

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

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| In the Matter of |) | |
| |) | |
| Americom Las Vegas Limited Partnership |) | File No. EB-02-DV-094 |
| |) | |
| Licensee of FM Radio Station KZTQ |) | |
| (Formerly KWNZ) |) | NAL/Acct. No. 200332800006 |
| Carson City, Nevada |) | FRN 0003-7662-92 |
| Facility ID # 53706 |) | |

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 2006

Released: December 1, 2006

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny the application for review filed by Americom Las Vegas Limited Partnership (“Americom”), licensee of FM radio station KZTQ (Formerly KWNZ),¹ Carson City, Nevada, of the *Forfeiture Order* issued May 28, 2004, by the Chief, Enforcement Bureau (“Bureau”),² in the amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 1.1310 of the Commission’s Rules (“Rules”).³ The noted violations involve Americom’s failure to comply with the radio frequency radiation (“RFR”) maximum permissible exposure (“MPE”) limit applicable to KZTQ’s transmission facilities and failure to adequately take measures to prevent the public from accessing areas that exceeded the RFR exposure limits. In this case, we affirm the Bureau’s decision in the *Forfeiture Order*.

II. BACKGROUND

2. KZTQ’s transmission facilities are located on McClellan Peak, near Carson City, Nevada. The McClellan Peak site is on unfenced, publicly accessible property managed by the Bureau of Land Management (“BLM”), approximately 4 kilometers northeast of Carson City. On November 6, 2001, agents from the FCC’s San Francisco, California, Field Office (“San Francisco Office”) conducted a site inspection at the McClellan Peak antenna site. There are 13 broadcast stations which transmit from the McClellan Peak site. During the November 6, 2001, inspection, the personal RFR monitors worn by the agents began to alarm while in the vicinity of the KZTQ transmitter site. The personal RFR monitors are designed by the manufacturer to begin alarming when RFR exposure levels reach 50 percent of the Commission’s occupational exposure limit. The occupational exposure limit is five times greater than the public exposure limit. Thus, the alarming indicated that there were RFR levels in excess of the MPE limit for the general public in the vicinity of the KZTQ transmitter.

¹ Subsequent to the initiation of this proceeding, on February 26, 2004, the station’s call sign was changed to KZTQ.

² *Americom Las Vegas Limited Partnership*, 19 FCC Rcd 9643 (Enf. Bur. 2004) (“*Forfeiture Order*”).

³ 47 C.F.R. § 1.1310.

3. On May 1, 2002, the FCC's Denver, Colorado Field Office ("Denver Office") issued a Letter of Inquiry ("LOI") to Americom and to each of the 12 other broadcast licensees which transmit from the McClellan Peak site regarding RFR compliance at the site and advising that a site inspection would take place on May 15, 2002.

4. On May 14, 2002, FCC agents from the Denver and San Francisco Offices conducted preliminary measurements in publicly accessible areas throughout the McClellan Peak site. On May 15, 2002, the agents returned to the McClellan Peak site and conducted additional measurements. The measurements taken by the agents on May 15, 2002, indicated that there were RFR fields in publicly accessible areas at ground level that exceeded the FCC's MPE limits for the general public and that KZTQ's operation alone exceeded the MPE limits for the general public in unfenced areas between the KZTQ transmitter building and the KZTQ antenna tower.

5. The agents observed that the site was easily accessible to 4-wheel drive vehicles from a public gravel and dirt roadway off Goni Road. Two commercial gravel pits were located along the gravel roadway to the site. An ungated internal dirt road led from the gravel roadway to the site, with multiple branches to reach the various antenna structures. The agents observed that there were trails for off-road 4-wheel drive vehicles and all terrain vehicles ("ATVs") along the gravel roadway and at the site itself. The agents also observed persons who appeared to be teenagers driving ATVs, ATV tire tracks, a campfire ring, beer and wine bottles, and other trash indicative of public use of the BLM site.

6. Additionally, the agents observed that the only signs warning the public of excessive RFR levels at the KZTQ antenna site were posted at the front of the site and along the road leading to the site. The agents also observed that there were no warning signs which could be seen by persons approaching the unfenced area in which the RFR exceeded the public MPE limit from the rear of the KZTQ antenna site.

7. Americom submitted its response to the LOI on June 7, 2002 ("LOI response"). As part of the response, Americom submitted a report of RFR measurements conducted at the McClellan Peak site on May 15, 2002, by an Americom consultant. This report shows that RFR fields in an unfenced area adjacent to the KZTQ tower exceeded the MPE limits for the general public.⁴ Americom stated that out of an abundance of caution, it had contracted for this location to be fenced.

8. On November 22, 2002, the Bureau issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to Americom in the amount of ten thousand dollars (\$10,000) for apparent willful and repeated violations of Section 1.1310 of the Rules.⁵ In its response to the NAL, filed December 23, 2002 ("NAL response"), Americom sought cancellation of the proposed monetary forfeiture. Americom argued that there is "only circumstantial evidence" of recent public use of the area near the KZTQ transmitter site; that there is "no evidence whatsoever of public use of the particularized ten square foot area" where Americom exceeded the RFR MPE limits; that, by providing appropriate signs warning the public of excessive RFR levels, Americom has in "good faith" treated the KZTQ transmitter site as "controlled environment" and implemented a "common sense" approach to RFR compliance which is consistent with

⁴ See LOI response, Attachment 2; see also *Application for Review*, Attachment – Response to Notice of Apparent Liability for Forfeiture at 3, note 4.

⁵ *Americom Las Vegas Limited Partnership*, 17 FCC Rcd 26689 (Enf. Bur. 2002) (finding that, based on RFR measurements conducted in May 2002 by FCC agents and by Americom's consultant, the operation of KZTQ (formerly KWNZ) created RFR fields that exceeded the RFR exposure limits for the public in unfenced, publicly accessible areas).

OET Bulletin 65;⁶ and that, if it did violate Section 1.1310 of the Rules, the appropriate sanction is admonishment. In its May 28, 2004, *Forfeiture Order*, the Bureau rejected these arguments and imposed a monetary forfeiture of \$10,000. In its application for review, Americom argues that “the resolution of this proceeding hinges on whether Americom reasonably concluded that the KZTQ Antenna Site . . . was remote and not likely to be visited by the public, making tower fencing unnecessary, particularly in light of three posted warning signs.”⁷ Americom also argues that its treatment in this proceeding is the same as that of the licensee in *A-O Broadcasting Corporation*,⁸ “which was found to have operated at more than 1500 percent above the public RFR exposure limits” and that, if the Bureau has overruled the “common sense” approach of OET Bulletin 65, it is obligated to give Americom advance notice of this change but failed to do so.

III. DISCUSSION

9. In 1996, the Commission amended its rules to adopt new guidelines and procedures for evaluating the environmental effects of RFR from FCC regulated facilities, operations or transmitters.⁹ The Commission adopted MPE limits for electric and magnetic field strength and power density for facilities, operations or transmitters operating at frequencies from 300 kHz to 100 GHz.¹⁰ The MPE limits, which are set forth in Section 1.1310 of the Rules, include limits for occupational/controlled (“occupational”) exposure and limits for general population/uncontrolled (“public”) exposure. The occupational exposure limits apply in situations in which persons are exposed as a consequence of their employment, provided those persons are fully aware of the potential for exposure and can exercise control over their exposure.¹¹ The limits for occupational exposure also apply in situations where an individual is transient through a location where the occupational limits apply, provided that he or she is made aware of the potential for exposure. The more stringent public exposure limits apply in situations in which the general public may be exposed, or in which persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure.¹² The Commission has assessed a minimum forfeiture of \$10,000 against every licensee that it has found has willfully and/or repeatedly violated the public RFR MPE limits.¹³

⁶ OET Bulletin 65, “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields” (August 1997) (“OET Bulletin 65”).

⁷ *Application for Review* at 2 – 3.

⁸ 17 FCC Rcd 24184 (2002); *Forfeiture Order* 18 FCC Rcd 27069 (2003).

⁹ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, ET Docket No. 93-62, 11 FCC Rcd 15123 (1996), *recon. granted in part, First Memorandum Opinion and Order*, 11 FCC Rcd 17512 (1996), *recon. granted in part, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494 (1997) (“*Guidelines*”).

¹⁰ *See* 47 C.F.R. § 1.1310, Table 1.

¹¹ 47 C.F.R. § 1.1310, Note 1 to Table 1.

¹² 47 C.F.R. § 1.1310, Note 2 to Table 1.

¹³ *See, e.g., A-O Broadcasting Corporation*, 18 FCC Rcd 27069 (2003), *recon. denied*, 20 FCC Rcd 756 (2005); and *Radio One Licenses, LLC, et. al*, 19 FCC Rcd 23922 (2004), *recon. denied*, FCC 06-173 (released December 1, 2006).

