

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

In the Matter of)	
)	
Octavio Sarmiento, Jr.)	File No. EB-02-TP-208
)	NAL/Acct. No. 200232700012
Naples, Florida)	FRN 0007-0497-62
)	

FORFEITURE ORDER

Adopted: December 19, 2002

Released: December 20, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Octavio Sarmiento, Jr. for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“*Act*”).¹ The noted violation involves Mr. Sarmiento’s operation of a radio station on 107.5 MHz in Naples, Florida without Commission authorization.

2. On June 5, 2002, the Commission’s Tampa, Florida Field Office (“*Tampa Office*”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Mr. Sarmiento for a forfeiture in the amount of ten thousand dollars (\$10,000).² Mr. Sarmiento filed a response to the *NAL* on July 19, 2002,³ and supplemented his response on August 5, 2002.

II. BACKGROUND

3. On April 19, 2002, agents from the Tampa Office investigated complaints alleging that an unlicensed radio station transmitting on frequency 107.5 MHz in the Naples, Florida area was causing interference to the reception of an FM broadcast station licensed to operate on frequency 107.1 MHz in Naples, Florida. A search of Commission records showed that there was no FM radio station licensed on 107.5 MHz in Naples, Florida. The agents detected an FM radio station operating on 107.5 MHz and identifying as “WTEN” and “Tropical Estereo.” Using radio direction finding techniques, the agents located the source of the radio station transmitting on 107.5 MHz. The agents determined that the station

¹ 47 U.S.C. § 301.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232700012 (Enf. Bur., Tampa Office, released June 5, 2002).

³ Mr. Sarmiento’s response to the *NAL* was untimely under Section 1.80(f)(3) of the Commission’s Rules (“*Rules*”), 47 C.F.R. § 1.80(f)(3). Nevertheless, we will consider the response in order to provide Mr. Sarmiento an opportunity to respond on the record.

was transmitting from a single-story office building located at 2201 Kirkwood Avenue, Naples, Florida. The agents took field strength measurements of the station's signal and determined that the station required a license to operate.⁴

4. Immediately after locating the radio station, the agents inspected the facilities at that address and found broadcast studio and radio transmitting equipment in operation on frequency 107.5 MHz. The agents interviewed Octavio Sarmiento, Jr. and other individuals who were operating the station. Mr. Sarmiento stated that he was the president of Tropical Estereo Enterprises ("Tropical Estereo"), which owned the radio station equipment and operated the station. The agents asked Mr. Sarmiento if he had a license for the station and he stated that he had no license authorizing operation of the radio station but that he had submitted an application for a low power FM ("LPFM") license to the FCC.⁵ The agents advised Mr. Sarmiento that he could not operate the station without a license and directed him to terminate the unlicensed operation. The agents also hand delivered to Mr. Sarmiento a warning letter which advised him that operation of a radio station without a license violates Section 301 of the Act, warned him that operation of the unlicensed station must cease immediately, and listed the penalties for unauthorized operation of a radio station. Mr. Sarmiento stated that he would cease operation of the unlicensed station.

5. On April 20, 2002, the agents returned to the Naples, Florida area and again detected an FM radio station transmitting on 107.5 MHz and identifying as "WTEN" and "Tropical Estereo." Using radio direction finding techniques, the agents determined that the station was again transmitting from a single-story office building located at 2201 Kirkwood Avenue, Naples, Florida. The agents took field strength measurements of the station's signal and determined that the station required a license to operate.⁶

6. On June 5, 2002, the Tampa Office issued an *NAL* for a \$10,000 forfeiture to Octavio Sarmiento, Jr. for operating a radio station on April 19 and April 20, 2002 without a license in willful and repeated violation of Section 301 of the Act. Mr. Sarmiento filed a response on July 19, 2002 in which he seeks cancellation of the forfeiture. In his response, Mr. Sarmiento acknowledges that agents from the Tampa Office issued a warning to him on April 19, 2002, but denies the remaining allegations set forth in

⁴ Under Section 15.239 of the Rules, 47 C.F.R. § 15.239, non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmissions does not exceed 250 $\mu\text{V/m}$ at three meters. The agents' measurements indicated that the station's field strength extrapolated to three meters was 17,785,270 $\mu\text{V/m}$. Thus, the station operating on 107.5 MHz exceeded the permissible level for a non-licensed low-power radio transmitter by 71,141 times.

⁵ The Tampa Office subsequently learned that on April 5, 2002, Tropical Estereo had filed an application for an LPFM license on FCC Form 319. On April 24, 2002, the Commission's Media Bureau returned this application to Mr. Sarmiento as improperly filed, noting that FCC Form 319 is used to signify operation pursuant to a granted construction permit and that Tropical Estereo had never applied for or received the required construction permit for an LPFM station. The Media Bureau further noted that pursuant to 47 C.F.R. § 73.870(b), the required form for a construction permit for an LPFM license, FCC Form 318, will only be accepted during Commission-specified filing periods.

