

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

In re	)	
	)	
Emery Telephone	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0020
for Rural Radiotelephone Service	)	
Station KNKO305	)	
Castle Dale, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0022
for Rural Radiotelephone Service	)	
Station KNKM777	)	
Castle Dale, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0023
for Rural Radiotelephone Service	)	
Station KNKM779	)	
Orangeville, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0024
for Rural Radiotelephone Service	)	
Station KNKO304	)	
Ferron, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0025
for Rural Radiotelephone Service	)	
Station KNKO306	)	
Emery, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0026
for Rural Radiotelephone Service	)	
Station KNKO307	)	
Horn Mountain, Utah	)	
	)	
Notice of Apparent Liability for Forfeiture	)	File No. 316MS0027
for Rural Radiotelephone Service	)	
Station KNKO767	)	
Horn Mountain, Utah	)	

Notice of Apparent Liability for Forfeiture  
for Rural Radiotelephone Service  
Station KNKO786  
Horn Mountain, Utah

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File No. 316MS0028

### **MEMORANDUM OPINION AND ORDER**

**Adopted: September 2, 1998**

**Released: October 29, 1998**

By the Commission:

#### **I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. On September 11, 1995, the Enforcement Division, Wireless Telecommunications Bureau (Bureau), reduced the total amount of forfeitures imposed upon Emery Telephone (Emery) in connection with Emery's failure to file certain FCC forms as required by the Commission's Rules.<sup>1</sup> On October 16, 1995, Emery filed an Application for Review requesting remission or reduction of these forfeitures. For the reasons discussed below, we deny the Application for Review and affirm the Bureau's decision to assess a \$10,000 forfeiture for Emery's violations of the Commission's Rules.

#### **II. BACKGROUND**

2. On January 24, 1991, September 26, 1991, August 13, 1992, and September 15, 1992, the Commission granted Emery eight separate authorizations to operate on eight frequencies in various locations in rural Utah.<sup>2</sup> The stations are used to provide a Basic Exchange Telephone Radio System (BETRS).<sup>3</sup> The construction periods for the authorizations ended January 24, 1992, September 26, 1992, August 13, 1993, and September 15, 1993. Emery constructed and

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<sup>1</sup> See *Emery Telephone*, 10 FCC Rcd 10012 (Wireless Tel. Bur. 1995).

<sup>2</sup> See Public Notice, PMS-91-18-A (January 30, 1991); Public Notice, PMS-2-1-A (October 2, 1991); Public Notice, PMS-92-47-A (August 19, 1992); Public Notice PMS-92-52-A (September 23, 1992).

<sup>3</sup> Former Section 22.2 of the Commission's Rules defined BETRS as follows:

In the Rural Radio Service this service provides public message communication service between a central office and fixed subscribers located in rural areas. In the domestic Public Cellular Radio Telecommunications Service, this service provides public message communications service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas.

47 C.F.R. § 22.2 (1994); See *Report and Order*, CC Docket Nos. 92-115, 93-116, and 94-46, 9 FCC Rcd 6513 (1994) (eliminating this definition from our Rules)

placed the stations into operation within the construction periods.<sup>4</sup> However, Emery did not timely file FCC Forms 489 as required by Section 22.9(b)(1) of the Commission's Rules, 47 C.F.R. § 22.9(b)(1) (1993),<sup>5</sup> before operating on the authorized frequencies.

3. In November 1993, the Bureau notified Emery that two of its stations had automatically terminated for failure to file FCC Forms 489.<sup>6</sup> On January 3, 1994, Emery filed eight separate applications for Special Temporary Authority (STAs), which were granted on January 10, 1994.<sup>7</sup> The Bureau then issued eight Notices of Apparent Liability for Forfeiture (NALFs) against Emery, on June 2, July 25, and July 26, 1994, for a total forfeiture of \$32,000, for failing to timely file an FCC Form 489 for each of its eight Rural Radiotelephone Service stations.<sup>8</sup> On August 25, 1994, Emery filed a consolidated response to the NALFs. On September 15, 1995, the Bureau addressed Emery's response in a Memorandum Opinion and Order (MO&O) that denied remission but granted reduction of the forfeiture amounts from \$32,000 to \$10,000.<sup>9</sup>

4. In the MO&O issued under delegated authority,<sup>10</sup> the Bureau reassessed the forfeiture amounts which totaled \$32,000, primarily because they were based on the forfeiture guidelines established in the Commission's *1991 Forfeiture Policy Statement*,<sup>11</sup> which was vacated in *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). In reassessing the eight violations, the Bureau relied on the statutory guidelines in Section 503(b)(2)(D) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 503(b)(2)(D), and existing

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<sup>4</sup> Statement of Gregory Killpack, Manager of Emery Telephone, August 23, 1994.

<sup>5</sup> Section 22.9(b)(1) was the applicable Rule in effect when timely notice was due from Emery. Our rules have subsequently been amended and reorganized so that the notice requirement provided in former Section 22.9(b)(1) now appears in Section 22.142(b) of the Commission's Rules, 47 C.F.R. § 22.142(b) (1996).

<sup>6</sup> Special Public Notice (November 15, 1993).

<sup>7</sup> The Bureau granted the STAs by letter; six were granted on January 10, 1994, and two were granted on January 11, 1994.

<sup>8</sup> See *Emery Telephone*, 9 FCC Rcd 3566 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3565 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3564 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3563 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3562 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3561 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 3560 (Com. Car. 1994); *Emery Telephone*, 9 FCC Rcd 2524 (Com. Car. 1994).

<sup>9</sup> See *Emery Telephone*, 10 FCC Rcd 10012 (Wireless Tel. Bur. 1995).

<sup>10</sup> Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1); 47 C.F.R. § 0.331(b).

<sup>11</sup> 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993).

precedent.<sup>12</sup> The Bureau used a \$2,000 base forfeiture amount for each of Emery's Section 22.9(b)(1) violations and then reduced six of the violations to \$1,000 each. The Bureau explained that the reductions were based on the factors set forth in Section 503(b)(2)(D) of the Act and precedent. The Bureau noted that Emery's voluntary disclosure and its promptness in informing the Commission of its mistake were most compelling in reducing six of the violations. The two violations which Emery did not voluntarily disclose, however, were not reduced from the base amount of \$2,000. Thus, the total forfeiture amount issued against Emery for the eight violations was reduced to \$10,000.

5. On October 16, 1995, Emery filed an Application for Review. On July 18, 1996, the Bureau sent Emery a request for certain financial information. Emery responded, by letter, on August 19, 1996.<sup>13</sup>

### III. DISCUSSION

6. In its Application for Review, Emery sets forth three primary arguments. First, Emery argues that the Bureau erred in finding eight violations of Section 22.9(b)(1) instead of one.<sup>14</sup> Emery contends that the Bureau could have assigned a single call sign for the integrated system of stations (BETRS) and, therefore, Emery was only required to file one FCC Form 489. Second, Emery claims that the Bureau assessed the forfeitures based on an objective formula established in *AllCity* and failed to take Emery's unique circumstances into account as required by Section 503(b)(2)(D) of the Act.<sup>15</sup> In particular, Emery contends that the Bureau erred by not taking into account its history of past regulatory compliance and degree of culpability. Third, Emery argues that forfeitures totaling \$10,000 are punitive in nature and do not impel compliance as dictated in *Crowell-Collier Broadcasting Corp.*, 44 FCC 2444 (1961).<sup>16</sup>

#### A. Emery Committed Multiple Violations

7. We reject Emery's argument that it committed only one violation of Section 22.9(b)(1) of our rules. Emery contends that because the Bureau could have assigned a single call sign to the integrated system of stations, only one FCC Form 489 was required to be filed, and therefore, only one Section 22.9(b)(1) violation has been committed. Emery cites no authority to support this argument, but points to the fact that the Commission granted most of

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<sup>12</sup> See *Emery Telephone*, 10 FCC Rcd at 10012 (citing *AllCity Paging, Inc.*, 9 FCC Rcd 6485 (Com. Car. 1994)).

<sup>13</sup> Letter from Harold Mordkofsky and Richard D. Rubino, Emery's counsel, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau (Aug. 19, 1996).

<sup>14</sup> Application for Review at 5-7.

<sup>15</sup> Application for Review at 7-10.

<sup>16</sup> Application for Review at 13-17.

the FCC Form 401 applications simultaneously in January 1991 with the exception of three additional applications, which were granted some months later. Significantly, Emery submitted eight individual applications and was granted eight separate authorizations to operate in five different locations in rural Utah (Castle Dale, Orangeville, Ferron, Emery and Horn Mountain).

8. Section 22.9(b)(1) of the Commission's rules, which was in effect at the time when Emery received its authorization, clearly states that "[w]hen construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489 . . . ."<sup>17</sup> While Emery elected to construct its eight authorized facilities and provide service as a single integrated system, Emery's selected mode of operations does not modify or nullify the requirements of Section 22.9(b)(1). Emery, as the holder of eight distinct authorizations, was required to file an FCC Form 489 for each of these authorizations.<sup>18</sup> The purpose of an FCC Form 489 is to notify the Commission that construction has been completed and service has begun. We rely on this notification in fulfilling our electromagnetic spectrum management functions. The Form 489 is thus a tool of spectrum management in that it informs us of whether the facility has been built and the frequency is in use. For instance, if the licensee fails to provide it to the Commission, the Commission presumes the frequency is not in use, and will cancel the authorization through public notice, and make it available to the public. As a result, the Commission could unknowingly assign a frequency that is already in use, resulting in harmful co-channel interference. Significantly, avoidance of harmful interference between users is one of the core purposes of our spectrum management duties. Consequently, the information provided on the Form 489 is necessary for effective and efficient spectrum management.<sup>19</sup> There is no dispute that Emery failed to timely file an FCC Form 489 for each authorization. Therefore, Emery committed eight violations of Section 22.9(b)(1).

