

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

In the Matter of)	
)	
Kemp Broadcasting, Inc.)	File No.: EB-FIELDWR-13-00008283
Owner of Antenna Structure No. 1061958)	NAL/Acct. No.: 201432900003
Moapa, Nevada)	FRN: 0007648348
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: February 26, 2014

Released: February 27, 2014

By the District Director, Los Angeles Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Kemp Broadcasting, Inc. (Kemp), owner of antenna structure number 1061958 (the Antenna Structure), located in Moapa, Nevada, apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act),¹ and Sections 17.47(a), 17.48(a), and 17.51(b) of the Commission's rules (Rules),² by failing to: (1) monitor obstruction lighting on a daily basis or maintain an alarm system; (2) notify the Federal Aviation Administration (FAA) of a known lighting outage, and (3) exhibit required obstruction lighting. We conclude that Kemp is apparently liable for a forfeiture in the amount of fourteen thousand dollars (\$14,000).

II. BACKGROUND

2. The Antenna Structure is 401 meters in overall height above ground level and is required to be painted and lighted.³ Specifically, the Antenna Structure is required to have dual lighting, *i.e.*, red lights at nighttime and white lights during the daytime and twilight.

3. On April 17, 2013, agents from the Enforcement Bureau's Los Angeles Office inspected the Antenna Structure during the daytime, and observed: 1) no white flashing lights functioning on the top of the 400 meter Antenna Structure; 2) no white flashing lights functioning on the $\frac{3}{4}$ level (300

¹ 47 U.S.C. § 303(q).

² 47 C.F.R. §§ 17.47(a), 17.48(a), 17.51(b).

³ See Antenna Structure Registration (ASR) database for antenna structure number 1061958. The FAA Study (1998-AWP-1961-OE) listed on the Antenna Structure's ASR does not list any painting and lighting requirements, consequently, the FCC assigned Chapters 3, 4, 8 and 13 of FAA Circular Number 70/7460-1J to the Antenna Structure. Chapter 3 requires painting, Chapter 4 requires red lights, and Chapter 8 requires dual lighting with medium intensity red lighting at nighttime and medium intensity white lighting for daytime and twilight. We note that a subsequent FAA Study (2001-AWP-485-OE) was issued for the Antenna structure. This study requires "Dual-red and high intensity white" lighting but does not require the structure to be painted. See also 47 C.F.R. § 17.23 (antenna structures requiring notice to the Federal Aviation Administration (FAA) must comply with the FAA's painting and lighting recommendations). We note that Kemp has failed to update the ASR for the Antenna Structure with the most recent FAA Study.

meter) of the Antenna Structure; 3) only one of the required white flashing lights functioning at the ½ level (200 meters); and 4) only one of the required white flashing lights functioning at the ¼ level (100 meters). While on the premises, the agents encountered an employee of Kemp who had driven up to the site in a motor vehicle. The agents identified themselves as FCC agents conducting an inspection of the Antenna Structure, and informed the Kemp employee that the extinguished lights were a violation of FCC rules. The agents then left the area, but returned at nighttime and observed no flashing red lights on the ¼ level. The agents contacted the FAA and learned that no Notice to Airmen (NOTAM) had been issued for the Antenna Structure.⁴

4. On April 29, 2013, a Los Angeles Office agent called Kemp to inform them of the FCC's NOTAM report, and to request that Kemp renew the NOTAM if the lights had not been restored before the May 3, 2013, expiration date. A Kemp representative stated they had not reported a NOTAM, but would report one if the lights were not fixed before the expiration date.

5. On May 16, 2013, the Los Angeles Office issued a Notice of Violation (NOV) to Kemp concerning the extinguished lights and failure to notify the FAA and initiate a NOTAM.⁵ In the NOV Response,⁶ Kemp acknowledged the violations. Kemp stated the red lights were restored on June 1, 2013, and the white lights would be restored by June 24, 2013.⁷ Kemp also stated the lights on the Antenna Structure were monitored by visual inspection, typically twice a month.⁸ In terms of the duration of the outage prior to the inspection by the Los Angeles agents on April 17, 2013, Kemp was "unable to state with any assurance of accuracy the last date upon which all lighting on the antenna were operational."⁹

6. On September 12, 2013, Los Angeles Office agents observed no white lights on the ¼ level of the Antenna Structure during the daytime. An agent contacted the FAA and learned that no NOTAM had been issued for the Antenna Structure.¹⁰ Subsequently, on September 20, 2013, a Los Angeles Office agent called Kemp to inform them of the FCC's NOTAM report, and to request that Kemp renew the NOTAM if the lights had not been restored before the expiration date. A Kemp representative stated they were aware of the light outage and believed that a NOTAM had been issued.¹¹

III. DISCUSSION

7. 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

⁴ See 47 C.F.R. § 17.48 (requiring antenna structure owners to notify the FAA immediately of any known outages of tower lighting lasting more than 30 minutes). The agent informed the FAA of the lighting outages and the FAA issued a NOTAM for the Antenna Structure on April 17, 2013.

⁵ See *Kemp Broadcasting, Inc.*, Notice of Violation, V201332900025 (May 16, 2013).

⁶ See Response to Notice of Violation of Kemp Broadcasting, Inc. (June 14, 2013) (on file in EB-FIELDWR-13-00008283) (NOV Response).

