188. See also 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 and 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...." and *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

and, accordingly, we find below that the violations are also willful.

14. Section 1.1310 of the Rules requires licensees to comply with RFR exposure limits. Table 1 in Section 1.1310 provides that the MPE limit for the general population from a radio station operating in the frequency range 30-300 MHz is 0.200 mW/cm² and the MPE limit for occupational or controlled exposure from a station operating in this frequency range is 1 mW/cm².

15. A-O certified in its construction permit and license applications that operation of station KTMN in Cloudcroft, New Mexico would comply with the FCC's RFR exposure limits and would not require the filing of an Environmental Assessment.¹⁸ The construction permit for KTMN authorized A-O to construct the station with the antenna radiation center at 18 meters AGL.¹⁹ A-O certified in its application for a license to cover the construction permit that the station was constructed as authorized in the construction permit.²⁰ However, A-O did not construct KTMN as authorized. Because A-O did not construct KTMN as authorized in the construction permit, we again reject A-O's claim originally made in response to the Denver Office's warning letter and reiterated in the response to the *NAL* that the Commission cannot now penalize it for violation of the RFR rules after having reviewed A-O's RFR analysis. The Commission's review of the RFR analysis provided by A-O in its construction permit application was based on A-O's representation that the antenna would be mounted with a center of radiation 18 meters AGL. The antenna was mounted at 13 meters AGL, rather than the authorized 18 meters AGL. As A-O concedes, it did not submit a revised RF study to demonstrate that an antenna mounted at 13 meters AGL would comply with the RFR limits as required by KTMN's license. In its response to the *NAL*, A-O claims it was unaware that its antenna was mounted at 13 meters AGL. As we recently reiterated, "the Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations."²¹ Therefore, since A-O's antenna was mounted by either its employees or its contractor, A-O is chargeable with its employees' or contractor's knowledge of the location of the antenna for the purpose of determining that the violation was willful.²²

16. The license for KTMN also included special operating conditions requiring A-O to post RF warning signs at least eight meters from the base of the tower and to reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from RFR fields in excess of FCC limits. A-O did not comply with these conditions. Warning signs were only found on a fence three meters from the base of the tower. The USFS rangers who could access the tower and lookout were not informed of the RFR hazard and were never instructed to contact the licensee before accessing the stairway or lookout platform on the tower. Additionally, contrary to the claim in A-O's response to the *NAL*, the KTMN transmitter site is not remote and is easily accessible to the general public by a gravel road which can be used by two wheel drive vehicles.

17. The USFS rangers who had access to the lookout tower on which KTMN's antenna was

¹⁸ See Section 1.1307(b) of the Rules.

¹⁹ The Media Bureau granted A-O's construction permit application on September 24, 1998 (File No. BPH-19971030MG).

²⁰ The Media Bureau granted A-O's license for station KTMN on October 5, 2001 (File No. BLH-20010924AAM).

²¹ See, e.g., *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation marks omitted) and cases cited therein.

²² See *Pinnacle Towers, Inc.*, DA-03-2620 (Enf. Bur., released August 11, 2003).

mounted had no training with respect to RFR and no knowledge of the potential impact of RFR exposure. Absent such training and knowledge, the rangers are considered members of the general population. Furthermore, as noted above, the area surrounding the KTMN transmitter site was readily accessible to the general public. Thus, the RFR exposure limits for the general population set forth in Section 1.1310 apply in this case. Based on RFR modeling of the transmitter at the authorized power and on-site measurements at 40% of the authorized power, FCC agents determined that operation of KTMN as constructed created RFR fields that exceeded the RFR exposure limits for the general population. With the station operating at only 40% of the authorized power,²³ the FCC agents found spatially averaged RFR fields which were more than 300% over the limits for MPE by the public at distances of 20 to 60 feet from the base of the tower, which includes areas outside of the fence surrounding the lookout tower that were accessible to the general public and within the lookout platform. In addition, the agents found spatially averaged RFR fields which were more than 1500% over the limits for maximum permissible exposure by the public on the stairway leading to the lookout tower. Given that the RFR fields exceeded the public MPE limits by more than 300% with the station operating at only 40% of authorized power at the time of the inspection on November 14, 2001, it is clear that KTMN was not in compliance with the MPE limits during its operation at up to 60% of authorized power between October 5, 2001, when the license for KTMN was granted, and November 7, 2001, when A-O took the station off the air. Accordingly, based on the evidence before us, we find that A-O willfully and repeatedly violated Section 1.1310 of the Rules during the period from October 5, 2001 and November 7, 2001 by exceeding the RFR exposure limits for the general population and failing to take measures to adequately prevent the public from accessing areas that exceeded the RFR exposure limits.

