

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

In re Application of)	
)	
Elenbaas Media, Inc.)	Facility I.D. No 41600
)	NAL/Acct. No. MB200741410173
For Renewal of License for)	FRN: 0008131245
Station KMZK(AM))	File No. BR-20060630AFK
Billings, Montana)	

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

Adopted: January 31, 2007

Released: March 1, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the captioned application of Elenbaas Media, Inc. (the "Licensee") for renewal of its license for Station KMZK(AM), Billings, Montana (the "Station"). In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture ("NAL")* issued pursuant to Sections 309(k) and 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),¹ by the Chief, Media Bureau by authority delegated under Section 0.283 of the Rules,² we find that the Licensee apparently willfully violated Section 73.3539 of the Rules by failing to timely file a license renewal application for the Station,³ and willfully and repeatedly violated Section 301 of the Act,⁴ by engaging in unauthorized operation of the Station after its authorization had expired. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of seven thousand dollars (\$7,000), and we grant the captioned Station KMZK(AM) license renewal application and reinstate the call sign for the Station.

II. BACKGROUND

2. Section 73.3539(a) of the Rules requires that applications for renewal of license for broadcast stations must be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."⁵ An application for renewal of the Station's license should have been filed by December 1, 2004, four months prior to the Station's April 1, 2005 license expiration date,⁶ but was not. Accordingly, on June 27, 2006, the staff wrote to the Licensee indicating that the Station's license had expired and that (1) all authority to operate the Station was terminated; and

¹ 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. § 73.3539.

⁴ See 47 U.S.C. § 301.

⁵ 47 C.F.R. § 73.3539(a).

⁶ See 47 C.F.R. §§ 73.1020, 73.3539(a).

(2) the Station's call letters were deleted from the Commission's data base. The Licensee was advised that any further operation of the Station was unauthorized and must cease immediately.⁷ Thereafter, on June 30, 2006, the Licensee filed the captioned license renewal application, and on July 5, 2006, it also sought special temporary authorization ("STA") to continue Station operations.⁸ The staff granted that STA request on July 12, 2006.⁹ The STA was to expire on January 12, 2007. The Licensee timely filed for an extension of the STA on January 3, 2007, which remains pending. In the STA Request, the Licensee explains that it had "has little or no experience" with the Commission's electronic filing system, and while it had successfully filed a license renewal application for co-owned Station KURL(AM) in Billings, Montana, it mistakenly assumed that it had filed a renewal application for KMZK(AM) as well; it did not realize that it had to prepare and file a separate renewal application for each of its stations.¹⁰

III. DISCUSSION

3. *Proposed Forfeiture.* In this case, the record indicates that the Licensee failed to timely file a license renewal application for the Station, as required by Section 73.3539 of the Rules. Moreover, it continued operating the Station for more than a year after the Station's license had expired on April 1, 2005, before filing the appropriate renewal application and a request for STA to so operate, in violation of Section 301 of the Act. Accepting the Licensee's claim that its failure to timely file was "unintentional and inadvertent," the Licensee was obligated to fully comply with the Rules, including timely filing the Station's renewal application and maintaining in effect the Station authorization.¹¹ It did not do so.

4. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹² Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ Section 312(f)(2) 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."¹⁶

⁷ Letter to Elenbaas Media, Inc., Ref. 1800B3 (Chief, Audio Division, Media Bureau, Jun. 27, 2006).

⁸ File No. BLSTA-20060705ACP (the "STA Request").

⁹ Letter to Richard J. Hayes, Jr., Esquire, Ref. 1800B3 (MB Jul. 12, 2006) ("STA Request").

¹⁰ See Application, Exhibit 6; STA Request.

¹¹ See, e.g., *Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Rcd 2940, 2941-2 (CIB 1999) (responsibility for complying with terms of station license "rests solely and exclusively with the licensee") (citing *Empire Broadcasting Corp.*, Memorandum Opinion and Order, 25 FCC 2d 68 (1970)).

¹² 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁵ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁶ 47 U.S.C. § 312(f)(2).

5. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.¹⁷ The guidelines also specify a base forfeiture amount of \$10,000 for station construction and/or operation without an instrument of authorization for the service.¹⁸ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "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."¹⁹

6. In this case, the Licensee failed to timely file the KMZK(AM) renewal application and continued operating the Station for more than a year before filing the appropriate renewal application and a request for STA to so operate. Nevertheless, because it had previously been licensed to operate the Station, the latter transgressions are not comparable to "pirate" wireless operations, which typically have been subject to forfeitures of approximately \$10,000. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture for the full \$3,000 base amount for the failure to timely file the renewal application, but reduce the proposed forfeiture for the unauthorized operation from the \$10,000 base amount to \$4,000.²⁰ Thus, we propose a forfeiture in the total amount of \$7,000.

7. *License Renewal Application.* In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.²¹ That Section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.²² If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted."²³

8. We find that the Licensee's apparent violations of Section 73.3539 of the Rules and Section 301 of the Act do not constitute "serious violations" warranting designation for evidentiary

¹⁷ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁸ A broadcast station requires an authorization from the Commission to operate. See 47 U.S.C. § 301.

¹⁹ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

²⁰ See, e.g., *Discussion Radio Incorporated*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7438 (2004); *Gospel Media, Inc.*, Letter, 19 FCC Rcd 15600 (MB 2004). Although in *Gospel Media*, the Bureau imposed a proposed forfeiture of \$3,000 for unauthorized operation, the unauthorized operation lasted only two weeks and the applicant did not allow its STA for continued operations to expire. The \$4,000 forfeiture proposed here for unauthorized operation is analogous to use of an unauthorized frequency by a land mobile station holding a license for a different frequency. See, e.g., *In the Matter of Dave Mitchell*, Forfeiture Order, 20 FCC Rcd 1366 (EB 2005); *In the Matter of Joselyn Gordon*, Forfeiture Order, 19 FCC Rcd 23557 (EB 2004).

²¹ 47 U.S.C. § 309(k).

²² 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

²³ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.²⁴ Further, we find that Station KMZK(AM) served the public interest, convenience, and necessity during its subject license term. We will therefore grant the license renewal application below.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Elenbaas Media, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for the apparent willful violation of Section 73.3539 of the Commission's Rules and willful and repeated violation of Section 301 of the Communications Act of 1934, as amended.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Elenbaas Media, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the proposed 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, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

12. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 respondent'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.

14. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁵

15. IT IS FURTHER ORDERED, that call sign KMZK(AM) IS REINSTATED.

²⁴ For example, we do not find here that the Licensee's operation of the Station "was conducted in an exceedingly careless, inept and negligent manner and that the Licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *See Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. *See also Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

²⁵ *See* 47 C.F.R. § 1.1914.

16. IT IS FURTHER ORDERED that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the license renewal application of Elenbaas Media, Inc. for Station KMZK(AM), Billings, Montana, (File No. BR-20060630AFK) IS GRANTED.

17. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Elenbaas Media, Inc., P.O. Box 31038, Billings, Montana 59107-1038, and to its counsel, Richard J. Hayes, Jr. Esquire, P.O. Box 200, Lincolnville, Maine 04849.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau