

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

In the Matter of)	
)	
Ely Radio, LLC)	File Number: EB-08-SF-0039
)	NAL/Acct. No.: 200932960001
Antenna Structure Owner)	FRN: 0014848899
Winnemucca, NV)	
ASR # 1005854)	

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 2012

Released: July 11, 2012

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order (MO&O), we deny the petition for reconsideration¹ (Petition) filed by Ely Radio, LLC (Ely), of the *Forfeiture Order* issued by the Enforcement Bureau's Western Region on October 30, 2009.² Ely is the licensee of Station KWNA(AM) and—based on our decision herein—is the owner of antenna structure number 1005854 in Winnemucca, Nevada.³ The *Forfeiture Order* imposed a monetary forfeiture against Ely in the amount of \$11,000 for repeated violation of Section 303(q) of the Communications Act of 1934, as amended (Act),⁴ and certain provisions under Part 17 of the Commission's Rules (Rules)⁵ concerning antenna lighting and other requirements. As discussed below, we affirm the *Forfeiture Order*, and also require Ely to submit a sworn statement under penalty of perjury, within thirty (30) calendar days of release of this MO&O, confirming compliance.

II. BACKGROUND

2. On October 31, 2008, the FCC Enforcement Bureau's San Francisco Office issued an *NAL* in the amount of \$13,000 to Ely.⁶ In the *NAL*, the San Francisco Office found that Ely apparently repeatedly violated Section 303(q) of Act⁷ and Section 17.51(a) of the Rules,⁸ by failing to exhibit the structure's red obstruction lighting from sunset to sunrise; and violated Section 17.47(a) of the Rules, by

¹ See Ely Radio, LLC, Petition for Reconsideration (Nov. 30, 2009) (Petition).

² *Ely Radio, LLC*, Forfeiture Order, 24 FCC Rcd 13258 (Enf. Bur., Western Region 2009) (*Forfeiture Order*), *aff'g*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200932960001 (Enf. Bur., Western Region, San Francisco District Office rel. Oct. 31, 2008) (*NAL*).

³ For purposes of this proceeding, use of the terms “antenna,” “antenna structure,” “radio tower,” and “tower” refer to antenna structure number 1005854 in Winnemucca, Nevada.

⁴ 47 U.S.C. § 303(q).

⁵ 47 C.F.R. §§ 17.47(a), 17.48, 17.51(a), 17.57.

⁶ See *NAL*, *supra* note 2.

⁷ 47 U.S.C. § 303(q).

⁸ 47 C.F.R. § 17.51(a).

failing to make observations of the antenna structure's lights at least once each 24 hours.⁹ The San Francisco Office found that Ely's failure to make the required observations of the lighting on the antenna structure resulted in its failure to notify the nearest Flight Service Station of the Federal Aviation Administration (FAA) of the outage of the flashing obstruction lights, a significant public safety concern and a violation of Section 17.48 of the Rules.¹⁰ The San Francisco Office also found that Ely apparently repeatedly failed to immediately notify the Commission of a change in ownership information for antenna structure number 1005854, a violation of Section 17.57.¹¹

3. Although Ely denied ownership of, and responsibility for, the antenna during the investigation, the preponderance of the evidence established that Ely was the owner of the antenna.¹² As part of the record evidence, the San Francisco Office sent a Letter of Inquiry (LOI) not only to Ely, but also to Sheen Broadcasting Company (Sheen), the former licensee of Station KWNA(AM).¹³ Sheen responded to the LOI, and confirmed that it was no longer a Commission licensee; that, pursuant to the Asset Purchase Agreement executed in August 2006, it assigned the Station and sold all the equipment used to operate the Station, including the antenna, to Ely; and that the only relationship it continues to have with Ely concerns the lease of a building and land on which the Station and antenna are located.¹⁴

4. On December 31, 2008, Ely filed a response to the *NAL*, contending that, based on its interpretation of the Asset Purchase Agreement, it was not the owner of antenna structure 1005854 and, therefore, could not have committed any of violations.¹⁵ The Enforcement Bureau's Western Region fully considered Ely's response and held, in the *Forfeiture Order*, that the *NAL* properly concluded, based on the preponderance of the evidence, that Ely was the owner of the antenna structure.¹⁶ In addition, the *Forfeiture Order* held that, independent of the Asset Purchase Agreement, Ely was nevertheless responsible for ensuring that the structure complied with the antenna lighting and other requirements based on undisputed record evidence that Ely was the only licensee using the antenna; that Ely had access to and control over the lighting on the antenna; and that it was Ely's personnel (by their own admission) that improperly extinguished the antenna lights that resulted in the violation of the Act and Rules.¹⁷ The *Forfeiture Order* also determined that the initially proposed \$13,000 forfeiture in the *NAL* warranted some

⁹ 47 C.F.R. § 17.47(a).