18. Section 11.35(a) of the Rules states in part that all broadcast stations are “responsible for ensuring that EAS Encoders, Decoders, and Attention Signal generating and receiving equipment used as part of the EAS are installed so that monitoring and transmitting functions are available during the times that stations . . . are in operation.”²⁴ At the time of inspection, no EAS equipment was installed or operational at station KTMN. A-O argues in its response to the *NAL*, that it was not required to have EAS equipment because it was within a 60 day grace period specified by Section 11.35(b) of the Rules.²⁵ Section 11.35(b) provides in pertinent part: “If an EAS Encoder or EAS Decoder becomes defective, the broadcast station . . . may operate without the defective equipment pending its repair or replacement for 60 days without further FCC authority. Entries shall be made in the broadcast station log . . . showing the date and time the equipment was removed from service and restored to service.” The 60 day grace period is, therefore, applicable only when *defective* EAS equipment is removed for repair or replacement. A-O does not claim that it ever installed KTMN’s EAS equipment or that A-O removed the EAS equipment because it became defective. In fact, the EAS equipment found at KTMN’s transmitter site was still in its original packaging and had apparently never been installed. Based on the evidence, we find that A-O willfully and repeatedly violated Section 11.35(a) of the Rules by failing to have EAS equipment installed and operational.

19. Section 73.1125(a) of the Rules provides in pertinent part that “[e]ach AM, FM, or TV broadcast station shall maintain a main studio at one of the following locations: (1) within the station’s community of license; (2) at any location within the principal community contour of any AM, FM, or TV Broadcast station licensed to the station’s community of license; or (3) within twenty-five miles from

²³ A-O indicated that it had operated at up to 60% of authorized power. We use the lower 40% figure because that was the power when the staff took measurements. The RFR problem would have been even worse when the station operated at 41%-60% of authorized power.

²⁴ 47 C.F.R. § 11.35(a).

²⁵ 47 C.F.R. § 11.35(b).

the reference coordinates of the center of its community of license as described in §73.208(a)(1).²⁶ In addition, the station's main studio must serve the needs and interests of the residents of the station's community of license. To fulfill this function, a station must, among other things, maintain a meaningful managerial and staff presence at its main studio.²⁷ The Commission has generally defined "meaningful presence" as full-time managerial and full-time staff personnel and has stated that there must be "management and staff presence" on a full-time basis during normal business hours to be considered "meaningful."²⁸ With respect to management personnel, the Commission has stated that they need not be "chained to their desks" but that they would be required to report to work at the main studio on a daily basis, spend a substantial amount of time there, and use the main studio as their "home base."²⁹ Although A-O's owner stated that he was temporarily using KTMN's transmitter building as a main studio, it is apparent that KTMN had no main studio presence in the community at the time of the inspection. The transmitter building was contained within a locked fence and therefore was inaccessible to the public; there was little room, if any, for more than one person to move around in the transmitter building; there was no listing for KTMN or A-O in the local telephone directory; and there was no public inspection file. Moreover, A-O did not maintain a meaningful management and staff presence at the transmitter site. In this regard, A-O's owner told the agents that he visited the site every day, or every other day, but had no other personnel present at the transmitter site when he was not there. Therefore, based on the evidence, we conclude that A-O failed to maintain a main studio, in willful and repeated violation of Section 73.1125 of the Rules.³⁰