⁶ Under Section 15.239 of the Rules, non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmissions does not exceed 250 $\mu\text{V/m}$ at three meters. The measurements taken by the agents on April 20, 2002 indicated that the station's field strength extrapolated to three meters was 974,976 $\mu\text{V/m}$. Thus, the station operating on 107.5 MHz exceeded the permissible level for a non-licensed low-power radio transmitter by 3,900 times.

the *NAL*. Additionally, Mr. Sarmiento requests a bill of particulars detailing all facts, including among other things, the time of the alleged offenses, what equipment was used to determine the offense was taking place, identification of the complainants that initiated the investigation, all documentation reflecting the ownership of Tropical Estereo, and copies of all documents generated in the investigation. Mr. Sarmiento also requests a hearing if required in support of cancellation of the forfeiture.

7. In a supplemental response filed on August 5, 2002, Mr. Sarmiento again admits that agents from the Tampa Office issued him a warning on April 19, 2002, but contends that transmissions were not conducted at any point in time after that date. In support of this contention, Mr. Sarmiento provides sworn affidavits from five employees of Tropical Estereo who claim that they observed the station being shut down and that transmissions on the station did not resume at any point after April 19, 2002. Mr. Sarmiento also provides sworn affidavits from 25 individuals who claim that they listened to frequency 107.5 MHz on an FM radio on April 20, 2002, and did not hear any transmissions. In addition, Mr. Sarmiento claims that he had been led to believe that the frequency 107.5 MHz had been leased to him and that an LPFM station required no further licensing, but later found out that he had been duped. Mr. Sarmiento also asserts that the subject investigation “was initiated in bad faith by adverse interests” and that the allegations in the *NAL* are “a result of falsehoods, unsupported allegations and aspersions cast upon Mr. Sarmiento.” Finally, Mr. Sarmiento asserts that mitigation of the forfeiture is warranted because he has been forthcoming by having initiated written contact with the FCC, has applied for an LPFM license, and has demonstrated a respect for local, state and federal laws.

III. DISCUSSION

8. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁷ Section 1.80 of the Rules,⁸ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). In examining Mr. Sarmiento’s response, Section 503(b) of the Act requires that the Commission 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 other such matters as justice may require.⁹

9. As an initial matter, we deny Mr. Sarmiento’s requests for a bill of particulars and a hearing. Nothing in the Act requires the Commission to provide an unlicensed operator a bill of particulars or the opportunity for an evidentiary hearing prior to imposition of a forfeiture.¹⁰ Rather, under Section 503(b)(4) of the Act, the Commission must issue a written notice of apparent liability which specifies each provision of the Act and the rules alleged to be violated, the facts upon which the charge against the named violator is based, and the date upon which the alleged violation occurred.¹¹ The

⁷ 47 U.S.C. § 503(b).

⁸ 47 C.F.R. § 1.80.

⁹ 47 U.S.C. § 503(b)(2)(D).

¹⁰ Section 504(a) of the Act provides that any suit brought by the United States in federal district court for the collection of a forfeiture imposed pursuant to the Act shall be a trial *de novo*. 47 U.S.C. § 504(a).

¹¹ 47 U.S.C. § 503(b)(4).

NAL issued by the Tampa Office fully complied with these requirements. To the extent that Mr. Sarmiento seeks additional investigatory records and information, including identification of the complainants that initiated the investigation and copies of all documents generated in the investigation, we note that such records are not routinely available for public inspection under Section 0.457 of the Rules¹² and that any requests for such records must be made in accordance with the Freedom of Information Act procedures set forth in Section 0.461 of the Rules.¹³

10. Section 301 of the Act prohibits radio operation “except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”¹⁴ Mr. Sarmiento does not dispute that he operated a radio station on 107.5 MHz without Commission authorization on April 19, 2002. We conclude that this violation was a willful violation within the meaning of Section 503(b) of the Act. In this regard, the term “willful,” as used in Section 503(b) of the Act, does not require a finding that the violation was intentional or that the violator was aware that it was committing a violation.¹⁵ Rather, the term “willful” simply requires that the violator knew it was taking the action in question, irrespective of any intent to violate the Act or the Commission’s rules.¹⁶