10. In OET Bulletin 65, the Commission's Office of Engineering and Technology gave guidance to Commission licensees concerning controlling exposure to RF fields. When dealing with compliance with the Commission's public MPE limit, the OET stated that:

Restricting access is usually the simplest means of controlling exposure to areas where high RF levels may be present. Methods of doing this include fencing and posting such areas or locking out unauthorized persons in areas, such as rooftop locations, where this is practical. There may be situations where RF levels may exceed the MPE limits for the general public in remote areas, such as mountain tops, that could conceivably be accessible but are not likely to be visited by the public. In such cases, common sense should dictate how compliance is to be achieved. If the area of concern is properly marked by appropriate warning signs, fencing or the erection of other permanent barriers may not be necessary.¹⁴

11. Americom argues that it "reasonably and in good faith" concluded that the posting of RFR warning signs near the KZTQ's antenna site was a "common sense approach at such a remote mountain top location." Americom supports its belief that the site was remote and not likely to be visited by the public by again presenting the affidavits presented in its response to the *NAL* in which a County Sheriff and two individuals with work experience at the site state that, in their experience, the public is unlikely to visit the site. The evidence gathered by the FCC agents, however, included:

[T]rash in at least four locations throughout the approximately ¼ mile long area on McClellan Peak Ridge where the transmission towers are located; ATV tracks throughout that area; and a campfire ring in the same area. The trash observed by the FCC agents included beer and wine bottles -- not the kind of trash likely to be left by workers who service transmission facilities.¹⁵ The tire tracks observed by the FCC agents were ATV tracks; these tracks were not made by the kind of vehicles that would be used to service the transmission sites on McClellan Peak Ridge. Finally, the agents also observed ATV use by at least two drivers during the inspection of KWNZ [KZTQ].¹⁶

Despite Americom's assertion that the evidence is in dispute in this proceeding, we find that Americom has not presented any evidence which contradicts the FCC agents' observations. The June 6, 2002, letter of Storey County Sheriff Patrick A. Whitten¹⁷ indicates that his office receives "little to no call volume" from McClellan Peak and "is aware of no significant foot traffic at the site." The letter contains no information about whether Sheriff Whitten observed any ATV use, ATV tracks, trash or campfire rings and does not refute the observations of the FCC agents.¹⁸ The December 20, 2002, declaration of

¹⁴ OET Bulletin 65 at 53 (footnotes omitted).

¹⁵ Even if we accept Americom's assertion that the ATV tracks, trash, and campfire rings could have been the product of maintenance personnel, Americom has provided no evidence that these maintenance personnel, who were exposed as a consequence of their employment, were fully aware of the potential for exposure or could exercise control over their exposure. Consequently, Section 1.1310 of the Rules requires that the public MPE limit be applied to these maintenance personnel as well.

¹⁶ 19 FCC Rcd at 9645.

¹⁷ *Application For Review*, Attachment 2.

¹⁸ Americom asserts that the Bureau alleged, in its May 1, 2002, LOI that information from law enforcement officials indicated the public frequently visits the McClellan Peak antenna site but contends the Bureau has not reasserted this allegation since Americom submitted Sheriff Whitten's letter. *Application For Review*, note 8. The Bureau's failure to reassert the allegation is of no significance because the FCC agents' observations – unrefuted by Sheriff Whitten – contradict the licensee's contention and are a sufficient basis for our being unable to find that the KZTQ antenna site is "not likely to be visited by the public." See Paragraph 12, *supra*.

KZTQ's engineering consultant, Stephen R. Weber,¹⁹ indicates that Mr. Weber initially did not see any trash or fire rings "in the immediate vicinity of the site" and that later he could find no fire ring on McClellan Peak and observed trash that was "sparse, old, or located under shrubbery nowhere near the KWNZ [KZTQ] tower site." The December 21, 2002, declaration of McClellan Peak Ridge property owner James Lencioni²⁰ indicates he has observed ATV use but no fire rings or trash on McClellan Peak Ridge. Because Messrs. Weber and Lencioni do not state whether they made any observations on or near the date of the FCC inspection, their failure to observe all the signs of public use reported by the FCC agents does not contradict the agents' observations. In fact, the declarations of Mr. Lencioni and Mr. Weber partially confirm the agents' observations and bolster the inference from those observations that there is public use of McClellan Peak.