#### **B. The Bureau Correctly Relied on *AllCity***

9. We also find Emery's argument that the Bureau erred in imposing forfeitures based on *AllCity* to be unavailing. The Bureau did not fail to take into account Emery's unique circumstances when it relied on *AllCity* in assessing forfeitures totaling \$10,000. Section 503(b)(2)(D) of the Act requires that the Commission, when setting forfeiture amounts, 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 such other

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<sup>17</sup> 47 C.F.R. § 22.9(b)(1) (1993).

<sup>18</sup> See *Telepersonal Communications, Inc.*, 11 FCC Rcd 12268 (Wireless Tel. Bur. 1996); *U.S. West Communications, Inc.*, 11 FCC Rcd 12263 (Wireless Tel. Bur. 1996).

<sup>19</sup> In this context, we note that these frequencies are now subject to auction and geographic area licenses. The Form 489 provides another means to assure a swift return of spectrum for those uses.

matters as justice may require."<sup>20</sup> Under the 1991 *Forfeiture Policy Statement*, these factors were used by starting with a \$20,000 base forfeiture amount for Section 22.9(b)(1) violations and using a system of percentage reductions when individual factors were present. However, since the 1991 *Forfeiture Policy Statement* was vacated, the Commission has relied on Section 503(b)(2)(D) of the Act and case precedent when assessing forfeitures. In *AllCity*, the Commission found that a forfeiture of \$2,000 for each failure to file a timely FCC Form 489 in violation of Section 22.9(b)(1) (for a total of \$210,000) was warranted. Further, the Commission reduced the forfeiture by \$1,000 (to a total of \$105,000, or \$1,000 for each Form 489 violation), based on the factors set forth in Section 503(b)(2)(D) of the Act.<sup>21</sup> Additionally, since September 15, 1995, when the Bureau issued the MO&O denying Emery's request for remission, 10 FCC Rcd 10012 (1995), the Commission has adopted a Report and Order regarding its forfeiture policy.<sup>22</sup> This latest Forfeiture Policy Statement similarly relies on the factors in Section 503(b)(2)(D) of the Act, and therefore is consistent with our decision in the instant case.

10. Furthermore, as stated in the MO&O, the forfeiture amount determined in Emery is the product of a review of the appropriate statutory factors described in Section 503(b)(2)(D) of the Act. In reducing six of Emery's violations from \$2,000 to \$1,000, the Bureau assessed all the factors present, including Emery's history of past regulatory compliance, and was especially persuaded by Emery's voluntary disclosure of these six violations and its filing of the necessary forms as soon as it discovered its mistake.<sup>23</sup> In addition, we have reviewed the Bureau's findings and the factors relating to those findings, and we conclude that the Bureau's decision not to reduce the forfeiture less than \$1,000 for each Form 489 violation was appropriate. Although the Bureau reduced the forfeiture by the same amount in both *AllCity* and the instant case, this does not mean that it did not consider the particular facts and circumstances of Emery's case. Indeed, all cases, such as Emery and *AllCity*, must be decided on a case-by-case basis, as was done here.<sup>24</sup> Further, Emery's request for total remission based entirely on past compliance unduly relies on *Liberty Communications, Inc.*, 9 FCC Rcd 3188 (1994) and *David L. Hollingsworth*, 7 FCC Rcd 6640 (1992). These cases dealt with forfeitures under the guidelines in the vacated 1991 *Forfeiture Policy Statement*, which were remitted because the percentage reduction amount (for history of past regulatory compliance) taken from the vacated guidelines exceeded or met the amounts of the already-reduced forfeitures. Because those guidelines are no longer in effect, these cases are inapposite.

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<sup>20</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>21</sup> See *AllCity*, 9 FCC Rcd at 6486.

<sup>22</sup> See *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines (Forfeiture Policy Statement)*, 12 FCC Rcd 17087 (1997).

<sup>23</sup> *Emery Telephone*, 10 FCC Rcd at 10012.

<sup>24</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17092 (1997).