¹⁰ 47 C.F.R. § 17.48.

¹¹ 47 C.F.R. § 17.57.

¹² See *NAL*, NAL/Acct No. 200932960001, at paras. 13-14.

¹³ See Letter from Thomas N. Van Stern, District Director, San Francisco Office, to Torrey Sheen, Sheen Broadcasting Company (June 26, 2008) (on file in EB-08-SF-038).

¹⁴ See Letter from Torrey Sheen, Sheen Broadcasting Company, to Thomas N. Van Stern, District Director, San Francisco Office (June 30, 2008) (on file in EB-08-SF-038) (Sheen LOI Response). See also Asset Purchase Agreement by and between Sheen Broadcasting Company, Seller, and Ely Radio, LLC, Buyer, dated August 28, 2006 (Asset Purchase Agreement or Agreement).

¹⁵ See *Ely Radio, LLC*, Response to *NAL* (Dec. 1, 2008) (Ely Response to *NAL*).

¹⁶ See *Forfeiture Order*, 24 FCC Rcd at 13262-64, paras. 12-17

¹⁷ See *id.*

reduction based on Ely's history of compliance with the Rules.¹⁸ As such, the proposed forfeiture was reduced to \$11,000.¹⁹

5. On November 30, 2009, Ely Radio filed a petition for reconsideration (Petition) of the *Forfeiture Order*, urging the Bureau to reverse the finding therein that Ely is the owner of the subject antenna structure. In its Petition, Ely Radio's sole argument is that the Western Region's interpretation of Section 2 of the Asset Purchase Agreement is incorrect because it is contrary to Nevada law.

III. DISCUSSION

6. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.²⁰ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.²¹ As discussed below, we find that Ely has not provided any basis to warrant reconsideration of the *Forfeiture Order*. We therefore affirm the Western Region's findings.

7. In its Petition, Ely Radio does not dispute the facts concerning the Bureau's investigation, and nor does it dispute that registration for antenna structure number 1005854 has not been updated to show Ely as the registrant.²² Ely refuses to register the antenna because—it maintains—it is not the owner of the subject antenna structure; rather, Ely states, it is merely a "tenant" pursuant to a lease arrangement with Sheen for use of a building and land on which the AM transmitter and antenna are located.²³ In its Petition, Ely specifically contends that reconsideration of the *Forfeiture Order* is appropriate because the Western Region's reading of the Asset Purchase Agreement (Agreement) is contrary to Nevada Law.²⁴ The specific provision at issue is Section 2 of the Agreement stating: "Seller will sell, assign, transfer, convey and delivery to buyer . . . [a]ll tangible property and fixtures owned by Seller used or useful in the operation of the station."²⁵ The Western Region found this and other related provisions in the Agreement as further support for its conclusion that Ely was the owner.²⁶ In support of its request for reconsideration, Ely submits information that it contends is sufficient to counter the Western Region's understanding of the

¹⁸ See *id.* at 13254, para. 18.

¹⁹ *Forfeiture Order*, 24 FCC Rcd at 13264. The Western Region agreed with Ely Radio's claim that it had a history of compliance with the Rules, but noted that Ely Radio's violation of Section 17.57 of the Rules (failure to update the antenna structure registration for antenna structure number 1005458) remained ongoing and declined to reduce the \$3,000 forfeiture for the Section 17.57 violation. The Western Region reduced the \$10,000 forfeiture amount for the other violations listed in the *NAL* to \$8,000, nevertheless, because of Ely Radio's prior history of compliance.

²⁰ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, (Enf. Bur. 2000), citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

²¹ *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257.

²² A more complete recitation of the facts established in the *NAL* and *Forfeiture Order* are incorporated herein by reference.

²³ See Petition at 1-2. See also Asset Purchase Agreement, *supra* note 14, at Section 6.8.

²⁴ See *id.*

²⁵ Asset Purchase Agreement, *supra* note 14, at Section 2.

²⁶ The *Forfeiture Order* noted that Section 3 of the Asset Purchase Agreement details the "Excluded Assets," and that antenna structure number 1005854 was not listed. See *Forfeiture Order*, 24 FCC Rcd at 13263, para. 15.