20. Licensees are also responsible for operating their broadcast stations within tolerances specified by applicable technical rules contained in this part and in accordance with the terms of the station authorization. Section 73.1400 of the Rules allows stations to employ various methods or levels of transmission system monitoring and supervision to preclude out-of-tolerance operation and to ensure compliance with the transmission system control requirements of Section 73.1350. At the time of the inspection, A-O's owner admitted that he did not have ongoing supervision of the transmission system by a station employee or other person designated by the licensee, did not have an automatic transmission system to alert a contact person in the event of a technical malfunction, and did not have a remote control whereby the transmission system could be monitored and controlled for compliance with Section 73.1350. Use of a consumer-grade portable receiver to tune into the station does not meet the transmission system monitoring and control requirements of Section 73.1400. Based on the evidence, we further find that A-O willfully and repeatedly violated Section 73.1400 of the Rules by failing to have adequate transmission system monitoring and control.

21. A-O claims that the inspection of KTMN "was not conducted in accordance with" Section 73.1225(a) of the Rules,³¹ because "KTMN was not on the air and was not conducting business" at the

²⁶ 47 C.F.R. § 73.1125(a).

²⁷ See *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215, 3217-18 (1987), *clarified*, 3 FCC Rcd 5024, 5026 (1988).

²⁸ *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615, 3616 (1991), *clarified*, 7 FCC Rcd 6800 (1992) ("*Jones Eastern*").

²⁹ 7 FCC Rcd at 6802.

³⁰ See *B&C Kentucky, LLC*, 16 FCC Rcd 9305 (Mass Media Bur., Video Services Div., 2001) (concluding that a television licensee's transmitter building was not a main studio where no employees regularly worked at that location, no production equipment or station files were maintained there, and the building was contained within a locked fence and therefore was inaccessible to the public).

³¹ 47 C.F.R. § 73.1225(a). This section provides that "The licensee of a broadcast station shall make the station available for inspection by representatives of the FCC during the station's business hours, or at any time it is in

time of the inspection. Section 73.1225(a) simply specifies the times at which broadcast station licensees *must* make their stations available for inspection; it is *not* the basis for the Commission's authority to inspect broadcast stations. The basis for the Commission's authority to inspect radio stations is Section 303(n) of the Act,³² which gives the FCC authority to "inspect all radio installations associated with stations required to be licensed" Section 303(n) authorized the inspection of KTMN, which A-O permitted. Given the safety concerns in this case, it was essential to inspect KTMN and it would have been a dereliction of duty not to have done so. We conclude that the inspection was proper.

22. A-O argues that we had "articulated no rational basis" for specifying a \$10,000 base forfeiture amount for violation of Section 1.1310 of the Rules. We do not agree. *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines ("Forfeiture Policy Statement")*³³ does not specify a base forfeiture for violation of the RFR maximum permissible exposure limits for transmitting tower antennas in Section 1.1310.³⁴ However, as stated in the *NAL*, the *Forfeiture Policy Statement* does specify a base forfeiture amount of \$10,000 for failure to comply with other public safety related rules, such as prescribed antenna structure lighting and/or marking rules related to public and private air navigation safety. Because of the public safety nature of the RFR maximum permissible exposure limits, it was entirely reasonable for us to conclude in the *NAL* that a base forfeiture amount of \$10,000 for failure to comply with the RFR exposure limits is appropriate.

23. A-O claims to have a history of overall compliance. In particular, A-O argues that KTMN was a "new station" which had been constructed for only 44 days at the time of the inspection and, therefore, A-O had no history of prior offenses. In fact, a new station cannot claim a history of overall compliance.³⁵ Accordingly, we find that no reduction is warranted on the basis of a history of overall compliance.

24. A-O also argues that it cannot pay any forfeiture amount because it has no revenues. The financial information submitted by A-O does indeed indicate that A-O has no revenues. However, this fact alone does not establish that A-O can pay nothing. While a licensee's gross revenues is normally the primary factor used to determine the licensee's ability to pay, it is not the only factor. In this case, A-O was on the air for such a brief period that it never had any revenues. In such a situation, it is necessary to look at factors other than gross revenues³⁶ to determine the licensee's ability to pay. In a

operation."

³² 47 U.S.C. § 303 (n).

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

³⁴ 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 guidelines] ... should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. *Forfeiture Policy Statement*, 12 FCC Rcd at 17099. The Commission retains the discretion, moreover, to depart from the *Forfeiture Policy Statement* and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act. *Id.*

³⁵ See *Bay Television, Inc.*, 10 FCC Rcd 11509 (1995) (six months of radio station operation insufficient to establish a history of overall compliance).

³⁶ The Commission has long recognized that, although gross revenues are the primary indicator of a licensee's ability to pay a forfeiture, other financial indicators can be considered. See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1991).

related proceeding³⁷ A-O has filed an application for review of the Media Bureau's cancellation of its license for station KTMN. The filing of that application for review implies that A-O has sufficient resources to return KTMN to air and to operate it. Additionally, A-O's application for a construction permit at a new site³⁸ and its subsequent license application for authority to operate at the new site³⁹ imply that A-O had sufficient funds to reconstruct KTMN at the new site and did so. In order to determine A-O's ability to pay the proposed monetary forfeiture, it is necessary to know what resources are available to A-O – e.g., A-O's lines of credit, A-O's liquid assets and the assets and income of A-O's owner. Since A-O has not provided such information, we are unable to determine that it cannot pay the proposed forfeiture amount and we will not reduce the forfeiture on the basis of A-O's inability to pay.

25. We find that A-O demonstrated good faith⁴⁰ by obtaining EAS equipment before the inspection and by starting construction of a main studio before the inspection. A-O argues that the 50% good faith reduction awarded in *Rego, Inc.*,⁴¹ requires reducing the portion of the forfeiture proposed for the EAS and main studio violations by at least 50%. The reduction awarded on the basis of good faith depends on the circumstances of the particular case.⁴² The circumstances in this case are not the same as those in *Rego*. In *Rego*, the licensee ordered new EAS equipment to replace the defective equipment installed at the station whereas, in this case, there was EAS equipment present at the station but it was not installed. Furthermore, there was no main studio violation in *Rego*. We find the portion of the forfeiture proposed for the EAS and main studio violations should be reduced from \$15,000 to \$12,000 and the total forfeiture amount from \$28,000 to \$25,000.

26. We have examined A-O's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that A-O willfully and repeatedly violated Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Rules and that the appropriate forfeiture amount is \$25,000.

IV. Ordering Clauses

27. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,⁴³ A-O **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for failing to comply with radio frequency radiation maximum permissible exposure limits applicable to transmitters on towers, failing to have EAS equipment installed and operating, failing to maintain a main studio and failing to have adequate transmission system control, in willful and repeated violation, respectively, of Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Rules.

28. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the

³⁷ See *Letter to Paul H. Brown, Esq.*, fn 1, *supra*.

³⁸ Granted September 30, 2002 (File No. BPH-20020822AAC).

³⁹ Dismissed July 31, 2003 (File No. BLH-20030703ACD).

⁴⁰ See Section 1.80(b)(4) of the Rules, 47 C.F.R. § 1.80(b)(4), *Guidelines for Assessing Forfeitures, Part II, Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment Criteria*.

⁴¹ 16 FCC Rcd 16795 (Enf. Bur. 2001).

⁴² See, e.g., *Radio One, Inc.*, 18 FCC Rcd 15964, 15965 ((2003) (Less than 50% reduction for good faith efforts to install EAS equipment).

⁴³ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.⁴⁴ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332800001 and FRN 0005-0204-74. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.

29. **IT IS FURTHER ORDERED THAT** a copy of this **FORFEITURE ORDER** shall be sent by Certified Mail, Return Receipt Requested to A-O Broadcasting Corp., Attention: Robert Flotte, 3001 North Florida Avenue, Alamogordo, New Mexico 88310-9794, and its counsel, Paul Brown, Esq., Wood, Maines & Brown, Chartered, 1827 Jefferson Place, N.W., Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁴ 47 U.S.C. § 504(a).