

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

In the Matter of)	
)	
Ely Radio, LLC)	File Number: EB-08-SF-0039
)	NAL/Acct. No.: 200932960001
Former Owner of Antenna Structure Number)	FRN: 0014848899
1005854, Winnemucca, NV ¹)	
)	

ORDER ON REVIEW

Adopted: April 24, 2013

Released: April 25, 2013

By the Commission: Commissioner McDowell not participating.

I. INTRODUCTION

1. In this Order on Review, we deny the Application for Review² filed by Ely Radio, LLC (Ely), a broadcast licensee and former owner of antenna structure number 1005854 in Winnemucca, Nevada.³ Ely seeks Commission review of the Memorandum Opinion and Order (*MO&O*) issued by the Enforcement Bureau (Bureau) on July 11, 2012, in this proceeding.⁴ In the *MO&O*, the Bureau denied Ely's petition for reconsideration of an eleven thousand dollar (\$11,000) forfeiture for violation of Section 303(q) of the Communications Act of 1934, as amended (Act),⁵ and certain provisions under Part 17 of the Commission's rules (Rules).⁶ The noted violations concerned Ely's failure to ensure that the antenna structure exhibited the required obstruction lighting and that the antenna structure's registration with the Commission was appropriately updated to reflect a change in ownership.⁷ For the reasons discussed below,

¹ See *infra* note 7.

² See Appeal, filed by Ely Radio, LLC (Aug 1, 2012) (on file in EB-08-SF-0039) (Application for Review). Although Ely entitled its document as an "Appeal," we are referring to the document in this proceeding as an "Application for Review," consistent with Commission rules. See 47 C.F.R. § 1.115.

³ For purposes of this proceeding, use of the term "antenna structure" refers to antenna structure number 1005854 in Winnemucca, Nevada. Also, we note that Ely Radio, LLC is the licensee of AM radio station KELY in Ely, Nevada.

⁴ *Ely Radio, LLC*, Memorandum Opinion & Order, 27 FCC Rcd 7608 (Enf. Bur. 2012) (*MO&O*), *aff'g*, Forfeiture Order, 24 FCC Rcd 13258 (Enf. Bur., Western Region 2009) (*Forfeiture Order*), Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200932960001 (Enf. Bur., Western Region, San Francisco District Office rel. Oct. 31, 2008) (*NAL*).

⁵ 47 U.S.C. § 303(q).

⁶ See 47 C.F.R. §§ 17.47(a), 17.48, 17.51(a), 17.57.

⁷ At the time of the violation, Ely was the licensee of Station KWNA(AM), Winnemucca, Nevada, which used the antenna structure to broadcast its signal and was determined by the Bureau to be the owner of the antenna structure. On August 29, 2012, the Commission's Media Bureau granted an application assigning the license for Station KWNA(AM) from Ely to Buckaroo Broadcasting, LLC (Buckaroo). See File No. BAL-20120508ADB, granted August 29, 2012. The parties consummated the assignment on October 19, 2012. See Notice of Consummation, filed October 22, 2012. Buckaroo also filed the required FCC Form 854 to update the Antenna Structure's ownership on February 21, 2013. See Antenna Structure Registration (ASR) database for antenna structure number 1005854 (which now reflects Buckaroo as the registered owner).

we deny Ely's Application for Review, affirm the Bureau's *MO&O*, and order Ely to pay the \$11,000 monetary forfeiture.

II. BACKGROUND

2. On October 31, 2008, the Enforcement Bureau's San Francisco Office issued an *NAL* in the amount of \$13,000 to Ely.⁸ In the *NAL*, the San Francisco Office found that Ely apparently repeatedly violated Section 303(q) of the Act and Section 17.51(a) of the Rules, by failing to exhibit the antenna structure's red obstruction lighting from sunset to sunrise; and violated Section 17.47(a) of the Rules, by failing to make observations of the antenna structure's lights at least once each 24 hours.⁹ The San Francisco Office found that Ely's failure to make the required observations of the lighting on the antenna structure resulted in its failure to notify the nearest Flight Service Station of the Federal Aviation Administration of the outage of the flashing obstruction lights, a significant public safety concern and a violation of Section 17.48 of the Rules.¹⁰ The San Francisco Office also found that Ely apparently repeatedly failed to immediately notify the Commission of a change in ownership information for antenna structure number 1005854 after it acquired Station KWNA(AM), a violation of Section 17.57.¹¹

