

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

In the Matter of	)	
	)	
In re Application of	)	Facility I.D. No. 71179
	)	
Wayne Kowalski	)	FRN: 0013450408
	)	
For Renewal of License for FM Translator Station	)	NAL/Acct. No. MB200741410136
W251AD Alpena, Michigan	)	File No. BRFT-20060712AEU

FORFEITURE ORDER

Adopted: November 17, 2009

Released: November 18, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”), we issue a monetary forfeiture in the amount of five hundred dollars (\$500) to Wayne Kowalski (“Licensee”), licensee of FM Translator Station W251AD Alpena, Michigan (“Station”), for willfully violating Section 73.3539 of the Commission's Rules (“Rules”) by failing to timely file a license renewal application for the Station and for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (“Act”),¹ by engaging in unauthorized operation of the Station.²

II. BACKGROUND

2. On February 8, 2007, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”) in the amount of seven thousand dollars (\$7,000) to Licensee for these violations.³ Licensee filed a “Response to Notice of Apparent Liability for Forfeiture” (“Response”) on March 12, 2007.

3. As noted in the NAL, Licensee's renewal application for the Stations' current license term should have been filed by June 1, 2004, four months prior to the Station's October 1, 2004, expiration date, but was not.⁴ In fact, Licensee did not file the renewal application until July 12, 2006, more than twenty-one months after the Stations' license expiration. On February 8, 2007, the staff advised Licensee of its apparent liability for a

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 73.3539; 47 U.S.C. § 301.

³ *Wayne Kowalski*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 2386 (MB 2007).

⁴ *See* 47 C.F.R. §§ 73.1020, 73.3539(a).

forfeiture of \$7,000 for his failure to timely file the Station's renewal application and for unauthorized operation of the Station.⁵ Licensee filed the subject Response.

4. In his Response, Licensee attributes the untimely filing of his renewal application to his "anticipation," but non-receipt, of notification from the Commission of the required filing date or that the license had expired. Consequently, Licensee asserts that the late-filing was "unintentional." Licensee asserts that the proposed forfeiture should be cancelled and an admonishment issued, because the violations were not egregious and the Station provides a secondary service. Licensee states that these are "first-time" violations and that he does not have the ability to pay. Licensee also states that all of the statutory mitigating factors warranting a reduction of the proposed forfeiture are applicable in this case.

III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,⁶ Section 1.80 of the Rules,⁷ and the Commission's *Forfeiture Policy Statement*.⁸ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we 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 matters as justice may require.⁹

6. Licensee does not dispute that he failed to file a timely renewal application for the Station, but states that these violations were unintentional. Specifically, he states that he was not aware of the filing deadline and mistakenly assumed that he would receive a reminder of the filing date from the Commission.¹⁰ As the Commission has held, however, violations resulting from inadvertent error or failure to become familiar with the FCC's requirements are willful violations.¹¹ In the context of a forfeiture action, "willful" does not require a finding that the rule violation was intentional. Rather, the term "willful" means that the violator knew that it was taking (or in this case, not taking) the action in question, irrespective of any intent to violate the Rules.¹²

⁵ The Commission granted the above-referenced license renewal application on February 8, 2007.

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ *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), *recon. denied*, 15 FCC Rcd 303 (1999).

⁹ 47 U.S.C. § 503(b)(2)(E).

¹⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California*") (stating that "inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance"); *Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358, 358 (1986) (stating that "employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations").

¹¹ See *Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd 2649, 2651 (EB 2008) (declining to reduce or cancel forfeiture for late-filed renewal based on licensee's administrative error); *Southern California*, 6 FCC Rcd at 4387.

¹² *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64 (2002) ("*Eure*"); *MTD*, (continued....)

7. Regarding Licensee's claim of financial hardship, the Commission will not consider reducing or canceling a forfeiture in response to inability to pay unless the licensee submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflect the licensee's current financial status. Here, Licensee has failed to provide us with any documentation regarding his finances. Licensee therefore has provided an insufficient basis on which to assess its ability to pay, and we reject that argument.¹³

8. With respect to Licensee's charge that the *NAL* should be cancelled because the Station provides only a secondary service, we note that FM translators were first authorized in 1970¹⁴ to provide secondary FM service to areas and populations that are unable to receive satisfactory service due to distance or intervening terrain obstacles and, as such, the Commission adopted rules restricting their service, ownership, sources of financial support, and program origination.¹⁵ Notwithstanding the secondary status of FM Translators, the Commission has stressed that, "as with *all* broadcast services," the licensee is responsible for operation of the station and for its *full compliance with all Commission rules*.¹⁶ However, given the Commission's recent decisions assessing forfeitures in the amount of \$500 against licensees of translator stations for violations of Section 73.3539 of the Rules and Section 301 of the Act, we will reduce the forfeiture amount against FM Translator Station W251AD to five hundred dollars (\$500) based on the Station's status as an provider of secondary FM translator service.¹⁷

9. Finally, regarding Licensee's claim that the *NAL* should be cancelled because these are its first violations at the Station, we note that a reduction of the proposed forfeiture based on Licensee's status as an FM

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Inc., Memorandum Opinion and Order, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361, 1972 WL 26325, at *1 (1972).

¹³ See *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 756, 759 (2005) (finding that licensee failed to provide sufficient information needed to evaluate an inability to pay claim); *Frank Neely*, Memorandum Opinion and Order, 22 FCC Rcd 1434, 1434 (EB 2007) (same); *Pang Cheng*, Memorandum Opinion and Order, 20 FCC Rcd 2351, 2353 (EB 2005) (same).

¹⁴ On June 29, 2009, the Commission adopted changes in the FM translator rules to allow AM stations to use currently authorized FM translator stations to retransmit their AM service within their AM stations' current coverage areas. See *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009).

¹⁵ *Id.* at 9645.

¹⁶ See *Creation of a Low Power Radio Service*, Notice of Proposed Rule Making, 14 FCC Rcd 2471, 2504 (1999) (emphasis added).

¹⁷ See, e.g., *Best Media, Inc.*, Forfeiture Order, 24 FCC Rcd 4140, 4143 (MB 2009) (reducing *sua sponte* forfeiture amount from \$7,000 to \$500 for translator station's late renewal filing and unauthorized operation); *Valley Baptist Church and Christian School*, Forfeiture Order, 23 FCC Rcd 8740, 8742 (MB 2008) (reducing *sua sponte* forfeiture amount from \$1,500 to \$250 for translator station's late renewal filing).

Translator exceeds that which would be accorded Licensee for a “history of compliance.”¹⁸

10. We have considered Licensee's response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Licensee willfully¹⁹ violated Section 73.3539 of the Rules and willfully and repeatedly²⁰ violated Section 301 of the Act²¹ and that a forfeiture in the total amount of five hundred dollars (\$500) is warranted.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,²² that Wayne Kowalski SHALL FORFEIT to the United States the sum of five hundred dollars (\$500) for willfully violating Section 73.3539 of the Commission's Rules and for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Forfeiture 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.²³ Payment of the proposed 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 in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank--Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159,

¹⁸ See, e.g., *WLIV, Inc.*, Forfeiture Order, 24 FCC Rcd 7715, 7717 (MB 2009) (20 percent reduction accorded for “history of compliance”), citing *Wayne State College*, Forfeiture Order, 24 FCC Rcd 2484 (MB 2009) (issuing forfeiture for licensee's public file violations, but reducing forfeiture amount based on licensee's history of compliance); *Christian Center, Inc.*, Forfeiture Order, 24 FCC Rcd 1228 (MB 2009) (same); *John Brown University*, Forfeiture Order, 214 FCC Rcd 1536 (MB 2009) (same).

¹⁹ Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California*, 6 FCC Rcd at 4387-88.

²⁰ Section 312(f)(1) of the Act defines “repeated” as “the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(1). See also *Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

²¹ 47 U.S.C. § 301.

²² 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

²³ 47 U.S.C. § 504(a).

enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code).²⁴

12. IT IS FURTHER ORDERED, that a copy of this Forfeiture Order shall be sent by Certified Mail Return, Receipt Requested, to Wayne Kowalski, 135 Ripley Street, Alpena, Michigan 49707, and to his attorney Christopher D. Imlay, Booth, Freret, Imlay & Tepper, P.C., 14356 Cape May Road Silver Spring, Maryland 20904-6011.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle, Chief
Audio Division
Media Bureau

²⁴ See 47 C.F.R. § 1.1914.