### C. The Total Forfeiture Amount Is Not Punitive in Nature

11. We reject Emery's argument that the total forfeiture amount is punitive in nature and does not impel substantial compliance as dictated by *Crowell-Collier Broadcasting Corp.*, 44 FCC 2444 (1961). Emery contends that it has already remedied its inadvertent errors and therefore does not need a \$10,000 forfeiture to impel compliance. Emery further states that the Commission does not intend for forfeitures to be punitive, because "punitive fines would discourage the provision of essential communications services."<sup>25</sup> In support of its position, Emery also cites *Canby Telephone Cooperative Ass'n*, 5 FCC Rcd 731, 732 (1990), where the forfeiture was reduced because a licensee's "ability to serve the public could be affected by the amount assessed." Further, Emery warns that "the imposition of a substantial fine, in the amount of \$10,000 as ordered by the Bureau, could force Emery to have to reconsider its decision to provide local exchange telephone service."<sup>26</sup>

12. In contrast to Emery's claim, our reading of *Crowell-Collier* supports the \$10,000 forfeiture, as it is consistent with the Bureau's policy to "impel . . . licensees to become familiar with the terms of their licenses and the applicable rules, and to adopt procedures, including periodic review operations, which will ensure that stations will be operated in substantial compliance with their licenses and the Commission's rules."<sup>27</sup> Although Emery's error was inadvertent and corrections were made after the fact, violations were committed nonetheless.<sup>28</sup> By issuing forfeitures for such violations, the Bureau impels licensees to be more familiar with the applicable rules in structuring future conduct. "[I]nadvertence' . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance."<sup>29</sup>

13. Furthermore, Emery's reliance on *Canby Telephone* is misplaced. Emery has not demonstrated that \$10,000 in forfeitures would threaten its ability to serve the public. In determining an appropriate forfeiture amount, the Commission considers a company's ability to serve the public and pay the forfeiture. Specifically, we use gross revenues as a yardstick to assess the company's financial condition.<sup>30</sup> In addition, income derived from other affiliated

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<sup>25</sup> Application for Review at 16.

<sup>26</sup> Application for Review at 16-17. At the same time Emery warns it may have to eliminate the service, it describes the need the subscribers have for it: "Emery is providing essential BETRS services to its subscribers, who would otherwise be forced to do without local exchange telephone service. . . . Emery's BETRS subscribers rely on their radio telephones for daily communications. In many instances these radio telephones are their only communications link to police and fire/rescue services. . . ." *Id.*

<sup>27</sup> 44 FCC at 2449-50.

<sup>28</sup> See *Paging Network of Los Angeles, Inc.*, 10 FCC Rcd 12213 (Wireless Tel. Bur.1995).

<sup>29</sup> *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>30</sup> *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992).

operations, as well as the financial status of the station(s) in question, can be taken into account.<sup>31</sup> In *Canby Telephone*, the licensee committed a Section 22.9(b)(1) violation and was assessed a \$2,630 forfeiture.<sup>32</sup> However, the licensee produced financial information indicating that the station had generated only \$861 in revenues during the period of the violation, and that the estimated operating costs for the period were \$29,308. The forfeiture was found to threaten the licensee's "ability to serve the public," and thus, the forfeiture was reduced to \$600. In comparison, Emery's gross revenues for the 1994 and 1995 calendar years were \$3,626,897 and \$4,085,666 respectively.<sup>33</sup> The portion of those revenues derived from the BETRS service for the same period were \$2,093 and \$1,383 respectively. In deciding whether to adjust the forfeiture amount here, we took Emery's financial status into account, and determined that in light of Emery's total gross revenues, \$10,000 in forfeitures is not unduly harsh nor does it threaten Emery's ability to serve the public. Therefore, we do not consider the total forfeiture amount imposed by the Bureau to be punitive in nature or a threat to Emery's ability to serve the public.

#### IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons stated above, we conclude that Emery's arguments are insufficient to justify remission or reduction of the forfeitures, and that imposition of such forfeitures is in furtherance of our spectrum management functions. Thus, we affirm the Bureau's Order assessing forfeitures against Emery which total \$10,000.

15. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Emery Telephone is hereby advised of its **LIABILITY FOR FORFEITURE** in the amount of ten thousand dollars (\$10,000) for repeated violations of Section 22.9(b)(1) of the Commission's Rules, 47 C.F.R. § 22.9(b)(1). **IT IS ORDERED** that the Application for Review filed by Emery in the above-captioned proceeding **IS DENIED**.

16. **IT IS FURTHER ORDERED** that a copy of this Order **BE SENT** to Emery, in care of Blooston, Mordkofsky, Jackson & Dickens, 2120 L Street, N.W., Washington, DC 20037, by Certified Mail, Return Receipt Requested.

#### FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>31</sup> *Id.* at 2089.

<sup>32</sup> 5 FCC Red at 731.

<sup>33</sup> *See* fn. 13.