

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

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| 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 |) | |

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 2004

Released: January 3, 2005

By the Commission:

I. Introduction

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny a petition for reconsideration filed by A-O Broadcasting Corporation (“A-O”), former licensee² of FM radio station KTMN, Cloudcroft, New Mexico, of our *Forfeiture Order* issued December 29, 2003,³ in the amount of twenty-five thousand dollars (\$25,000) for willful and repeated violation of Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Commission’s Rules (“Rules”).⁴ 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 Emergency Alert System (“EAS”) equipment installed and operating, failing to maintain a main studio, and failing to have adequate transmission system control.

II. Background

2. On November 14, 2001, agents from the FCC’s Denver, Colorado Field Office (“Denver Office”) investigated a complaint against KTMN alleging that the station was not operating at its authorized power and was not in compliance with the FCC’s RFR tower guidelines. As part of the investigation, the agents conducted an inspection of KTMN’s transmitting facility in Cloudcroft, New Mexico.⁵ The agents, relying on a laser range finder, found that the KTMN transmitting antenna was

¹ The Commission’s records now list 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 A-O’s failure to transmit broadcast signals on the station for a consecutive 12-month period. *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (MB 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 (MB 2003). An application for review of that action is pending.

³ *A-O Broadcasting Corporation*, 18 FCC Rcd 27069 (2003) (“*Forfeiture Order*”).

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

⁵ Pursuant to its license at that time, KTMN was authorized to operate on frequency 97.9 MHz with an effective radiated power (“ERP”) of 100 kW and a center of radiation equal to 18 meters above ground level (“AGL”). See File No. BLH-20010924AAM granted on October 5, 2001.

approximately five meters below the authorized level on a United States Forest Service (“USFS”) fire lookout tower. The top bay of the antenna was level with the lookout platform. The lookout tower was in a gated and locked area approximately 30 meters from Forest Service Road 175. USFS personnel had unrestricted access to the lookout tower.

3. 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 its 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 by over 200%. The agents also found numerous areas on the stairway of the lookout tower in excess of the public MPE limits by over 1400%. Inside the lookout platform, RFR fields exceeded the public MPE limits by over 200%.

4. On November 18, 2002, the Commission issued a *Notice of Apparent Liability* (“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.⁶ In its response, filed on December 18, 2002, A-O sought reduction or cancellation of the proposed monetary forfeiture. A-O argued 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 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. On December 29, 2003, we issued a *Forfeiture Order* to A-O imposing a forfeiture of \$25,000 for the violations alleged in the *NAL*. In the *Forfeiture Order*, we rejected all of A-O’s arguments except the “good faith” argument and, because A-O demonstrated good faith by obtaining EAS equipment before the inspection of KTMN and by starting construction of a main studio before the inspection, we reduced the portion of the forfeiture proposed for the EAS and main studio violations from \$15,000 to \$12,000.

5. In its petition for reconsideration of the *Forfeiture Order*, filed January 28, 2004, A-O argues that the violations noted in the *Forfeiture Order* “were the direct result of FCC actions”; that the Commission granted KTMN’s construction permit (for its original site) after A-O’s “detailed disclosure of the nature of the proposed facility”; that the “alleged five meter difference [between the authorized level of A-O’s antenna and the lower level observed by FCC agents] is not material to the existence of excessive RF levels”; that the Commission has never demonstrated “by anything other than the say-so of FCC agents” that A-O’s antenna was not mounted at its authorized level; that A-O’s owner “had no reason to suppose” that A-O’s antenna was mounted lower than authorized; that, by suspending the operation of KTMN, A-O “was doing what it could to avoid any prohibitive RF exposure”; that KTMN did not broadcast continuously between October 5 and November 7, 2001, but operated for “less than 40 hours total”; that it was not required to have a main studio or functional EAS equipment because it was silent; that it is a victim of entrapment; and that it is unable to pay the assessed forfeiture.

⁶ *A-O Broadcasting, Inc.*, 17 FCC Rcd 24184 (2002).