3. Although Ely denied ownership of, and responsibility for, the antenna structure during the investigation, the preponderance of the evidence established that Ely was the owner of the structure.¹² As part of the record evidence, the San Francisco Office sent a Letter of Inquiry (LOI) not only to Ely, but also to Sheen Broadcasting Company (Sheen), the former licensee of Station KWNA(AM).¹³ Sheen responded to the LOI, and confirmed that it was no longer a Commission licensee; that, pursuant to the Asset Purchase Agreement for the sale of Station KWNA(AM) to Ely in August 2006, it assigned the Station and sold all the equipment used to operate the Station, including the antenna structure; and that the only relationship it continues to have with Ely concerns the lease of a building and land on which the Station and structure are located.¹⁴

4. On December 31, 2008, Ely filed a response to the *NAL*, contending that, based on its interpretation of the Asset Purchase Agreement, it was not the owner of antenna structure 1005854 and, therefore, could not have committed any of violations.¹⁵ The Enforcement Bureau's Western Region fully considered Ely's response and held, in the *Forfeiture Order*, that the *NAL* properly concluded, based

⁸ See *NAL*, *supra* note 4.

⁹ 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.47(a), 17.51(a).

¹⁰ 47 C.F.R. § 17.48.

¹¹ 47 C.F.R. § 17.57.

¹² See *NAL*, NAL/Acct. No. 200932960001, at paras. 13–14.

¹³ See Letter from Thomas N. Van Stavern, District Director, San Francisco Office, to Torrey Sheen, Sheen Broadcasting Company (June 26, 2008) (on file in EB-08-SF-038).

¹⁴ See Letter from Torrey Sheen, Sheen Broadcasting Company, to Thomas N. Van Stavern, District Director, San Francisco Office (June 30, 2008) (on file in EB-08-SF-038) (Sheen LOI Response). See also Asset Purchase Agreement by and between Sheen Broadcasting Company, Seller, and Ely Radio, LLC, Buyer, dated August 28, 2006 (Asset Purchase Agreement).

¹⁵ See *Ely Radio, LLC*, Response to NAL (Dec. 1, 2008) (on file in EB-08-SF-0039).

on the preponderance of the evidence, that Ely was the owner of the antenna structure.¹⁶ In addition, the Western Region held that, independent of the Asset Purchase Agreement, Ely was nevertheless responsible for ensuring that the structure complied with the antenna lighting and other requirements based on undisputed record evidence that Ely was the only licensee using the antenna structure; that Ely had access to and control over the lighting on the antenna structure; and that it was Ely's personnel (by their own admission) that improperly extinguished the antenna lights that resulted in the violation of the Act and the Rules.¹⁷ The Western Region also determined that the initially proposed \$13,000 forfeiture in the *NAL* warranted some reduction based on Ely's history of compliance with the Rules prior to the investigation in this case.¹⁸ As such, the proposed forfeiture was reduced to \$11,000.¹⁹

5. On November 30, 2009, Ely filed a petition for reconsideration (Petition) of the *Forfeiture Order*, urging the Bureau to reverse its determination that Ely was responsible for the violations of the Commission's tower rules as the owner of the subject antenna structure.²⁰ In its Petition, Ely did not dispute the Bureau's factual findings, but argued that the Bureau's understanding of the Asset Purchase Agreement²¹ was contrary to Nevada state law, based on a legal opinion letter from a Nevada attorney retained by Ely.²² The Bureau, however, declined to adjudicate the proper interpretation of the Asset Purchase Agreement between Ely and Sheen under Nevada law.²³ The Bureau noted that the proper body to interpret the relevant provision at issue was a court of competent jurisdiction in the State of Nevada, given the continuing disagreement between Ely and Sheen concerning certain provisions of the Asset Purchase Agreement.²⁴ The Bureau, instead, affirmed the *Forfeiture Order* based on the available record. The Bureau held: "Based on the overall record in this case, we find that the preponderance of the evidence supports the *Forfeiture Order*'s conclusion that Ely was (and is) the owner of the subject antenna structure for purposes of the relevant Part 17 Rules and, therefore, remains liable for the

