

Federal Communications Commission

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

In the Matter of)
)
Viva Communications Group, LLC) File Number EB-07-BF-020
Licensee of Station WSDE)
Cobleskill, New York) NAL/Acct. No. 200832280002
Facility ID # 4002)
) FRN 0011157781

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: December 20, 2007

By the Resident Agent, Buffalo Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("*NAL*"), we find that Viva Communications Group, LLC ("Viva"), licensee of AM radio station WSDE, Cobleskill, New York, has apparently willfully and repeatedly violated Sections 11.35(a), 73.1560(a), 73.1745(a), and 73.3526(e)(12), of the Commission's Rules ("*Rules*")¹ by failing to maintain operational Emergency Alert System ("EAS") equipment, failing to sign off at local sunset time, failing to maintain daytime operating power at more than 90% of the authorized power, and failing to maintain a complete public inspection file. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("*Act*"),² that Viva is apparently liable for a forfeiture in the amount of sixteen thousand dollars (\$16,000).

II. BACKGROUND

2. On May 4, 2007, the FCC's Buffalo Office received a complaint regarding AM station WSDE, Cobleskill, New York. The complaint alleged that the station was operating during nighttime hours, was not maintaining a complete public inspection file, and was not maintaining an EAS system.

3. On May 4, 2007, an agent in the Buffalo Office searched the FCC's data base and determined that WSDE is authorized to operate with a power of 1000 watts daytime. The station is not authorized for nighttime operation and must sign off the air at local sunset, which is 7:15 PM Eastern Standard Time for the month of May.

4. On May 9, 2007, the agent traveled to Cobleskill, New York and monitored radio station WSDE before and after local sunset. The agent determined that WSDE remained on the air with programming after local sunset. The agent conducted field strength measurements before and after local sunset and determined that the radio station was operating at the same power level for both daytime and

¹ 47 C.F.R. §§ 11.35(a), 73.1560(a), 73.1745(a), 73.1870(a), and 73.3526(e)(12).

² 47 U.S.C. § 503(b).

nighttime.

5. On the morning of May 10, 2007, the agent monitored radio station WSDE before and after sunrise. The agent determined radio station WSDE was on the air with programming before sunrise. The agent conducted field strength measurements before and after sunrise and determined the radio station was operating at the same power level for daytime and nighttime.

6. Later that morning, the FCC agent visited WSDE's main studio and met with Edward Hurak. Mr. Hurak admitted that the station remained on the air after sunset and stated that the station had been operating at nighttime for quite some time.

7. After conducting the inspection at the main studio, Mr. Hurak and the agent went to the transmitter site. The agent determined that the operating power of the station was only 33% of the authorized power, *i.e.*, 333 watts. Mr. Hurak stated that the station had technical problems and that he wanted to keep the power low until the problems were corrected.

8. The agent and Mr. Hurak later returned to WSDE's main studio. The agent asked the operator on duty for the station's EAS logs. The operator on duty stated that the station does not have an EAS log. The operator on duty further stated that he has been employed at the station for approximately three years and has never conducted an EAS test. The operator further stated that he did not know the procedure for conducting an EAS test and does not recall the last time the station received an EAS test. The agent inspected the EAS equipment and determined that it was not functioning; no stations could be detected on the EAS receiver. The agent also found that the EAS printer was not attached to the EAS equipment.

9. The agent reviewed the station's public inspection file and found that it did not contain any issues/ programs lists for the last two years

III. DISCUSSION

10. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly 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.³

11. Section 73.1560(a) of the Rules provides that AM stations must be maintained as near as practicable to the authorized antenna input power and may not be less than 90% nor more than 105% of the authorized power.⁴ Section 73.1745(a) provides that "[no] broadcast station shall operate at times, or with modes of power, other than those specified and made part of the license...."⁵ Station WSDE's license authorizes the station to operate during the daytime at 1000 watts and the station must sign off the air at local sunset and may not sign on until local sunrise. The agent determined, based on off-air monitoring and field strength measurement, and Mr. Hurak confirmed, that station WSDE remained on

³ 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).

⁴ 47 C.F.R. § 73.1560(a)

⁵ 47 C.F.R. § 73.1745(a).

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the air after sunset on May 9, 2007, and was on the air before sunrise on May 10, 2007, with approximately 333 watts of power. The agent also determined that station WSDE was operating with approximately 333 watts of power during the daytime, which is less than 90% of the station's authorized power.

12. Section 11.35(a) of the Rules states that "EAS participants are responsible for ensuring that EAS Encoders, EAS Decoders and Attention Signal generating and receiving equipment used as part of the EAS are installed so that the monitoring transmitting functions are available during the times the stations and systems are in operation."⁶ On May 10, 2007, the agent found that WSDE's EAS equipment was not operational and the operator on duty, who has been employed by the station for approximately three years, reported that he does not recall the last time an EAS test was received or conducted.

13. Section 73.3526(e)(12) of the Rules requires licensees to place in the public inspection file, for each calendar quarter, a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period.⁷ This list is known as the radio Issues/Programs list. On May 10, 2007, in response to a request to inspect the station's public inspection file, an agent was provided a public inspection file for station WSDE that did not contain any issues/programs lists for calendar years 2006 and 2007.

14. Based on the evidence before us, we find that Viva willfully and repeatedly violated Sections 73.1560(a) and 73.1745(a) of the Rules by failing to sign off the air at local sunset and remain off the air until local sunrise as required by the station's license and by operating at less than 90% of the station's authorized power. We also find that Viva willfully and repeatedly violated Section 11.35 of the Rules by failing to maintain operational EAS equipment. We further find that Viva willfully and repeatedly violated Section 73.3526(e)(12) of the Rules by failing to maintain issues/programs lists for a two-year period.

15. 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 exceeding the power limits and operating at less than 90% of the station's authorized power is \$4000, the base forfeiture amount for failure to maintain an operational EAS system is \$8000, and the base forfeiture amount for violation of the public inspection file rule is \$10,000.⁸ Because station WSDE's public inspection file contained a portion of the required items, a downward adjustment of the base forfeiture amount for this violation to \$4,000 is warranted. 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.⁹ Applying the *Forfeiture Policy Statement*, Section 1.80, and the statutory factors to the instant case, we conclude that Viva apparently is liable for a \$16,000 forfeiture.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's Rules, Viva Communications Group, LLC. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A**

⁶ 47 C.F.R. § 11.35(a)

⁷ 47 C.F.R. § 73.3526(e)(12).

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

⁹ 47 U.S.C. § 503(b)(2)(D).

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FORFEITURE in the amount of sixteen thousand dollars (\$16,000) for violations of Sections 11.35(a), 73.1745(a), 73.1560(a), and 73.3526(e)(12) of the Rules.¹⁰

17. **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, Viva **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the 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 above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

19. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Northeast Region, Buffalo Office, 6400 Sheridan Drive, Suite 140, Williamsville, NY 14221 and must include the NAL/Acct. No. referenced in the caption.

20. 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) 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.

21. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.¹¹

22. **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 Viva Communications Group LLC at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

David Viglione
Resident Agent
Buffalo Office
Northeast Region
Enforcement Bureau

¹⁰ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 11.35, 73.1745(a), 73.1560(a), and 73.3526(e)(12).

¹¹ See 47 C.F.R. § 1.1914.