6. In addition to the instant proceeding, we note that A-O has a relevant parallel proceeding regarding its operation of station KTMN currently before the Media Bureau. Specifically, by letter filed with the Commission on January 9, 2002, 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 new 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 RFR 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.⁷ This application was granted on September 30, 2002. Following a finding by the Media Bureau that A-O's license for KTMN cancelled automatically as of 12:01 a.m. November 8, 2002, for extended silence,⁸ A-O filed an application for a license to cover the facilities constructed at the 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.⁹ On April 13 and 15, 2004, A-O filed applications for an STA to construct and operate a radio station at its new site.¹⁰

III. Discussion

7. We reject A-O's contention that the violations noted in the *Forfeiture Order* resulted from the FCC agents' request for test transmissions on November 14, 2001, while KTMN was silent. All of the violations that served as the basis for the *Forfeiture Order* occurred during KTMN's period of operation between October 5, 2001 (the date the Commission granted the license for KTMN), and November 7, 2001 (the date A-O said it discontinued operation of KTMN).¹¹ Therefore, the violations, some of which were the subject of a complaint to the FCC, had already occurred at the time of the test transmissions and were not the result of the agents' request for test transmissions.

8. We also reject A-O's implication that our imposition of a forfeiture for A-O's RFR violations (Section 1.1310) is inconsistent with the prior grant of a construction permit on the basis of A-O's "detailed disclosure of the nature of the proposed facility." We sufficiently addressed this argument in the *Forfeiture Order*¹² and A-O has raised nothing new.

⁷ File No. BPH-20020822AAC.

⁸ See 47 U.S.C. § 312(g) (if a broadcast station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period).

⁹ 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*.

¹⁰ These applications are now before the Media Bureau (File Nos. BLSTA-20040413ABX and BLSTA-20040415AGE).

¹¹ As indicated in the *Forfeiture Order* at fn. 15, we need not discuss whether the violations of Sections 11.35, 73.1125 and 73.1400 of the Rules apply to KTMN's period of silence because these violations existed throughout KTMN's period of operation.

¹² *Forfeiture Order* at 29073, ¶ 15 (where station was not constructed as proposed, FCC's review of RFR analysis

9. Additionally, we reject A-O's claim that the "alleged five meter difference [between the authorized level of A-O's antenna and the lower level observed by FCC agents] is not material to the existence of excessive RF levels." A-O provides no basis for its claim. The agents' measurements and calculations with A-O's antenna at 13 meters, however, show that the five meter difference did, in fact, lead to an excessive RFR level on the ground. Further, the terms and conditions upon which A-O's license was granted were based on A-O's representation in its application that the antenna would be mounted at 18 meters AGL.

10. A-O implies that our finding that its antenna was not mounted at its authorized level is inadequately supported because it is based solely on the information from FCC agents. The agents determined the level of A-O's antenna through the use of a laser range finder. We find that this evidence adequately supports our finding that A-O's antenna was not mounted at its authorized level. A-O provides no contrary evidence.

11. We reject A-O's contention that its owner "had no reason to suppose" A-O's antenna was mounted lower than authorized. We sufficiently addressed this argument in the *Forfeiture Order*,¹³ and A-O has raised nothing new with respect to it.

12. A-O's claim that it "was doing what it could to avoid any prohibitive RF exposure" when it suspended the operation of KTMN on November 7, 2001, is not credible.¹⁴ This is the first time A-O has made such a claim. On November 14, 2001, A-O's President stated to the FCC agents that KTMN had been off the air since November 7, 2001, because of damage resulting from a power surge and, in its letter filed with the Commission on January 9, 2002, A-O stated that KTMN ceased transmitting on November 7, 2001, "as a result of a transient failure of the station's computer."

13. With respect to the Section 1.1310 violation, A-O now claims that KTMN did not broadcast continuously between October 5 and November 7, 2001, and operated for "less than 40 hours total" during that period. A-O does not specify the dates or times of its operation for "less than 40 hours total" and does not provide any documentary support for its claim such as logs or sworn statements. In the absence of adequate support we cannot accept this claim, but even if we were to accept it, we would not reduce the portion of the forfeiture imposed for A-O's RFR violation (Section 1.1310) because the hazard to human health would still have been significant.

14. A-O's contention that it was not required to have a main studio or functional EAS equipment because it was silent is not material because, as noted above, the main studio and EAS violations existed during the period of KTMN's operation (between October 5 and November 7, 2001), before it went silent.¹⁵ Further, A-O provides no evidence that it complied with these rules during this period of operation.

15. A-O argues that it is a victim of entrapment, citing *Sorrells v. United States*, 287 U.S. 435, 442 (1932) ("*Sorrells*"). The alleged entrapment apparently refers to the November 14, 2001, test

submitted with application does not prevent it from imposing forfeiture for excessive RFR).

¹³ *Id* at 27093, ¶ 15 (licensee chargeable with employee's or contractor's knowledge of location of antenna).

¹⁴ Even assuming *arguendo* that A-O suspended operation to prevent excessive RFR exposure, A-O, as pointed out above and in the *Forfeiture Order*, violated Section 1.1310 of the Rules during its October 5 through November 7, 2001, period of operation.

