

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

In re Applications of)	NAL/Acct. No. 20031810006
)	
KM Radio of St. Johns, L.L.C.)	
)	
for Modified Construction Permit,)	File Nos. BMPH-20000414ACI,
License to Cover Permit, and)	BLH-20001206ABE, and
Minor Modification of Licensed Facilities)	BPH-20010308AAL
for KWKM(FM), St. Johns, AZ)	

**MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY**

Adopted: March 23, 2004

Released: March 25, 2004

By the Commission:

1. We have before us an Application for Review filed on May 21, 2001, by Country Mountain Airwaves, L.L.C. (“CMA”).¹ KM Radio of St. Johns, L.L.C (“KM”) filed an Opposition to the Application for Review. CMA seeks Commission review of a staff decision² which denied reconsideration of the staff’s grant of the captioned license application filed by KM (the “2000 License Application”).³ The *Staff Decision* found that KM, licensee of KWKM, St. Johns, Arizona, constructed the station’s tower at the wrong coordinates, but nonetheless affirmed the grant of the license application. The *Staff Decision* also granted an unopposed minor modification application to correct KWKM’s coordinates, without prejudice to further enforcement action, and dismissed as moot KM’s request for Special Temporary Authority (“STA”).⁴ We deny the Application for Review with respect to the staff’s grant of the 2000 License Application and, pursuant to Section 1.115(a) of the Commission’s rules, we dismiss the Application for Review with respect to the staff’s grant of KWKM’s unopposed minor modification application to correct its tower coordinates.⁵ We also on our own motion, in light of the unique circumstances of this case, grant a waiver of Section 73.3598(e) of the Commission’s rules to

¹ CMA is the licensee of KTHQ(FM), Eager, Arizona, and KQAZ-FM, Springerville, Arizona.

² See *Letter to Jeffrey L. Timmons, Esq.*, Re KWKM(FM), St. Johns, Arizona (MMB Apr. 16, 2001) (“*Staff Decision*”).

³ KM filed the 2000 License Application on December 6, 2000 (File No. BLH-20001206ABE), and it was unopposed.

⁴ CMA had filed an Opposition to Request for Special Temporary Authority on March 13, 2000 (“STA Opposition”), and both KM and CMA had filed further responsive pleadings regarding the STA. Two days after release of the *Staff Decision*, KM filed its new application for a license (File No. BLH-20010418AAA) (the “2001 License Application”) to cover the new permit for the corrected coordinates (File No. BPH-20010308AAL) (the “2001 Permit”). CMA did not oppose the 2001 License Application, and the staff granted it on July 17, 2001.

⁵ See 47 C.F.R. § 1.115(a). CMA has not attempted to demonstrate that it was not possible for CMA to raise its objections to KM’s coordinates correction application at earlier stages of the proceeding.

prevent forfeiture of the construction permit.⁶ In addition, we issue a Notice of Apparent Liability to KM for operating KWKM at variance from its authorized geographic coordinates in violation of Section 73.1350(a) of the Commission's rules.⁷

2. Background. On July 13, 2000, over the objections of CMA, the staff granted a modification application authorizing KM to construct at a mountain top site on a private parcel of land known as Brown Ranch (the "2000 Permit").⁸ KWKM's 2000 Permit was valid through December 21, 2000.⁹ As indicated above, on December 6, 2000, KM filed the 2000 License Application to cover the permit, and the staff granted that application on December 20, 2000. Although CMA had not filed a timely objection to the 2000 License Application, the staff reviewed CMA's petition for reconsideration of the license grant, filed on January 4, 2001, on public interest grounds due to the nature of the misrepresentation allegations raised.¹⁰ The *Staff Decision* found that KM had constructed the KWKM tower approximately 900 feet away from the coordinates approved by the Commission. Nevertheless, the staff determined that KM had not engaged in misrepresentation as CMA had alleged. The *Staff Decision* rejected as conclusory CMA's allegation that KM's misstatements in the 2000 License Application concerning the tower location were intended to deceive the Commission. The staff was persuaded by KM's admission that it had been negligent in supervising construction.¹¹ Concurrently, as noted above, the *Staff Decision* granted KM's unopposed modification application to correct the tower's geographic coordinates and dismissed as moot KM's request for STA "to continue to operate" from the incorrect coordinates.¹²

3. On review, CMA argues that the staff erred in finding that KM did not misrepresent the location of the KWKM tower in the 2000 License Application. CMA repeats arguments previously raised in the petition for reconsideration and rejected by staff. Specifically, CMA bases its allegation of misrepresentation on alleged inconsistencies between KM's statements to local zoning authorities and to the Commission. According to CMA, KM had a motive to deceive the Commission -- namely, to prevent loss of the KWKM authorization which would have expired had KM failed to file the license application by December 21, 2000. CMA notes that under the express terms of the 2000 Permit, the permit would be automatically forfeited if KM failed to complete the authorized construction prior to December 21, 2000.¹³

⁶ See 47 C.F.R. § 73.3598(e).

