

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

In the Matter of)
Playa Del Sol Broadcasters) File Number: EB-08-SD-0088
Licensee of Station K238AK) NAL/Acct. No.: 200832940003
Palm Desert, California) FRN: 0004256426

ORDER ON REVIEW

Adopted: February 28, 2013

Released: March 1, 2013

By the Commission:

I. INTRODUCTION

1. In this Order on Review (Order on Review), we deny the Application for Review¹ filed by Playa Del Sol Broadcasters (Playa Del Sol), the licensee of Station K238AK, Palm Desert, California, pursuant to Section 1.115 of the Commission’s Rules (Rules). Playa Del Sol seeks review of the Forfeiture Order issued by the Western Region, Enforcement Bureau (Bureau)² that assessed a \$4,000 forfeiture against the licensee for its willful and repeated violation of Section 74.1236(c) of the Rules.³ The noted violation concerned unauthorized emissions from Station K238AK⁴ which resulted from Playa Del Sol’s failure to properly attenuate Station K238AK’s emissions in the VHF aviation band.⁵ For the reasons stated below, we affirm the Bureau’s Forfeiture Order.

II. BACKGROUND

2. Playa Del Sol uses translator Station K238AK to rebroadcast Station KRCK-FM, which is a full power FM broadcast station licensed to Playa Del Sol in Mecca, California. On March 12, 2008,

1 Application for Review, Playa Del Sol Broadcasters, EB-08-SD-0088, filed August 17, 2009 (“Application for Review”).

2 Playa Del Sol Broadcasters, Forfeiture Order, 24 FCC Rcd 9142 (Enf. Bur. Western Region 2009) (“Forfeiture Order”), aff’g Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200832940003 (Enf. Bur., Western Region, San Diego Office, rel. July 31, 2008) (“NAL”).

3 47 C.F.R. § 74.1236(c). Section 74.1236(c) of the Rules requires in relevant part that the power of emissions appearing outside the assigned channel shall be attenuated below the total power of the emission as follows:

Table with 2 columns: Distance of emission from center frequency, Minimum attenuation below unmodulated carrier. Row 1: Over 600 kHz, 60 dB

4 Specifically, Playa Del Sol failed to ensure that emissions appearing outside the assigned channel greater than 600 kHz from the center frequency had a minimum attenuation below the unmodulated carrier of 60 dB. Id.

5 Playa Del Sol requests that we stay the effect of the Forfeiture Order during the pendency of the Application for Review pursuant to Section 1.102(b)(3) of the Rules, 47 C.F.R. § 1.102(b)(3). As this Order on Review resolves the Application for Review, we dismiss this request as moot.

the San Diego District Office (San Diego Office) of the Bureau received a complaint from the Riverside County Sheriff's Department of interference to their helicopters when flying in the Indian Wells, California area.⁶ In response, on March 13, 2008, an agent from the San Diego Office traveled to the location during normal business hours and detected the audio of Station KRCK-FM on three separate frequencies in the VHF aviation band.⁷ The agent determined that the three signals emanated from the studio of Station KRCK-FM, which is collocated with Station K238AK's transmitter.⁸ Field strength measurements made by the agent on each of the three signals in the VHF aviation band showed that all three were attenuated less than 60 dB from 95.5 MHz, the carrier signal of Station K238AK.⁹ The next day, on March 14, 2008, the San Diego agent returned to the site during normal business hours and conducted another set of measurements with similar results.¹⁰ During that inspection the agent requested that the translator station be taken off the air and determined that whenever the Station K238AK transmitter was switched off, all three signals previously measured in the aviation band went off the air.¹¹

3. Playa Del Sol does not dispute any of the above facts. Nor does it deny that it operated Station K238AK on March 12, March 13, and March 14, 2008, or that Station K238AK was the source of the signals measured by the San Diego agent on 109.5 MHz, 122.2 MHz, and 136.1 MHz on March 13 and March 14, or that those signals violated the requirements of Section 74.1236(c) of the Rules. Instead, Playa Del Sol argues that, despite these facts, no forfeiture should be imposed against it because its violation of Section 74.1236(c) was not repeated or willful.¹²

III. DISCUSSION

4. In this *Order on Review*, we deny Playa Del Sol's Application for Review and affirm the Bureau's *Forfeiture Order*. The forfeiture amount in this case was assessed in accordance with section 503(b)(2)(E) of the Communications Act of 1934, as amended (Act).¹³ That provision states that any person who willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹⁴ Section 503's legislative history states that the definitions of "willful" and "repeated" recited in section 312(f) of the Act also apply to Section 503¹⁵ and the Commission has so interpreted the terms.¹⁶ Thus,

⁶ The original complaint advised the FCC on March 12, 2008, that the interference to multiple aviation frequencies had been ongoing for several weeks and getting worse.

⁷ Specifically, the agent detected unauthorized emissions containing the audio of Station KRCK-FM on aviation frequencies at 109.5 MHz, 122.2 MHz, and 136.1 MHz.

⁸ *Forfeiture Order*, 24 FCC Rcd at 9142.

⁹ *Id.* at 9142 – 9143. The agent determined that the 109.5 MHz signal was attenuated 18.0 dB from the carrier of Station K238AK, the 122.2 MHz signal was attenuated 30.8 dB from the carrier of Station K238AK and the 136.1 MHz signal was attenuated 20.9 dB from the carrier of Station K238AK.