¹⁵ As indicated above in fn 10, we need not determine whether these violations continued during KTMN's period of silence because A-O was charged with violating these rules throughout KTMN's period of operation.

transmissions made at the request of FCC agents. The defense of entrapment is generally limited to criminal proceedings¹⁶ but may also be available in “quasi-criminal” administrative proceedings.¹⁷ Because FCC enforcement actions are not criminal or quasi-criminal proceedings, but are administrative proceedings to enforce public safety and other rules by seeking recovery of civil penalties, the defense of entrapment is not available to A-O. Moreover, willful and repeated violations¹⁸ sufficient to support the forfeiture occurred between October 5 and November 7, 2001, KTMN’s period of operation. This was prior to November 14, 2001, the date of the alleged entrapment. Even assuming *arguendo* that the entrapment defense would be available in this case, we could not find that there was entrapment. The defense of entrapment can be maintained “only where, as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed.”¹⁹ In this case, all of the violations began well before November 14, 2001, and, therefore, the agents’ request for test transmissions on that date could not have induced A-O to commit the violations.

16. A-O again claims that it cannot pay the forfeiture. In the *Forfeiture Order*, we found that, to determine A-O’s ability to pay the monetary forfeiture, we needed additional information about the resources available to A-O such as A-O’s lines of credit and liquid assets and the assets and income of A-O’s owner (“the additional information”). A-O argues that this is “a radical departure from precedent,” that we did not seek such information in the *NAL* or in previous forfeiture cases, that we ignored A-O’s corporate existence, and that we misrepresented the meaning of the language of *PJB Communications of Virginia, Inc.* (“*PJB*”).²⁰ We reject all of these arguments. First, our ruling in the *Forfeiture Order* did not depart from precedent.²¹ While A-O discusses numerous FCC cases concerning the ability to pay a monetary forfeiture,²² none of these cases addresses the question we have here: how the licensee of a new station without revenues can establish its inability to pay a monetary forfeiture. We have addressed this question for the first time in this proceeding. Second, although we did not include the additional information in the *NAL*’s description of the information needed to evaluate an inability to pay claim and did not do so in previous cases, we determined in the *Forfeiture Order* that we need the additional information to evaluate A-O’s claim of inability to pay the forfeiture. A-O had the opportunity to provide the necessary resource information in its petition for reconsideration but did not do so. Third, we did not

¹⁶ See *Sorrells* at 442.

¹⁷ See *Rodriguez v. United States*, 534 F. Supp. 370, 373 (D.P.R. 1982); *New York v. Adorno*, 1987 WL 19642 (S.D.N.Y. 1987).

¹⁸ Sections 1.1310, 11.35, 73.1125, and 73.1400 of the Rules.

¹⁹ *Sorrells* at 442.

²⁰ 7 FCC Rcd 2088 (1991).

²¹ The Commission has looked to potential sources of income available to a violator when considering a violator’s ability to pay a forfeiture. See, e.g. *KASA Radio Hogar*, 17 FCC Rcd 6256 (2002).

²² *Sonderling Broadcasting Corp.*, 69 FCC 2d 289 (1977); *ABC, Inc.*, 18 FCC Rcd 25647 (Enf. Bur. 2003); *Tricounty Telephone Co.*, 54 Rad. Reg. 2d 1065 (Com. Car. Bur. 1983); *PJB*; *First Greeneville Corporation*, 11 FCC Rcd 7399 (1996); *Benito Rish*, 10 FCC Rcd 2861 (1995); *Pinnacle Communications, Inc.*, 11 FCC Rcd 15496 (1996); *N&W Promotions, Inc.*, 18 FCC Rcd 22341 (Enf. Bur. 2003); *Lighthouse Broadcasting*, 18 FCC Rcd 9573 (Enf. Bur. 2003); *C.W.H. Broadcasting, Inc.*, 17 FCC Rcd 14324 (Enf. Bur. 2003); *Radio Moultrie, Inc.*, 8 FCC Rcd 4266 (Mass Media Bur. 1993); *Target Telecom, Inc.*, 13 FCC Rcd 4456 (Com. Car. Bur. 1998); *Bear Communications*, 12 FCC Rcd 18108 (Compl. & Info. Bur. 1997); *Kenneth Paul Harris, Sr.*, 15 FCC Rcd 23991 (Enf. Bur. 2000); *Natchez Communications, inc.*, 15 FCC Rcd 4628 (Enf. Bur. 2000), *recon. denied*, 15 FCC Rcd 18798 (Enf. Bur. 2000); and *Hill Country Radio, Inc.*, 14 FCC Rcd 17708 (Mass Media Bur. 1999).

ignore A-O's corporate existence.²³ In fact, it was A-O who put recognition of its corporate existence at issue when it claimed an inability to pay the forfeiture and in support of its claim provided financial documentation that indicated that A-O had no revenues and its primary source of funding was its sole shareholder. In a case such as this, where A-O's sole shareholder appears to be providing substantial resources to A-O, we need information about A-O's access to these and other resources to determine whether A-O can pay the forfeiture. Finally, we did not misrepresent the meaning of the language of our *PJB* decision, which clearly allows indicators other than a violator's gross revenues to be considered in determining ability to pay a monetary forfeiture.²⁴

17. As we stated in the *Forfeiture Order*, a number of circumstances indicate that there are funds available to A-O: A-O's pending application for review of the Media Bureau's cancellation of its license for station KTMN (implying that A-O has sufficient resources to return KTMN to the air and to operate it),²⁵ and A-O's application for a construction permit at a new site²⁶ and subsequent license application for authority to operate at the new site²⁷ (implying that A-O had sufficient funds to reconstruct KTMN at the new site and did so). After the issuance of the *Forfeiture Order*, the Denver Office issued a new *NAL* to A-O on April 23, 2004,²⁸ for a forfeiture in the amount of ten thousand dollars (\$10,000) for operation of an unlicensed full-service FM broadcast radio station, in apparent willful and repeated violation of Section 301 of the Act.²⁹ The fact that A-O constructed and operated KTMN as a full-service FM broadcast station at the new site indicates that A-O apparently has sufficient funding to operate a radio station, and thus must provide more documentation to prove its inability to pay the forfeiture.

18. Although A-O did not provide financial information with its petition for reconsideration, we are taking official notice of the financial information A-O submitted with its response to the separate *NAL* issued on April 23, 2004. That information indicates that A-O is a "development stage company" which has no revenues and little or no cash on hand or other liquid assets. The information further indicates that apparently A-O's operations and capital investments are funded primarily by loans and, to a lesser extent, by issuing new stock. According to the financial information, A-O's loans are from its shareholder and from the Southern New Mexico Radio Foundation, whose president is also the owner and president of A-O. If A-O wants to continue to pursue its inability to pay claim, A-O must prove that it does not have

²³ By suggesting that A-O could provide financial information about its owner to demonstrate its inability to pay claim, we recognize that it may appear that we are attempting to pierce the corporate veil. However, we note that we do not have sufficient information at this time to determine whether the corporate veil should be pierced, nor do we seek to do so. Our only goal is to evaluate A-O's claim of inability to pay which it has raised in this proceeding. We further note that an evaluation of A-O's separate corporate existence may become necessary if A-O wishes to pursue its inability to pay claim. See *Dimension Cable TV, Inc.*, 25 FCC 2d 520 (1970), *reconsideration denied*, 27 FCC 2d 43 (1971); *Telecable Corp.*, 19 FCC 2d 574 (1969) (cases in which the Commission pierced the corporate veil).

²⁴ The relevant language is: "In general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators . . . may also be relevant." *PJB* at 2089. We believe this is such a case.

²⁵ See *Letter to Paul H. Brown, Esq.*, fn 1, *supra*.

²⁶ Granted September 30, 2002 (File No. BPH-20020822AAC).

²⁷ Dismissed July 31, 2003 (File No. BLH-20030703ACD).

²⁸ *Notice of Apparent Liability for Forfeiture*, NAL/Acct No 200432800001 (Enf. Bur., Denver Office, released April 23, 2004).

²⁹ 47 U.S.C. § 301.

access to the resources necessary to pay the forfeiture. Since A-O has not proven this, we are unable to determine that it cannot pay the forfeiture amount and we will not reduce the forfeiture on the basis of A-O's inability to pay.

19. We have examined A-O's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,³⁰ and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,³¹ as well. As a result of our review, we again 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

20. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act³² and Section 1.106 of the Rules,³³ A-O Broadcasting Corporation's petition for reconsideration of the *Forfeiture Order* **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

21. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the 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.³⁴ 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/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. 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.

22. **IT IS FURTHER ORDERED THAT** a copy of this *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

³⁰ 47 U.S.C. § 503(b)(2)(D).

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

³² 47 U.S.C. § 405.

³³ 47 C.F.R. § 1.106.

³⁴ 47 U.S.C. § 504(a).