⁷ 47 C.F.R. § 73.1350(a). See also 47 U.S.C. § 301.

⁸ File No. BMPH-20000414ACI. See *Letter to Nathaniel J. Hardy, Esq.* (MMB July 13, 2000).

⁹ See *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998) ("*Streamlining R&O*"), recon. granted in part and denied in part, 14 FCC Rcd 17525, 17536 (1999) (stating that construction permits that were valid on February 16, 1999, were automatically forfeited on the latter of December 21, 2000, or the permit's existing expiration date).

¹⁰ See 47 C.F.R. § 1.106(c)(2).

¹¹ See KM's "Response to Reply" at 3-4.

¹² See KM Letter from Kevin Joel Bae (Mar. 8, 2001), File No. 20010309ABK (requesting the STA).

¹³ See BMPH-20000414ACI (citing *Streamlining R&O*, 13 FCC Rcd 23056 ¶¶ 77-90, cautioning the permittee about automatic expiration). See also 47 C.F.R. § 73.3598(e).

4. In its Opposition, KM argues that the *Staff Decision* was consistent with previous Commission cases defining misrepresentation. KM also continues to deny that it had a motive or intent to deceive the Commission. KM refers to prior pleadings¹⁴ in which it (1) acknowledged that the new KWKM tower was constructed in error approximately 900 feet away from its authorized coordinates by KM's "local representatives" and (2) insisted it was not aware that it had constructed the tower at unauthorized coordinates until CMA raised the allegation.¹⁵

5. Discussion. Misrepresentation is a false statement of material fact made with intent to deceive the Commission.¹⁶ An intent to deceive may be inferred from a false statement of fact coupled with proof that the party making it had knowledge of its falsity.¹⁷ Intent may also be inferred from motive.¹⁸ Absent such intent, the submission of erroneous information through carelessness, inadvertence, or even gross negligence does not constitute misrepresentation.¹⁹ It is undisputed that KM submitted erroneous information in the 2000 License Application regarding the location of KWKM's tower. The issue before us is whether the record supports a finding of intent to deceive, as CMA alleges. KM asserts that its representations to the Commission and local zoning authorities were not inconsistent and any differences merely reflect KM's pursuit of both a private and a public parcel of land at the local level and its decision to specify the private parcel in its modification application. At about the same time that the Commission granted the modification application, local zoning authorities approved the use of the public parcel. KM then amended the local zoning permit to build on the private parcel in conformity with the 2000 Permit and received approval from the local zoning authorities for that amendment.

6. As noted above, KM, based in Illinois, states that it relied on on-site "representatives" in Arizona, *i.e.*, local contractors and personnel,²⁰ to conclude that the adjacent public and private land parcels were close enough to be at the same geographic coordinates.²¹ KM explains that in the fall of 2000, corporate officer Kevin Bae traveled from KM's headquarters in Chicago to inspect the site and to hire local contractors to construct the station's facilities.²² KM further explains that no one from KM visited the site again prior to filing the 2000 License Application and, by placing reliance on its representatives supervised from Chicago via communication by telephone, facsimile, e-mail and

¹⁴ See Opposition to Application for Review at 3-4, referring the Commission to KM's Reply to CMA's STA Opposition, which KM filed on March 23, 2001, summarizing KM's arguments and including copies of other relevant pleadings filed in the earlier stages of the proceeding (including the Dismissal Opposition, the Reconsideration Opposition, the Strike Motion, and the Response to Reply).

¹⁵ See, *e.g.*, KM's Response to Reply at 3-4.

¹⁶ *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *LUJ, Inc.*, 17 FCC Rcd 16980, 16982 (2002); *Liberty Productions, A Ltd. Partnership*, 16 FCC Rcd 12061, 12079-80 (2001); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).

¹⁷ *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991).

¹⁸ *Joseph Barr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

¹⁹ *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3753 (1995) *aff'd sub nom. Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998).

²⁰ See, *e.g.*, KM's Response to Reply at 3-4.

²¹ KM points out, in support, that two of the guy wires of the tower are located on the public land parcel, for which it obtained easements. See KM's Reply to CMA's STA Opposition at 6.

²² See KM's Response to Reply at 3-4 and Exhibit A.

overnight courier, KM management was not aware that KWKM's tower had been constructed at the wrong coordinates until CMA raised the allegation.²³

7. Upon learning of the problem, KM promptly pursued corrective action. Specifically, KM investigated by checking the coordinates provided by CMA's land surveyor and found that *they* were incorrect, placing the tower at the bottom of the mountain. CMA's surveyor conceded error and provided corrected coordinates that properly placed the tower on top of the mountain. Because there was still a variance with the authorized coordinates, KM commissioned an independent survey which confirmed that the tower was constructed at the wrong coordinates, albeit on the Brown Ranch site. On March 8, 2001, KM filed its minor modification application, seeking Commission authorization for the tower as constructed. On March 9, 2001, KM filed its STA request "to continue to operate" at the unauthorized coordinates. As noted above, CMA did not contest the March 2001 modification application, and the staff granted it on April 16, 2001.²⁴ Two days later, KM filed a new license application (the "2001 License Application") to cover the modified permit reflecting the tower's true geographic coordinates.²⁵

8. Based on our review of the record in this case, we find that CMA has not substantiated its allegation of KM's intent to deceive the Commission. We do not infer intent to deceive from mere inconsistencies,²⁶ such as those alleged by CMA regarding submissions to the local zoning authorities and the Commission. We thus agree with the staff's finding that KM's negligence in constructing at the wrong site does not rise to the level of misrepresentation, and we affirm the *Staff Decision* denying CMA's petition for reconsideration. The evidence is clear, however, that in connection with its construction at a site other than that authorized by its permit, KM failed to complete construction of the *authorized* facilities by the December 21, 2000, permit expiration date. KM's negligence in construction further resulted in its operation of the station with unauthorized facilities.

9. We first address the appropriate action for KM's failure to construct timely according to the 2000 Permit.²⁷ Section 73.3598(e) of our rules provides for automatic forfeiture of a permit if construction is not completed by the permit's expiration date.²⁸ In light of the unique circumstances of this case, however, we conclude that such an outcome would be unduly harsh. Prior to the 2000 Permit's expiration, KM built facilities that it believed to be those authorized. Although the 900-foot variance from the authorized site is enough to require an application for modification,²⁹ the KWKM facilities were nevertheless constructed substantially in compliance with the 2000 Permit. The antenna was identical to that authorized and was mounted at the proper height on the tower, albeit at a slightly different height

²³ *Id.*

²⁴ In the April 16, 2001, *Staff Decision* (at 4 n.3), the staff also dismissed as moot KM's STA request.

²⁵ File No. BLH-20010418AAA.

²⁶ See *Joseph W. Bollinger and Donna M. Bollinger*, 16 FCC Rcd 18107, 18109 (2001) (citing *Garret, Andrews, & Letizia, Inc.*, 86 F.C.C.2d 1172, 1180 (Rev. Bd. 1981) *mod. on other grounds*, 88 F.C.C.2d 620 (1981)) (burden is on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support). See also *Hispanic Broadcast System, Inc.*, 16 FCC Rcd 8072, 8074 (2001) (declining to infer an intent to deceive based on applicant's alleged motive to obtain favorable action on pending applications).

²⁷ Action regarding KM's construction at the wrong site is discussed *infra*, note 36.

²⁸ See 47 C.F.R. § 73.3598(e).

²⁹ See 47 C.F.R. § 73.1690(b)(2).

above average terrain because of terrain variations. The tower height was also as authorized. Our engineering staff confirmed that there was no short spacing between the KWKM facilities as constructed and any other station, nor any signal coverage advantage to be gained by the difference of 900 feet in the location of the tower. In fact, the constructed facility has a slight disadvantage in signal coverage, compared to the facility specified in the 2000 Permit. FAA notification was not required for either facility site, as the tower is less than 200 feet high and satisfies the glide slope ratio with respect to airports. Notably, KM responded promptly to CMA's allegation that the tower was constructed at the wrong geographic coordinates and commissioned an independent survey.³⁰ Taking into account all of these special circumstances and the fact that the resulting facility provides service to the public substantially in compliance with the 2000 Permit, we grant on our own motion a waiver of the automatic forfeiture provision of Section 73.3598(e), and thereby affirm the staff's licensing actions.³¹

10. We next address the appropriate action for KM's resulting failure to operate KWKM in accordance with the terms of the license application granted on December 20, 2000 -- a violation of Section 73.1350(a) of the Commission's rules.³² Licensees and other Commission regulatees are ultimately responsible for the acts and omissions of their employees and, as well, their independent contractors.³³ The Commission has refused to excuse licensees from forfeiture penalties where the actions of employees or independent contractors have resulted in violations of our rules.³⁴ Licensees are responsible for forfeitures when their negligent supervision of and reliance on contractors, including engineers, has resulted in the construction and operation of broadcast facilities at unauthorized geographic coordinates.³⁵ We conclude that a monetary forfeiture is warranted here as well.³⁶ KM's operation of the

³⁰ CMA's own initial survey was also wrong, which may suggest that the site presents survey difficulties.

