

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

In the Matter of)	File No. EB-02-DV-383
)	
Arnold Broadcasting Company, Inc.)	NAL/Acct. No. 200332800007
Station KNEC(FM))	
Yuma, Colorado)	FRN No. 0006-1597-43

FORFEITURE ORDER

Adopted: July 27, 2004

Released: July 29, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of six thousand dollars (\$6,000) to Arnold Broadcasting Company, Inc. (“Arnold”) for willful and repeated violation of Section 301 of the Communications Act of 1934 (“Act”)¹ and Section 11.61(a)(2) of the Commission’s Rules (“Rules”).² The noted violations involve Arnold’s operating radio transmitting equipment without a license and failing to receive and transmit required weekly tests of the Emergency Alert System (“EAS”).

2. On December 4, 2002, the Commission’s Denver District Office (“Denver Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Arnold for a forfeiture in the amount of twelve thousand dollars (\$12,000).³ Arnold filed a response to the NAL on January 2, 2003.

II. BACKGROUND

3. On June 13, 2002, a Denver Office agent inspected station KNEC. The agent determined that KNEC operated an unlicensed studio-to-transmitter link (“STL”) on 948.0 MHz at KNEC’s studio, 205 South Main Street, Yuma, Colorado. The STL link terminated at KNEC’s transmitter site approximately 12 kilometers south of Yuma, Colorado.⁴ The station manager represented to the agent that KNEC began STL operations in May 1999. In addition, on the same day the Denver Office agent reviewed KNEC’s station logs and determined that KNEC received no required weekly EAS test (“RWT”) from the designated LP1 or LP2 sources for the period from May 13, 2002 to June 9, 2002.⁵

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 11.61(a).

³ *Notice of Apparent Liability for Forfeiture*, File No. EB-02-DV-383, NAL/Acct. No. 200332800007 (released December 4, 2002).

⁴ The Commission’s records indicate that Arnold filed an application for the STL on 948.0 MHz on July 16, 2002, one month after the agents inspected the station. The license was granted on October 23, 2002, with an assigned call sign of WPWD551.

⁵ The station logs also reflected that it received no required monthly EAS test (“RMT”). However, we note that the RMT for that time period was cancelled.

Further, the Denver Office agent found that KNEC's station logs revealed that the station failed to transmit two required RWTs during the same time period. Finally, the Denver Office agent also noted that while KNEC was monitoring the designated LP1 radio station KNNG, it was not monitoring a designated LP2 station.⁶ Instead, KNEC was monitoring the National Weather Service ("NWS"). According to the State of Colorado EAS Plan, the NWS is a recommended additional source but not a replacement for the designated local primary station.

4. On December 4, 2002, the Denver Office issued an *NAL* to Arnold for twelve thousand dollars (\$12,000) for operating an aural broadcast auxiliary station without a license in violation of Section 301 of the Communications Act of 1934, as amended, and for failing to receive and transmit the required RWTs and RMTs in willful and repeated violation of Section 11.61 of the Rules during the period May 13, 2002 – June 9, 2002.⁷ Arnold responded to the *NAL* conceding that KNEC failed to log the receipt and broadcast of EAS tests. Arnold argues that this failure was "in no way attributable to the fact that it was monitoring the [NWS] instead of one of the two designated LP2 stations."⁸ Therefore, Arnold contends, KNEC's monitoring the NWS rather than the LP2 should not figure into the forfeiture amount.

5. Arnold submits that operating an STL without a license should be deemed a "much less serious offense" than operating a full-service station without a license. Arnold argues that its operation of an unlicensed STL posed "no significant risk of interference to other stations," as evidenced by Section 74.24 of the Rules, which permits 720 hours of operation per year without a license. Arnold further contends that this permission for unlicensed operation "can lead a licensee into making the sort of innocent mistake that Arnold made, to wit, believing that a license would be duly issued...." Arnold further stated that it expected its consulting engineer to submit its STL application and that it would receive a license in due course. Arnold admitted that it "did not think about the matter again" until the Denver Office agent's inspection.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, ("Act"),⁹ Section 1.80 of the Rules,¹⁰ 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 Arnold'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 such other matters as justice may require.¹¹

7. Section 301 of the Act mandates that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio" within the United States "except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."¹² Section 74.24 of the Rules permits short-term operation of broadcast auxiliary stations

⁶ The designated LP2 stations for KNEC are KATR(FM) or KRDZ(AM).

⁷ *NAL* at ¶¶ 1, 8.