¹⁶ See *Forfeiture Order*, 24 FCC Rcd at 13262–64, paras. 12–17

¹⁷ See *id.* In addition, Ely did not dispute the statement in the record in which Ely's owner told the Bureau's agents that he wanted to move the antenna structure to a new location, which suggests acknowledgment of ownership of the structure; and that he previously reported prior antenna light outages to the FAA, which suggests prior acceptance of responsibility for the structure. See *NAL*, NAL/Acct. No. 200932960001, at para 5.

¹⁸ See *Forfeiture Order*, 24 FCC Rcd at 13264, paras. 18–19.

¹⁹ See *id.*

²⁰ See Ely Radio, LLC, Petition for Reconsideration (Nov. 30, 2009) (on file in EB-08-SF-0039) (Petition).

²¹ The specific provision at issue is Section 2 of the Agreement which states: "Seller will sell, assign, transfer, convey and delivery to buyer . . . [a]ll tangible property and fixtures owned by Seller used or useful in the operation of the station." See *supra* note 14. The *Forfeiture Order* noted that Section 3 of the Asset Purchase Agreement details the "Excluded Assets," and that antenna structure number 1005854 was not listed, supporting Sheen's position that the antenna was included in the sale of the station. See *Forfeiture Order*, 24 FCC Rcd at 13263, para. 15.

²² See *Petition* at 1–2 & Attachment (Letter from Robert Dolan, Dolan Law LLC, to Peter Gutmann, Womble, Carlyle, Sandridge & Rice, PLLC, dated Nov. 30, 2009) (Dolan Letter) (In his opinion letter, Mr. Dolan stated that he reviewed the Agreement and that, "based on Nevada statutes and case law," Sheen, not Ely, is the legal owner of the land on which the antenna tower is located. In addition, Mr. Dolan opined that because the tower is part of the land, Sheen is presumed to be its owner.)

²³ See *MO&O*, 27 FCC Rcd at 7610–13, paras. 7–12.

²⁴ See *id.* at 7611, para. 8.

violations.”²⁵ Moreover, the Bureau also found that the Commission’s rules and policies nevertheless obligated Ely, as the licensee using the antenna structure in question and based on the facts and circumstances of this case, to comply with the relevant Part 17 requirements, thereby rendering the question of whether Ely was the legal owner of the antenna structure under Nevada law inconsequential for purposes of finding a violation of the Commission’s rules.²⁶ Thereafter, Ely filed an Application for Review of the Bureau’s *MO&O* which we discuss below.

III. DISCUSSION

6. Pursuant to Section 1.115(b)(2) of the Commission’s rules, to obtain relief through an application for review, an aggrieved party must specify, *inter alia*, how an action taken pursuant to delegated authority conflicts with a relevant “statute, regulation, case precedent, or established Commission policy,” or “involves a question of law or policy which has not previously been resolved by the Commission.”²⁷ In its Application for Review, Ely does not dispute the Bureau’s factual findings in this case, but argues that the Bureau erred in ruling that Ely is the owner of the subject antenna structure by disregarding the “expert opinion” of a Nevada real estate attorney, who opined that Sheen remains the owner of the antenna structure because—based on the Nevada attorney’s interpretation of Nevada law—a fixture such as a tower is part of the real estate unless otherwise provided for in the purchase or sale agreement.²⁸ Ely further states that the Bureau, in so ruling, effectively “amended” Nevada real estate law, which the Bureau did not have authority to do; and that even if the Bureau had such authority, it failed to follow the notice and comment procedures under the Administrative Procedure Act.²⁹

7. We find no merit in Ely’s argument. The Bureau made clear in the *MO&O* that it was *not* adjudicating the controversy based on Nevada law, but based on the case record compiled before the FCC, including all filings made by Ely, which Ely does not question. Therefore, Ely’s suggestion that the Bureau inappropriately “amended” Nevada law is misplaced. In the *MO&O*, the Bureau held:

We find that the opinion letter from [the Nevada attorney] is insufficient to warrant reconsideration. We are unable to evaluate the legal sufficiency of the letter because the letter does not provide the language or citations to the specific statutes and case law that counsel claims to have relied upon in rendering his legal opinion. In any event, with respect to the proper interpretation of the Asset Purchase Agreement, the Bureau will not adjudicate its proper interpretation under Nevada law. The interpretation of the referenced provision is most appropriately addressed by a court of competent jurisdiction, which Ely has not presented. At best, it appears that Ely and Sheen may have a continuing disagreement with respect to the contract and their respective understandings since its execution in August 2006. However, any resolution concerning a failure to

²⁵ *Id.* at 7611, para. 9.

²⁶ *Id.* at 7612–14, paras. 10–12.

²⁷ See 47 C.F.R. § 1.115(b)(2); *Beasley Broadcast Group, Inc., WQAM Limited Partnership, Application for Renewal of License of Station WQAM(AM), Miami, Florida*, Memorandum Opinion and Order, 23 FCC Rcd 15949, 15955 (2008).

²⁸ See Application for Review at 1. Underlying this argument is Ely’s assertion that the Asset Purchase Agreement did not include the sale of the antenna structure, which Sheen (the former licensee) disputed. See *MO&O*, 27 FCC Rcd at 7609, para. 3. See also Sheen LOI Response, *supra* note 14.

²⁹ See Application for Review at 1–2.

perform pursuant to a private contractual arrangement, including appropriate remedies or damages, are matters to be resolved in a local forum. Here, the Bureau must render its decision based on the available record.³⁰

8. We find nothing legally incorrect or inappropriate about the Bureau's decision. This case involves an unlit antenna structure that presented a potentially serious hazard to aviation. The Bureau has a regulatory responsibility to enforce the Commission's rules to prevent such situations and to take appropriate action where it finds violations. Here, the Bureau was required to determine the party responsible for ensuring that the antenna structure in question complied with all relevant Commission rules. In making that determination, the Bureau was not required to follow the conclusory and unsupported interpretation of Nevada law favored by Ely's Nevada counsel. Rather, the Bureau must conduct its own analysis of the evidence presented. In this case, based on the available record evidence and the Commission's policies and regulations, the Bureau reasonably determined that Ely was the antenna structure owner³¹ and, therefore, was responsible for the violations at issue here.³²

9. Moreover, Ely does not dispute that even if it is not the legal owner of the antenna structure, the Commission's rules and policies nonetheless obligate it, as licensee, to comply with the relevant Part 17 requirements.³³ On this point, the evidence is clear that: (1) Ely was the only licensee

³⁰ *MO&O*, 27 FCC Rcd at 7611, para. 8 (internal citations omitted).

³¹ The Bureau provided Ely with an opportunity to provide additional evidence to support its position concerning ownership, but it never did. On this point, the Bureau stated:

In addition, Ely still has not proffered any new evidence, separate from the Asset Purchase Agreement, to support its position that Sheen retained title to the antenna structure or that Sheen would be responsible for the maintenance of the antenna. In this regard, Ely could have submitted an amendment (executed by both parties) to the Asset Purchase Agreement or its current lease arrangement that unequivocally confirms that Sheen was and is the owner of the antenna; and this begs asking why Ely has not (to this day) sought to amend the Asset Purchase Agreement with Sheen to clarify ownership of, and responsibility for, antenna structure number 1005854.

Id. at 7611–12, para. 9.