Agreement. As part of its Petition, Ely attached a legal opinion letter it solicited from a Nevada attorney, Bob Dolan.²⁷ Mr. Dolan, in a letter addressed to Ely's counsel, states that he reviewed the Agreement and that, "based on Nevada statutes and case law," Sheen, not Ely, is the legal owner of the land on which the antenna tower is located.²⁸ Mr. Dolan, in his letter, further opines that because the antenna is part of the land, Sheen is presumed to be its owner.²⁹

8. We find that the opinion letter from Mr. Dolan is insufficient to warrant reconsideration. We are unable to evaluate the legal sufficiency of the letter because the letter does not provide the language or citations to the specific statutes and case law that counsel claims to have relied upon in rendering his legal opinion.³⁰ In any event, with respect to the proper interpretation of the Asset Purchase Agreement, the Bureau will not adjudicate its proper interpretation under Nevada law.³¹ The interpretation of the referenced provision is most appropriately addressed by a court of competent jurisdiction, which Ely has not presented. At best, it appears that Ely and Sheen may have a continuing disagreement with respect to the contract and their respective understandings since its execution in August 2006. However, any resolution concerning a failure to perform pursuant to a private contractual arrangement, including appropriate remedies or damages, are matters to be resolved in a local forum. Here, the Bureau must render its decision based on the available record.

9. Based on the overall record in this case, we find that the preponderance of the evidence supports the *Forfeiture Order's* conclusion that that Ely was (and is) the owner of the subject antenna structure for purposes of the relevant Part 17 Rules and, therefore, remains liable for the violations. The record evidence adduced—and even without consideration of the Asset Purchase Agreement—is sufficient to conclude that Ely is the owner. As the record reflects, Sheen was adamant in confirming that the sale of the Station to Ely included the antenna.³² In its LOI Response to the Bureau, Sheen stated: "Sheen Broadcasting co. sold all of its business assets and equipment to operate KWNA-AM and KWNA-FM to Ely Radio L.L.C. [since] 2006," and that "[t]he fault here lies with the ownership/management of Ely Radio L.L.C. for not re-applying for a change in the records of the antenna structure."³³ There is also a statement in the record from Ely's owner about his future plans to move the antenna structure to a different location.³⁴ This statement, in our view, appears to concede ownership. In addition, Ely still has not proffered any new evidence, separate from the Asset Purchase Agreement, to

²⁷ See Petition, Attachment (Letter from Bob Dolan, Dolan Law LLC, to Peter Guttmann, Womble, Carlyle, Sandridge & Rice, PLLC, dated Nov. 30, 2009 (Dolan Letter)).

²⁸ *Dolan Letter*, *supra* note 27.

²⁹ *See id.*

³⁰ We note that Ely's Petition also does not cite to any specific Nevada state statute or case law to support its position.

³¹ *See Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting with approval the Commission's "long-standing policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts").

³² Ely was aware of Sheen's position in this regard since the beginning of this investigation. *See* Ely LOI Response at 2, para. 4 ("I understand that Mr. Sheen may have sent a letter to the FCC denying ownership of the tower and suggesting that he sold it late last year.")

³³ *See* Sheen LOI Response at paras. 1 (emphasis in original) and 3.

³⁴ *See NAL*, NAL/Acct No. 200932960001, at para. 5 ("Ely's owner further stated that he wanted to move the antenna structure to a new location.")

support its position that Sheen retained title to the antenna structure or that Sheen would be responsible for the maintenance of the antenna. In this regard, Ely could have submitted an amendment (executed by both parties) to the Asset Purchase Agreement or its current lease arrangement that unequivocally confirms that Sheen was and is the owner of the antenna; and this begs asking why Ely has not (to this day) sought to amend the Asset Purchase Agreement with Sheen to clarify ownership of, and responsibility for, antenna structure number 1005854.

10. Notwithstanding private contractual arrangements, Ely, as licensee, in any event, was and is responsible for complying with the relevant Part 17 rules. Under Part 17 of the Commission's Rules, both antenna structure owners *and* licensees are responsible for maintaining the prescribed structure painting and/or lighting of antenna structures.³⁵ This shared responsibility is intended to ensure that prescribed structure painting and/or lighting is maintained at all times, and that lighting outages will be promptly rectified, given compelling public safety concerns. As the Commission has stated, "if the owner cannot be reached or reliance on the owner to maintain prescribed structure painting and/or lighting proves to be ineffective, we [will] then turn to the individual tenant licensees as the entities to bear secondary responsibility for the structure's proper maintenance."³⁶ So even assuming that a local court ultimately finds that Sheen, and not Ely, is the owner of the antenna under the Agreement, Ely knew or should have known that, as licensee, it had to assume responsibility for compliance with the applicable antenna structure rules since acquiring the Station in 2006, given that Sheen has consistently declined ownership and responsibility for the antenna or otherwise could not be relied upon to assume responsibility.