⁸ Arnold's Response at page 2.

⁹ 47 U.S.C. § 503(b).

¹⁰ 47 C.F.R. § 1.80.

¹¹ 47 U.S.C. § 503(b)(2)(D).

¹² 47 U.S.C. § 301.

subject to several conditions, including the requirement that such operation is on a secondary, non-interference basis to regularly authorized stations and shall be discontinued immediately if perceptible interference is caused to a regularly authorized station.¹³ The short-term operations may not exceed 720 hours annually per frequency.¹⁴

8. Arnold does not claim that its STL operation did not exceed 720 hours annually during its two years of unlicensed operation. Indeed, Arnold appears to concede that it made greater than 720 hours annual use of the station without first determining whether or not it had a license. Arnold relied on an independent contractor to file an application for the station and expected that a license would be issued in due course. Arnold admits that it “did not think about the matter again” until the Denver Office agent’s inspection. Arnold argues that its failure to follow up with its contractor was an innocent mistake. We find this argument to be without merit. “The Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”¹⁵

9. Likewise, we find that Arnold’s argument that its operations posed no significant risk to other stations is a fundamental misunderstanding of the Communications Act requirement of a license prior to broadcasting radio transmissions. It is well established that enforcement of Section 301 of the Act does not depend on the existence of interference caused by the unauthorized operations.¹⁶

10. Arnold also appears to rely upon the flexibility of Section 74.24 of the Rules to mitigate Arnold’s own failure to ensure it had a license: “In view of the fact that STL stations can be placed in operation and operated for up to 720 hours per year without a license...it is unreasonable to the extent of being arbitrary and capricious for the Commission to assess the same forfeiture for operating a [sic] ‘unlicensed’ STL station that it would for operating an unlicensed full service station.”¹⁷ We agree that the proposed forfeiture here was excessive under the circumstances. The unauthorized operation in this case is not a violation on the same order as is construction and operation with no color of authority.¹⁸ In this case, Section 74.24 of the Rules gave Arnold the color of authority to begin operations, although Arnold had no authority to continue operations past the specified 720 hours for more than two years. Accordingly, we impose a forfeiture for this violation of four thousand dollars (\$4,000), the base amount for using an unauthorized frequency, rather than the ten thousand dollars (\$10,000) proposed in the *NAL*.

11. Section 11.61(a)(2) of the Rules requires weekly tests of the EAS header codes and End of Message (“EOM”) codes. At the time of the inspection on June 13, 2002, Arnold’s records showed that it failed to receive RWTs between May 13, 2002 and June 9, 2002. In addition, Arnold’s records showed that it failed to transmit RWTs during the same time period. Arnold does not dispute that it failed to conduct RWTs during this time period. Accordingly, without regard to Arnold’s monitoring of the NWS, we conclude that a two thousand dollar (\$2,000) forfeiture is appropriate for this violation.

¹³ 47.C.F.R. § 74.24(c).

¹⁴ 47 C.F.R. § 74.24(d).

¹⁵ *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation marks omitted) and cases cited therein.

¹⁶ *Stephen Paul Dunifer*, 11 FCC Rcd 718, 726 (1995).

¹⁷ Arnold’s Response, pages 3-4.

¹⁸ See, e.g., *WWC License LLC Licensee of Microwave Stations WPJE660, WPJD256 and WPJA761, Kansas*, 16 FCC Rcd 19490 (2001); *New York Radio Service, WPTM988, Brooklyn, New York*, --- FCC Rcd ----, DA 04-1720 (rel. June 18, 2004).

12. We have examined Arnold'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 Arnold willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended,¹⁹ and Section 11.61(a)(2) of the Rules, but we find that the forfeiture should be reduced to \$6,000 for these violations.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²⁰ Arnold Broadcasting Company, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand dollars (\$6,000) for its violation of Section 301 of the Act and Section 11.61(a)(2) of the Rules.

14. 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.²¹ 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. 200332800007 and FRN 0006-1597-43. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.²²

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Arnold Broadcasting Company, Inc., P.O. Box 830, Sterling, Colorado 80751, and to its counsel, David Tillotson, Esq., Law Office of David Tillotson, 4606 Charleston Terrace, N.W., Washington DC 20007-1911.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁹ 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" *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). As provided by 47 U.S.C. § 312(f)(2), "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). *Southern California Broadcasting Co.*, *supra*.

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

²¹ 47 U.S.C. § 504(a).

²² See 47 C.F.R. § 1.1914.