

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

In the Matter of	)	
	)	
A-O Broadcasting Corporation	)	File Number: EB-04-DV-114
	)	
Operation of Unlicensed Radio Station on 97.9	)	NAL/Acct. No. 200432800001
MHz near Cloudcroft, New Mexico	)	
(Former Licensee of KTMN, <sup>1</sup> Cloudcroft, New	)	FRN 0005-0204-74
Mexico, Facility ID 89049)	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Released: April 23, 2004

By the District Director, Denver Office, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that A-O Broadcasting Corporation ("A-O"), former licensee of station KTMN, in Cloudcroft, New Mexico, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended ("Act"),<sup>2</sup> by operating on the frequency 97.9 MHz without an authorization from the Federal Communications Commission ("Commission"). We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>3</sup> that A-O is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

**II. BACKGROUND**

2. On January 3, 2003, the Media Bureau notified A-O by letter that the license for station KTMN expired and was thereby forfeited as of November 8, 2002, pursuant to Section 312(g) of the Act,<sup>4</sup> because of that station's failure to transmit broadcast signals for a consecutive 12 month period.<sup>5</sup> On Thursday, April 8, 2004, the Commission's Denver Office received information from three different sources that KTMN had resumed broadcast operations. A search of the Commission's licensee database revealed no license for the operation of KTMN on 97.9 MHz.

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<sup>1</sup> The Commission's database now lists the station call sign as "DKTMN" to reflect its deletion.

<sup>2</sup> 47 U.S.C. § 301.

<sup>3</sup> 47 U.S.C. § 503(b).

<sup>4</sup> 47 U.S.C. § 312(g).

<sup>5</sup> *Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 35 (2003) ("Media Bureau January 2003 Letter"). The Media Bureau also denied A-O's petition for reconsideration of the Media Bureau January 2003 Letter. *See Letter to Paul H. Brown, Esq.*, 18 FCC Rcd 3818 (2003). An application for review of that action is pending.

3. On April 8, 2004, an agent from the Denver Office called KTMN and spoke with a disc jockey at the station who told the agent that KTMN had been on the air for two days. The Denver agent then contacted the President of A-O, who confirmed that KTMN was broadcasting on 97.9 MHz.<sup>6</sup> On April 9, 2004, the Denver agent telephoned A-O's President and advised that the Commission records failed to show any Commission operating authority for KTMN. Later that day, A-O filed a notification with the Commission that KTMN would be broadcasting the weekend of April 10 – 11, 2004, pursuant to Section 73.1250 of the Commission's Rules.<sup>7</sup>

4. On April 13, 2004, the Chief of the Media Bureau's Audio Division sent a letter to A-O's counsel advising them that "DKTMN(FM), Cloudcroft, N.M., is without authority to initiate or continue broadcast operations."<sup>8</sup> A-O was also ordered to report, by April 15, 2004, "whether the licensee ceased operations and on what day it ceased operations."<sup>9</sup> On April 15, 2004, A-O's counsel responded to the Media Bureau April 2004 Letter with a letter stating that "on behalf of the licensee, I can report to you that KTMN remains on the air . . . ."<sup>10</sup> The station, however, went off the air on April 19, 2004.

### III. DISCUSSION

5. Section 503(b) of the Act provides that any person who willfully fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.<sup>11</sup> The term "repeated" means the commission or omission of such act more than once or for more than one day.<sup>12</sup>

6. Section 301 of the Act prohibits radio operations "except and in accordance with this Act and with a

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<sup>6</sup> A-O's President indicated that the station was simulcasting 100% of KUPR's programming, a FM broadcast station licensed to Southern New Mexico Radio Foundation to serve Alamogordo, New Mexico, operating on 91.7 MHz. A-O's President, who is also the President of Southern New Mexico Radio Foundation, stated that KTMN was broadcasting from the Wofford Mountain electronics site, located on United States Forest Service lands near Cloudcroft, New Mexico, and had been on the air for the last two days.

<sup>7</sup> 47 C.F.R. § 73.1250 (Broadcasting Emergency Information). See Letter from A-O Broadcasting Corporation, KTMN, Cloudcroft, New Mexico, to Marlene Dortch, Secretary, Federal Communications Commission (April 9, 2004). A-O also contacted staff in the Audio Division of the Media Bureau about receiving temporary authority to operate April 10 – 11, 2004.

<sup>8</sup> April 13, 2004, letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Paul H. Brown, Wood, Maines & Brown ("Media Bureau April 2004 Letter").

<sup>9</sup> *Id.*

<sup>10</sup> April 15, 2004, letter from Barry D. Wood, Wood, Maines & Brown, to Peter H. Doyle, Chief, Audio Division, Media Bureau.

<sup>11</sup> 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', when used with reference to the commission or omission of any act, 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).

<sup>12</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[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."

license granted under the provisions of this Act."<sup>13</sup> On or around April 6, 2004, A-O began transmitting on the frequency 97.9 MHz, from the Wofford Peak electronic site, near Cloudcroft, New Mexico, located on United States Forest Service lands, without the required Commission authorization. As explained above, A-O apparently continued to operate KTMN until Monday, April 19, 2004, despite being notified by the Commission that KTMN's license had been automatically forfeited, by operation of law, and that KTMN has no Commission authority to initiate or continue broadcast operations. A-O explicitly acknowledged, on April 15, 2004, through counsel, that "KTMN remains on the air." Therefore, it appears that A-O's unlicensed operation on 97.9 MHz is willful. It further appears that unlicensed operation on 97.9 MHz occurred on more than one day; thus, it is repeated. Based on the evidence before us, we find that A-O willfully and repeatedly violated Section 301 of the Act by operating radio transmission apparatus without a license on 97.9 MHz.<sup>14</sup>

7. Pursuant to *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, ("*Forfeiture Policy Statement*"), and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization for this service is \$10,000.<sup>15</sup> In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require.<sup>16</sup> Considering the entire record and applying the factors listed above, we conclude a forfeiture in the amount of \$10,000 is appropriate.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's Rules, A-O Broadcasting Corporation is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars (\$10,000) for violations of Section 301 of the Act.<sup>17</sup>

9. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, A-O Broadcasting Corporation shall pay the full amount of the proposed forfeiture or shall file a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption.

11. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, and must include the NAL/Acct. No. referenced in the caption.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2)

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<sup>13</sup> 47 U.S.C. § 301.

<sup>14</sup> A-O operated on 97.9 MHz in Cloudcroft, N.M., from on or around April 6, 2004, until approximately noon on April 19, 2004.

<sup>15</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

<sup>16</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>17</sup> 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80.

financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>18</sup>

14. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Spectrum Enforcement Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

15. IT IS FURTHER ORDERED THAT a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to A-O Broadcasting Corporation, Attention Robert J. Flotte, 3001 North Florida Avenue, Alamogordo, New Mexico 88301-9794, and its counsel, Paul H. Brown, Esq., Wood, Maines & Brown, Chartered, 1827 Jefferson Place, N.W. Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears  
District Director, Denver Office

Enclosure: FCC List of Small Entities

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<sup>18</sup> See 47 C.F.R. § 1.1914.