¹⁰ *Id.* at 9143. The results of those measurements are as follows: the 109.5 MHz signal was attenuated 19.8 dB from the carrier of Station K238AK, the 122.2 MHz signal was attenuated 23.4 dB from the carrier of Station K238AK and the 136.1 MHz signal was attenuated 18.0 dB from the carrier of Station K238AK.

¹¹ *NAL* at para. 6; *Forfeiture Order*, 24 FCC Rcd at 9144.

¹² Application for Review at 2-5.

¹³ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80 (b)(4); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999).

¹⁴ 47 U.S.C. § 503(b).

¹⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., section 503) As defined . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there (continued . . .)

Section 503's use of the term "willful" means the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law,¹⁷ and the term "repeated" means "the commission or omission of such act more than once or, if such commission is continuous, for more than one day."¹⁸

5. Playa Del Sol denies that its violation of Section 74.1236(c) of the Rules was repeated. We disagree. Each of the three unauthorized emissions by Station K238AK – which Playa Del Sol does not dispute – constitutes a separate violation. Specifically, the FCC agent's field measurements found each unauthorized emission was attenuated less than 60 dB from 95.5 MHz and therefore, each of the three unauthorized emissions was a separate violation of Section 74.1236(c). Consequently, Playa Del Sol violated Section 74.1236(c) three times, or repeatedly, as the commission of the violation occurred more than once. In addition, the agent's direct evidence of the field measurements, obtained on each of the three spurs on two separate days during normal business hours, confirmed and verified the Riverside County Sheriff's Department's complaint of ongoing interference over several weeks to multiple aviation frequencies.¹⁹ Consequently, Playa Del Sol's violation was also repeated as each of the three violations also occurred on successive days.²⁰ Accordingly, we affirm the Bureau's finding that the violation was repeated.²¹

6. Second, Playa Del Sol argues that its violations were not "willful" because it did not definitely know that its transmitter was the source of the unauthorized emissions until the San Diego agent conclusively established this fact through testing on March 14, 2008.²² As noted above, the legislative history to our forfeiture authority defines "willful" as "the licensee knew he was doing the act in question, irrespective of any intent to violate the law."²³ There is no dispute that Playa Del Sol consciously and deliberately operated Station K238AK and, irrespective of any intent by the licensee to violate the rules, that Station K238AK produced three emissions more than 600 kHz outside its assigned channel of 95.5 MHz that were attenuated less than 60 dB. Consequently, the Bureau correctly determined that Playa Del Sol's violation was willful, as defined in Section 312(f)(1) of the Act and for

(Continued from previous page)

was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission's application of those terms . . .").

¹⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶10 (2001) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage); *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (applying Section 312(f)(1) definition of "willful" to Section 503 forfeiture), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ 47 U.S.C. § 312(f)(2).

¹⁹ Playa Del Sol admitted in its Application for Review that post-inspection repairs to the translator amplifier revealed "spurious emissions and a power supply failure." Application for Review at 4.

²⁰ See, e.g., *In the Matter of St. George Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 11447 ¶ 21 (2012) (treating each of the four days a cable operator failed to comply with the Commission's cable signal leakage limit as separate violations).

²¹ Accordingly, we reject Playa Del Sol's assertion that its violations had to be continuous to be considered "repeated." See Application for Review at 2–3. Whether or not the unauthorized emissions occurred continuously is not relevant to our determination, given that they occurred on separate days. See also 47 U.S.C. § 312(f)(2); *A-O Broadcasting Corp.*, Forfeiture Order, 31 Communications Reg. (P&F) 411 ¶ 12 (2003) (finding that violations of EAS, main studio, and technical rules were "repeated" because they occurred on more than one day or continued for more than one day).

²² Application for Review at 4.

²³ See *supra* note 14.

purposes of Section 503(b).²⁴ Therefore, upon review of the Application for Review and the entire record herein, we deny Playa Del Sol's application and affirm the Bureau's *Forfeiture Order*.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Commission's Rules,²⁵ that the Application for Review filed by Playa Del Sol Broadcasters **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

8. **IT IS FURTHER ORDERED** that, pursuant to Section 1.102(b)(3) of the Commission's Rules,²⁶ Playa Del Sol Broadcaster's request to stay the effect of the *Forfeiture Order* **IS DISMISSED AS MOOT**.

9. Payment of the forfeiture ordered by the Bureau and affirmed by this *Order on Review* shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Order on Review.²⁷ If the forfeiture is not paid within the period specified, the case may be pursued by the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁸ Playa Del Sol shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made.

10. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O.

²⁴ 47 U.S.C. §§ 312(f)(1), 503(b). Furthermore, as noted above, the Bureau not only correctly determined that Playa Del Sol willfully violated Section 74.1236(c), but also properly found that the licensee repeatedly violated that rule. Therefore, a finding of willfulness was not essential for imposition of the forfeiture. *See, e.g., Infinity Broadcasting Corp.*, Order on Review, 24 FCC Rcd 4270 (2009).

²⁵ 47 C.F.R. § 1.115(g).

²⁶ 47 C.F.R. § 1.102(b)(3).

²⁷ 47 C.F.R. § 1.80.

²⁸ 47 U.S.C. § 504(a).

²⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁰ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. **IT IS FURTHER ORDERED** that this *Order on Review* shall be sent by regular mail and by certified mail, return receipt requested, to Playa Del Sol Broadcasters at 73-733 Fred Waring Drive, Suite 201, Palm Desert, California, 92260, and Bruce A. Olcott, its counsel of record, at Squire Sanders, Suite 500, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20004.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ See 47 C.F.R. § 1.1914.