³¹ See 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[W]aiver is appropriate . . . if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

³² See 47 C.F.R. § 73.1350(a) (“Each licensee is responsible for maintaining and operating its broadcast station in a manner which complies with the technical rules . . . and in accordance with the terms of the station authorization”).

³³ See, e.g., *Eure Family L.P.*, 17 FCC Rcd 21861, 21863-64 (2002) (denying an application for review of an \$8,000 forfeiture assessment for failure to maintain required tower lighting where licensee claimed an inadvertent violation due to its contractor's failure to notify it of the extinguished beacon).

³⁴ See *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991) (Commission has long held that licensees are responsible for the negligent acts or omissions of their employees; responsibility is not lessened when contractors are used; imposing \$10,000 forfeiture for violating Commission's tower lighting rule). See also *Charter Communications VI, LLC*, 17 FCC Rcd 16516 (EB 2002) (licensees are responsible for the acts or omissions of their employees; issuing \$20,000 forfeiture for failure to comply with Commission's signal leakage standards and failure to comply with a cease operations order).

³⁵ See, e.g., *Farnell O'Quinn*, 18 FCC Rcd 16354 (EB 2003) (issuing monetary forfeiture against licensee whose engineers provided incorrect coordinates, resulting in failure to operate station in accordance with its authorization); *L.T. Simes II and Raymond Simes*, 18 FCC Rcd 8977 (EB 2003) (issuing monetary forfeiture against licensee for unauthorized operation and rejecting reliance on contract engineer's incorrect coordinates).

³⁶ See *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). Monetary forfeiture is also the usual sanction for unauthorized construction. In this instance, because the unauthorized construction at the wrong geographic coordinates occurred prior to commencement of the station's current license term in December 2000 and more than one year prior to today's date, we are barred by statute from issuing a Notice of Apparent Liability (continued....)

station notwithstanding its failure to verify proper construction was willful and, as such, its unauthorized operation of the station constituted a “willful and repeated” violation of our rules.³⁷ KM’s unauthorized operation at the wrong geographic coordinates commenced on December 21, 2000, and continued until KM filed the 2001 License Application on April 18, 2001, to cover the 2001 Permit. Based on these facts, we issue this Notice of Apparent Liability for forfeiture in the amount of \$4,000, the base amount for operation at an unauthorized location.³⁸ We find no facts warranting upward or downward adjustment in this case.

11. Accordingly, IT IS ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, KM Radio of St. Johns, L.L.C., licensee, Station KWKM(FM) St. Johns, Arizona, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Four Thousand Dollars (\$4,000.00) for willfully and repeatedly violating Section 73.1350(a) of the Commission’s rules, 47 C.F.R. §73.1350(a).

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s rules, that within thirty days of the release of this Notice, KM Radio of St. Johns, L.L.C., SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture may be made by credit card through the Commission’s Credit and Debt Management Center at (202) 418-1195, or 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 note the NAL/Account number referenced in the caption of this document (20031810006).

14. The response, if any, must be mailed to Peter H. Doyle, Chief, Audio Division, Media Bureau, 445 Twelfth Street, S.W., Room 2-A360, Washington, D.C. 20554, and MUST INCLUDE the NAL/Account number referenced in the caption of this document (20031810006).

15. 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; 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.

(Continued from previous page) _____
 (“NAL”) for the violation. See 47 U.S.C. § 503(b)(6)(A). See also, e.g., *Manahawkin Communications Corp.*, 17 FCC Rcd 342, 355 (2001) (in granting modification of permit following premature construction, Commission noted statute of limitations for monetary forfeiture had expired). We are not so barred from issuing an NAL for unauthorized operation after December 20, 2000, which falls within the current license term.

³⁷ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a) (any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission’s rules shall be liable for a forfeiture penalty); *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 (1991) (“willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules; a continuing violation is “repeated” if it lasts more than one day).

³⁸ See 47 C.F.R. § 1.80.

16. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554.³⁹

17. IT IS FURTHER ORDERED, that the Application for Review filed by Country Mountain Airwaves, L.L.C. on May 21, 2001, IS DENIED with respect to the staff's grant on December 20, 2000, of a covering license for KWKM(FM), St. Johns, Arizona (File No. BLH-20001206ABE), and IS DISMISSED with respect to the staff's grant on April 16, 2001, of a minor modification application to correct the tower's coordinates for KWKM(FM) (File No. BPH-20010308AAL).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁹ See 47 C.F.R. § 1.1914.