⁷ NOV Response at 5–6.

⁸ NOV Response at 6.

⁹ *Id.*

¹⁰ The agent informed the FAA of the lighting outage and the FAA issued a NOTAM for the Antenna Structure on September 12, 2013.

¹¹ The Kemp representative stated another employee had been instructed to report a NOTAM on September 11, 2013. However, the FAA record does not list a NOTAM report for September 11, 2013. The FAA record does list the NOTAM reported by the FCC on September 12, 2013.

thereunder, shall be liable 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 The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁶ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹⁷

A. Failure to Observe Lights on a Daily Basis, Failure to Notify the FAA, and Failure to Exhibit Required Lighting

8. The evidence in this case establishes that Kemp violated Section 303(q) of the Act and Sections 17.47(a), 17.48(a), and 17.51(b) of the Rules. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission. Section 17.47(a) of the Rules requires antenna structure owners to observe the lights on antenna structures visually once every 24 hours or alternatively to install and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner.¹⁸ Section 17.48(a) of the Rules states that owners of antenna structures “shall report immediately by telephone or telegraph to the nearest Flight Service Station or office of the Federal Aviation Administration any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes”¹⁹ Section 17.51(b) of the Rules requires the continuous exhibition of all high intensity and medium intensity obstruction lighting unless otherwise specified.

9. The Antenna Structure is 401 meters above ground in overall height and is required to be lighted with red obstruction lighting during nighttime hours, and white obstruction lighting during twilight and daytime hours.²⁰ On April 17, 2013, agents from the Los Angeles Office observed that multiple obstruction lights, including the top lights, were not functioning on the Antenna Structure, and determined

¹² 47 U.S.C. § 503(b).

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

¹⁵ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁶ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹⁷ 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.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹⁸ 47 C.F.R. § 17.47(a).

¹⁹ 47 C.F.R. § 17.48(a).

²⁰ See ASR database for antenna structure number 1061958.

that Kemp had failed to notify the FAA of the outage. Kemp acknowledged that it did not have a remote monitoring system in place and observed the lights on the tower only twice a month. Kemp was also “unable to state with any assurance of accuracy” when all the lights on the Antenna Structure had been operational prior to the April 17, 2013 inspection. On September 12, 2013, a subsequent inspection by Los Angeles agents revealed that again, some of the required obstruction lights were extinguished on the structure, and that Kemp had made no notification to the FAA concerning the outage. Therefore, based on the evidence before us, we find that Kemp apparently willfully and repeatedly violated Section 303(q) of the Act and Sections 17.47, 17.48(a), and 17.51(b) of the Rules by failing to monitor the lighting on the Antenna Structure or maintain a properly functioning automatic alarm system, failing to exhibit required obstruction lighting on the Antenna Structure, and failing to notify the FAA of the outages.

B. Proposed Forfeiture and Reporting Requirement

10. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed lighting is \$10,000.²¹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, 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.²² Considering the totality of the evidence, including Kemp’s repeated failure to notify the FAA of obstruction light outages, in both April 2013, and in September 2013, after being issued the NOV, we find that an upward adjustment of \$4,000 is warranted.²³ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Kemp is apparently liable for a total forfeiture in the amount of \$14,000.

11. We further order Kemp to submit a written statement, pursuant to Section 1.16 of the Rules, signed under penalty of perjury by an officer or director of Kemp, stating that: (1) Kemp has updated the ASR for the Antenna Structure to reflect the FAA Study 2001-AWP-485-OE and that the Antenna Structure is in compliance with the requirements of FAA Study 2001-AWP-485-OE; and (2) Kemp has ensured that its monitoring of the Antenna Structure now complies with the requirements of Section 17.47(a) of the Rules. This statement must be provided to the Los Angeles Office at the address listed in paragraph 16 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission’s rules, Kemp Broadcasting, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fourteen thousand dollars (\$14,000) for violations of Section 303(q) of the Act and Sections 17.47(a)(1), 17.48(a), and 17.51(b) of the Rules.²⁴

13. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission’s rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and

²¹ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

²² 47 U.S.C. § 503(b)(2)(E).

²³ Section 17.48(a) of the Rules states that owners of antenna structures “shall report immediately by telephone or telegraph to the nearest Flight Service Station or office of the Federal Aviation Administration any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes” 47 C.F.R. § 17.48(a).

²⁴ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.47(a), 17.48(a), 17.51(b).

Order, Kemp Broadcasting, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Kemp shall also send electronic notification on the date said payment is made to WR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

15. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

16. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²⁷ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Los Angeles Office, 18000 Studebaker Road, Suite 660, Cerritos, California 90703, and include the NAL/Acct. No. referenced in the caption. Kemp Broadcasting, Inc., also shall e-mail the written response to WR-Response@fcc.gov.

17. 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.

²⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁶ See 47 C.F.R. § 1.1914.

²⁷ 47 C.F.R. §§ 1.16, 1.80(f)(3).

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to Kemp Broadcasting, Inc., at 3800 Howard Hughes Parkway, 17th Floor, Las Vegas, NV 89169.

FEDERAL COMMUNICATIONS COMMISSION

Charles A. Cooper
District Director
Los Angeles Office
Western Region
Enforcement Bureau