³² To the extent Sheen and Ely continue to argue whether the antenna structure was included in the Asset Purchase Agreement, that dispute is more appropriate for a local court to decide. On this point, the Bureau's decision is consistent with the Commission's longstanding policy of declining to adjudicate private contract law questions for which a forum exists in state courts. See *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting with approval the Commission's "long-standing policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts"); *Algreg Cellular Engineering, etc.*, Decision, 9 FCC Rcd 5098, at para. 46 (Rev. Bd. 1994) ("Another fallacy . . . is the notion that the Commission is constrained to apply the laws of the various states in performing the enforcement of its licensing rules. It is well-established that while the Commission will look to state law, where appropriate, it must ultimately decide cases on the basis of its own federal policies and regulations."). See also *Assignment of Call Sign WPFX961, From Elaine Hough, Assignor, to Chadmoore Wireless Group, Inc., Assignee*, Order, 18 FCC Rcd 1875, 1877, para. 7 & n.14 (WTB 2003) (citing cases in support of general Commission policy of deferring resolution of private, contract matters to local courts).

³³ Under Part 17 of the Rules, both antenna structure owners and licensees are responsible for maintaining the prescribed structure painting and/or lighting of antenna structures. See *Streamlining the Commission's Antenna Structure Clearance Procedures and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, Report and Order, 11 FCC Rcd 4272, 4294, paras. 52–53 (1995) (*Antenna Structure Streamlining Report and Order*) (emphasis added). See also 47 C.F.R. 17.6 (Responsibility of Commission Licensees and Permittees); 47 C.F.R. 73.1213(b) ("In the event of default by the owner, each licensee or permittee shall be responsible for ensuring that the structure complies with applicable painting and lighting (continued....)");

using the antenna structure; (2) Ely had access to and control over the lighting on the antenna structure; (3) it was Ely's station personnel (by their own admission) that improperly extinguished the antenna lights that resulted in the violation of the Act and the Rules; and (4) Ely knew that Sheen remained adamant that the Asset Purchase Agreement included the sale of the antenna structure and had not been involved in the maintenance of the antenna structure since the sale of the station.³⁴ Based on the foregoing, we affirm the Bureau's *MO&O* and, therefore, find Ely liable for a monetary forfeiture in the amount of \$11,000 for repeatedly violating Section 303(q) of the Act and the relevant Part 17 Rules.³⁵

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115 of the Commission's Rules,³⁶ the Application for Review filed by Ely Radio, LLC, **IS DENIED** and the Bureau's Memorandum Opinion and Order **IS AFFIRMED**.

11. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Rules, Ely Radio, LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for violations of Section 303(q) of the Act and Sections 17.47(a), 17.48, 17.51(a), and 17.57 of the Rules.³⁷

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules immediately and no later than thirty (30) calendar days after the release date of this Order on Review.³⁸ On March 11, 2013, the United States filed a complaint in federal district court against Ely Radio, LLC, for recovery of the \$11,000 monetary forfeiture penalty, in *U.S. v. Ely Radio, LLC*, Civ. No. 13-00405 (D. Nev.). Pending court approval of a request from the United States, the court case will be held in abeyance until resolution of this administrative proceeding. If timely payment of the forfeiture is received, the government will dismiss the district court case. Ely Radio, LLC, shall send electronic notification of payment to WR-Response@fcc.gov and to Carlos A. Gonzalez, Assistant United States Attorney, at carlos.gonzalez2@usdoj.gov, on the date said payment is made.

13. 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.³⁹ When completing the

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requirements." This shared responsibility is intended to ensure that prescribed structure painting and/or lighting is maintained at all times, and that lighting outages will be promptly rectified, given compelling public safety concerns. Further, as the Commission has stated, "if the owner cannot be reached or reliance on the owner to maintain prescribed structure painting and/or lighting proves to be ineffective, we [will] then turn to the individual tenant licensees as the entities to bear secondary responsibility for the structure's proper maintenance." *Antenna Structure Streamlining Report and Order*, 11 FCC Rcd at 4293, para. 50.

³⁴ See *MO&O*, 27 FCC Rcd at 7608-14, paras. 1-11.

³⁵ See 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.47(a), 17.48, 17.51(a), 17.57.

³⁶ 47 C.F.R. § 1.115.

³⁷ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.47(a), 17.48, 17.51(a), 17.57.

³⁸ 47 C.F.R. § 1.80.

³⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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. 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.

14. **IT IS FURTHER ORDERED** that this Order on Review shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Ely Radio, LLC, 5010 Spencer, Las Vegas, Nevada, 89119.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary