

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

In the Matter of)	
)	
Mark Nierman and)	File Number: EB-09-NY-0300
Kakadu Productions, Inc.)	
)	NAL/Acct. No.: 201032380005
)	
Brooklyn, New York)	FRN: 0019 3494 71
)	
)	

FORFEITURE ORDER

Adopted: June 10, 2010

Released: June 14, 2010

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of four thousand five hundred dollars (\$4,500) jointly and severally to Mark Nierman (“Nierman”) and Kakadu Productions, Inc. (“Kakadu”), for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (“Act”),¹ by operating an unlicensed radio station on the frequency 99.9 MHz in Brooklyn, New York.

II. BACKGROUND

2. On October 12 and 13, 2009, in response to several complaints from licensed broadcasters, an agent from the Enforcement Bureau’s New York Office (“New York Office”), using a mobile direction-finding vehicle, monitored the frequency 99.9 MHz in Brooklyn, New York. The agent determined that the source of the broadcast transmissions on 99.9 MHz was a radio station operating from an apartment building located at 2814 West 8th Street, Brooklyn, New York 11224. The agent observed an FM broadcast antenna on top of a water tank on the roof of the apartment building located at 2814 West 8th Street. The agent subsequently took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 of the Commission’s Rules (“Rules”)² and therefore required a license. The agent searched Commission databases and found no evidence of a Commission authorization for this operation on 99.9 MHz in Brooklyn, New York.

3. After taking the field strength measurements on October 13, 2009, the agent went to the office of the building management company, Luna Park Housing Corporation (“Luna Park”). The agent conducted an interview with the Director of Operations (“Director”) regarding the unlicensed radio station operating at 2814 West 8th Street. The Director stated that he was aware of the antenna on the roof of the

¹ 47 U.S.C. § 301.

² Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239. Measurements showed that the field strength of the station’s signal exceeded the permissible level for a non-licensed Part 15 transmitter.

apartment building (Building #3) at 2814 West 8th Street and that a five-year lease had been executed between Luna Park and Mark Nierman of Kakadu allowing a radio station to operate in the bulkhead room of Building #3 beginning May 30, 2009 for \$6,000 per year.³ The agent then returned to the apartment building located at 2814 West 8th Street and conducted an inspection of the FM broadcast antenna on top of the water tank on the roof with the building superintendent. The agent observed coaxial cable connecting the FM broadcast antenna to radio station equipment located inside the bulkhead room on the roof. The agent also observed that the radio station equipment was active and recorded information about the equipment. The building superintendent then shut down all the equipment at the agent's request.

4. On October 16, 2009, the New York Office issued a Notice of Unlicensed Operation ("NOUO") to Kakadu.⁴ The NOUO warned Kakadu that operation of the unlicensed radio station on 99.9 MHz violated Section 301 of the Act and outlined the potential penalties for such a violation, including seizure of the equipment, fines and imprisonment. The NOUO also directed Kakadu to terminate operation of the unlicensed station immediately and provided Kakadu ten days to reply. On October 26, 2009, Kakadu submitted a reply to the NOUO stating that it had ceased operating the unlicensed radio station at 2814 West 8th Street and that it would comply with FCC directives in any future radio operations.

5. On January 8, 2010, the New York Office issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of ten thousand dollars (\$10,000) to Nierman and Kakadu jointly and severally for apparently willfully and repeatedly operating an unlicensed radio station in violation of Section 301 of the Act.⁵ Nierman and Kakadu jointly submitted a response to the NAL on February 9, 2010. In their response, Nierman and Kakadu do not dispute the violations identified in the NAL but request cancellation of the proposed forfeiture based on their inability to pay.

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"),⁶ Section 1.80 of the Rules,⁷ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Forfeiture Policy Statement").⁸ 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 other such matters as justice may require.⁹ As discussed below, we find that a reduction of the forfeiture amount from \$10,000 to \$4,500 based on Nierman's and Kakadu's inability to pay is appropriate.

7. Section 301 of the Act states that no 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

³ Mark Nierman is the sole shareholder of Kakadu Productions, Inc.

⁴ The New York Office also issued to Luna Park a NOUO on October 16, 2009 and a Notice of Apparent Liability for Forfeiture on January 8, 2010. See *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 201032380004 (Enf. Bur., New York Office, January 8, 2010).

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 201032380005 (Enf. Bur., New York Office, January 8, 2010).

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999)

⁹ 47 U.S.C. § 503(b)(2)(E).

accordance with the Act and with a license granted under the provisions of the Act.¹⁰ Nierman and Kakadu do not dispute that they operated a radio station without a license on October 12, 2009, and October 13, 2009, on 99.9 MHz in Brooklyn, New York. We therefore find that Nierman and Kakadu willfully and repeatedly operated an unlicensed station in violation of Section 301 of the Act.

8. Nierman and Kakadu claim that the proposed forfeiture amount poses a financial hardship and request that we cancel the forfeiture. In support of their claim of financial hardship, Nierman and Kakadu submitted three years of individual and corporate tax returns. With regard to an individual's or entity's inability to pay, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.¹¹ We have reviewed Nierman's and Kakadu's documentation and conclude that a reduction of the forfeiture to \$4,500 is warranted based on Nierman's and Kakadu's inability to pay.

IV. ORDERING CLAUSES

9. 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(f)(4) of the Commission's Rules, Mark Nierman and Kakadu Productions, Inc. **ARE JOINTLY AND SEVERALLY LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand five hundred dollars (\$4,500) for violations of Section 301 of the Act.¹²

10. 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.¹³ 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Nierman and Kakadu also shall send electronic notification on the date said payment is made to NER-Response@fcc.gov.

¹⁰ 47 U.S.C. § 153(33).

¹¹ See e.g., *Local Long Distance, Inc.*, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

¹² 47 U.S.C. §§ 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹³ 47 U.S.C. § 504(a).

11. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Mark Nierman and Kakadu Productions, Inc. at their addresses of record.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt
Regional Director
Northeast Region
Enforcement Bureau