12. Assuming *arguendo* that we accept Americom's argument that the KZTQ transmitter site is so remote as to only require RFR warning signs, pursuant to OET Bulletin 65, Americom would still be liable for a violation of Section 1.1310 of the Rules, because its signage at the site was inadequate. As the Enforcement Bureau stated in the *Forfeiture Order*, "[w]hen the agents took the RFR measurements, they looked for warning signs; the only warning signs they observed were at the front of the building at [KZTQ's] transmitter site, where they would not be seen by persons approaching the area affected by excessive RFR from a different direction."²¹ Americom argues that the *Forfeiture Order* should not credit the agents' failure to observe multiple signs as proof that only one sign existed. Americom, however, misses the point. There may very well have been more than one RFR warning sign on McClellan Peak on the two days that the agents took RFR measurements. But the agents were in the area of concern which exceeded the public MPE limit and looked for additional signs in the immediate vicinity and only saw the sign posted at the front of the KZTQ building. Therefore, any member of the public who came upon the accessible area of concern which exceeded the public MPE limits from any direction other than from the front of the KZTQ building would also have failed to see any RFR warning signs. In remote areas, when a licensee decides to depend on RFR warning signs rather than physical barriers to ensure that members of the public do not access areas of RFR in excess of the MPE public limits, the burden is on the licensee to ensure that the RFR warning signs are plainly visible to the public from every possible direction that the public may access the area of concern. The burden is not on the public to attempt to find RFR warning signs. Common sense dictates no less.

13. Americom also asserts that its treatment in this proceeding is the same as that of the licensee in *A-O Broadcasting Corporation, supra*, "which was found to have operated at more than 1500 percent above the public RFR exposure limits." The Commission determined in *A-O Broadcasting Corporation* that \$10,000 is an appropriate base forfeiture amount for violation of the RFR MPE limits. An RFR violation need not be as significant as *A-O Broadcasting Corporation's* violation²² to warrant

¹⁹ *Application For Review*, Attachment 3.

²⁰ *Application For Review*, Attachment 4.

²¹ 19 FCC Rcd at 9646.

²² In *A-O Broadcasting Corporation, supra*, United States Forest Service personnel, who were unaware of the risk, had unrestricted access to an area in an observation tower that exceeded the RFR MPE limits by over 1000%.

imposition of the full \$10,000 base forfeiture amount.²³ We conclude Americom's violation of the RFR MPE limits warrants imposition of the full base forfeiture amount.²⁴

14. Americom also argues that, if the Bureau overruled the "common sense" approach of OET Bulletin 65, it was obligated under *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), to give Americom advance notice of the change but failed to do so. We have not overruled the "common sense" approach of OET Bulletin 65. As indicated above, we found that the "common sense" guidelines set forth in OET Bulletin 65 for determining the applicable MPE limits in remote areas require application of the public MPE limits to the KZTQ antenna site and, therefore, require fencing or another permanent barrier to protect the public from exposure to RFR exceeding the public MPE limits. Even in those situations where the "common sense" approach of OET Bulletin 65 allows the application of the public MPE limits, the licensee must provide appropriate signs warning the public of excessive RFR levels. Americom did not provide such signs.

15. We have examined Americom's application for review pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,²⁵ and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,²⁶ as well. As a result of our review, we conclude that Americom willfully and repeatedly violated Section 1.1310 of the Rules and that the appropriate forfeiture amount is \$10,000.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Rules,²⁷ Americom's application for review of the *Forfeiture Order* **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

17. 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.²⁸ 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 Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate

²³ See, e.g., *Radio One Licenses, LLC, et. al*, 19 FCC Rcd 23922 (2004), *recon. denied*, FCC 06-173 (released December 1, 2006).

²⁴ The case cited by Americom, *Melody Music*, 345 F. 2d 730 (D.C. Cir. 1965), is inapplicable. In that proceeding, the Court remanded the case to the Commission because the Commission did not adequately explain why the appellant was treated differently from another Commission licensee. In this case, we have explained why Americom was treated similarly to A-O Broadcasting.

²⁵ 47 U.S.C. § 503(b)(2)(D).

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

²⁷ 47 C.F.R. § 1.115(g).

²⁸ 47 U.S.C. § 504(a).

Managing Director – Financial Operations, 445 12th Street, SW, Room 1A625, Washington, D.C. 20554.²⁹

18. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Americom's counsel Dennis P. Corbett, Esq., and Phillip A. Bonomo, Esq., Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ See 47 C.F.R. § 1.1914.