11. Although Mr. Sarmiento denies that there were any transmissions on the unlicensed radio station operating on 107.5 MHz on April 20, 2002, we conclude that Mr. Sarmiento’s violation of Section 301 was also repeated.¹⁷ The evidence in the record establishes that on April 20, 2002, agents from the Tampa Office observed an FM radio station transmitting on 107.5 MHz and identifying as “WTEN” and “Tropical Estereo.” Using radio direction finding techniques, the agents determined that this station was transmitting from a single-story office building located at 2201 Kirkwood Avenue, the same location from which Mr. Sarmiento admits transmitting on the previous day. Consistent with Commission practice, the agents recorded the transmissions on 107.5 MHz for approximately one half hour, between 10:00 and 10:30 a.m. Thus, we have a tape recording of the unlicensed station transmitting on 107.5 MHz on April 20, 2002. On the basis of this substantial evidence, we find altogether unpersuasive the sworn statements by Mr. Sarmiento and his employees that there were no transmissions on 107.5 MHz on April 20, 2002. Further, while Mr. Sarmiento provided sworn affidavits from 25 other individuals who claim that they listened to frequency 107.5 MHz on an FM radio on April 20, 2002, and did not hear any transmissions, we note that these individuals do not specify what time or how long they listened. In any event, as detailed above, there is substantial documented evidence that the unlicensed station transmitted

¹² 47 C.F.R. § 0.457.

¹³ 47 C.F.R. § 0.461.

¹⁴ 47 U.S.C. § 301.

¹⁵ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁶ *Id.*

¹⁷ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2).

on 107.5 MHz on April 20, 2002. Additionally, we have already concluded that Mr. Sarmiento's operation of the unlicensed station was willful.¹⁸

12. Mr. Sarmiento suggests that mitigation of the forfeiture is appropriate because he had been led to believe that the frequency 107.5 MHz had been leased to him and that an LPFM station required no further licensing, but later found out that he had been duped. While we think that it is unfortunate that Mr. Sarmiento may have been duped, the record evidence shows that Mr. Sarmiento knew that a license is required for an LPFM station at least two months prior to April 19, 2002, the date that the FCC agents first observed Mr. Sarmiento transmitting on 107.5 MHz without a license. In this regard, on February 19, 2002, the Commission received a letter from Mr. Sarmiento requesting information on how to obtain a license for an LPFM station. In this letter, Mr. Sarmiento related that in December 2001 he had leased a radio station transmitting on 105.1 MHz in Naples, Florida from an individual named Daniel Morisma, but then dissolved this lease after learning that Mr. Morisma did not have a license for that station. Mr. Sarmiento further stated that he had subsequently leased a radio station transmitting on 107.5 MHz from an individual named Dionisio Lombardi and began broadcasting on that frequency on January 1, 2002, but terminated this lease after learning on February 7, 2002, that Mr. Lombardi did not have a license to operate a radio station on 107.5 MHz. On April 5, 2002, Mr. Sarmiento filed an application for an LPFM license with the Commission.¹⁹ Thus, Mr. Sarmiento clearly knew that a license is required to operate an LPFM station but simply chose to operate without a license. Furthermore, on April 19, 2002, the FCC agents warned Mr. Sarmiento both orally and in writing that the unlicensed station had to be shut down. Despite these warnings, the agents observed the unlicensed station transmitting on 107.5 MHz again on April 20, 2002. Under these circumstances, we conclude that no reduction of the forfeiture on this basis is warranted.

13. We also find no merit to Mr. Sarmiento's assertion that the subject investigation "was initiated in bad faith by adverse interests." The investigation was initiated in response to complaints alleging that an unlicensed station transmitting on 107.5 MHz was causing widespread interference to the reception of an FM broadcast station licensed to operate on 107.1 MHz in Naples, Florida. Moreover, we think it is irrelevant why the investigation was initiated. The fact remains that Mr. Sarmiento was operating a radio station without a license in violation of Section 301 of the Act.

14. Finally, we reject Mr. Sarmiento's argument that mitigation of the forfeiture is warranted because he has been forthcoming by having initiated written contact with the FCC, has applied for an LPFM license, and has demonstrated a respect for local, state and federal laws. Mr. Sarmiento applied for an LPFM license only after putting his unlicensed station on the air, did not even attempt to comply with the Commission rules applicable to LPFM stations, and continued to operate the unlicensed station after receiving oral and written warnings from the FCC agents to terminate such operation. We do not think that such behavior evinces a respect for federal laws or warrants reduction of the forfeiture amount.

15. We have examined Mr. Sarmiento's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that

¹⁸ Section 503(b)(1) of the Act provides that a forfeiture penalty may be imposed if the violation is *either* willful *or* repeated. 47 U.S.C. § 503(b)(1).

¹⁹ The Media Bureau returned this application to Mr. Sarmiento as improperly and untimely filed on April 24, 2002. *See supra* n. 4.

Mr. Sarmiento willfully and repeatedly violated Section 301 of the Act and that he has provided no basis for rescission or reduction of the \$10,000 forfeiture.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 503 of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²⁰ Octavio Sarmiento, Jr. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 301 of the Act.

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. Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232700012 and FRN 0007-0497-62. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²¹

18. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by certified mail return receipt requested and first class mail to counsel for Octavio Sarmiento, Jr., Robert N. Pelier, Esq., Blanco & Pelier, P.A., 1100 Fifth Avenue South, Suite 201, Naples, Florida 34102.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²⁰ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²¹ See 47 C.F.R. § 1.1914.