11. We remain convinced nevertheless that Ely knew that it was responsible for the antenna structure, but failed to fully comply with the relevant rules. At the time of the violations, Ely was the only licensee using the antenna, and the record evidence suggests that Ely ceded to taking responsibility for the antenna, whether it believed it was the antenna owner or not, since it previously took steps to notify the FAA about past antenna light outages.³⁷ In addition, as the record shows, it was Ely's employees that purposely turned off the flashing obstruction lights on the antenna because they believed that the lights were responsible for generating noise into the Station's audio feed; and they kept the lights off until they could confirm that the lights were not the source of the problem, and then turned the lights back on again. This level of control over the antenna lights, and without Sheen's involvement, further supports our belief that Ely knew it had responsibility for the antenna structure based on actual ownership, which it denies, or an understanding with Sheen, which it refuses to acknowledge. Even if Ely believed that Sheen had the requisite responsibility as owner, it should have immediately notified Sheen before turning off the flashing obstruction lights so that Sheen could have notified the FAA and averted any problems. The record is undisputed that, based on statements from Station management, Ely

³⁵ See *In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedures and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, WT Docket No. 95-5, Report and Order, 11 FCC Rcd 4272, 4294, paras. 52-53 (1995) (*Antenna Structure Streamlining Report and Order*) (emphasis added). See also 47 C.F.R. 17.6 (Responsibility of Commission Licensees and Permittees); 47 C.F.R. 73.1213(b) ("In the event of default by the owner, each licensee or permittee shall be responsible for ensuring that the structure complies with applicable painting and lighting requirements.").

³⁶ *Antenna Structure Streamlining Report and Order*, 11 FCC Rcd at 4293, para. 50.

³⁷ As the *NAL* (at para. 5) reflects, "Ely's owner stated that he spoke to the FAA a year ago and notified the FAS over the past two months about the outage, but did not make any entries in the station log to memorialize this. Ely's owner also stated that he believed that antenna structure number 1005854 was less than 200 feet in height and that the airport does not have a control tower."

did not notify Sheen when they turned the lights off on the antenna.³⁸ As such, Ely could hardly fault Sheen for the violations, which presented a significant public safety concern to the FAA.

12. We therefore find that the overall evidence supports holding Ely as the responsible party for the violations, whether Ely is the legal owner of antenna structure number 1005854 or not, rendering any disputes about the proper interpretation of Section 2 of the Asset Purchase Agreement inconsequential.³⁹ Because Ely's Petition does not demonstrate a material error or omission in the underlying orders or raise any additional facts that justify reconsideration, we see no reason to disturb the determinations reached in the *Forfeiture Order*. Accordingly, we affirm the *Forfeiture Order* and find Ely liable for a monetary forfeiture in the amount of \$11,000 for repeatedly violating Section 303(q) of the Act and Sections 17.47(a), 17.48, 17.51(a), and 17.57 of the Rules.⁴⁰ In addition, we order Ely to submit a written statement signed under penalty of perjury by an officer or director of the company stating how the company has complied with the aforementioned provisions.⁴¹ This statement must be provided to the Enforcement Bureau at the address listed in paragraph 15, below, within thirty (30) calendar days of the release date of this Memorandum Opinion and Order. Ely Radio may be subject to additional enforcement action, including larger forfeitures, for any additional or ongoing violations.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934,⁴² as amended, and Section 1.106 of the Commission's Rules,⁴³ the Petition for Reconsideration filed by Ely Radio, LLC, **IS DENIED** and the *Forfeiture Order* **IS AFFIRMED**.

14. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Rules, Ely Radio, LLC, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for violations of Section 303(q) of the Act and Sections 17.47(a), 17.48, 17.51(a), and 17.57 of the Rules.⁴⁴

15. **IT IS FURTHER ORDERED** that Ely Radio, LLC, **SHALL SUBMIT** a sworn statement as described in paragraph 12, above, within thirty (30) calendar days of the release date of this Memorandum Opinion and Order, to Federal Communications Commission, Enforcement Bureau, Western Region Office, 215 S. Wadsworth Blvd., Suite 303, Lakewood, CO 80226, and must include the

³⁸ *See id.*

³⁹ We remain convinced that Ely is the owner of the antenna structure at issue and that the Western Region's understanding of the Asset Purchase Agreement is correct.

⁴⁰ 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.47(a), 17.48, 17.51(a), 17.57.

⁴¹ If Ely continues to challenge the Bureau's decision (while still using antenna structure number 1005854) and cannot otherwise convince Sheen to assume ownership of, and responsibility for, the antenna during the pendency of further administrative or court relief, we are directing Ely to properly maintain the structure and ensure compliance with applicable Part 17 rules for antenna structure number 1005854 to avert any public safety concerns. *See* 47 C.F.R. 17.6(b) ("In the event of non-compliance by the antenna structure owner, the Commission may require each licensee and permittee authorized on an antenna structure to maintain the structure, for an indefinite period, in accordance with the Antenna Structure Registration (FCC Form 854R) and the requirements of this subpart.").

⁴² 47 U.S.C. § 405.

⁴³ 47 C.F.R. § 1.106.

⁴⁴ 47 U.S.C. §§ 303(q), 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.47(a), 17.48, 17.51(a), 17.57.

NAL/Acct. No. referenced in the caption. An electronic copy shall also be sent to WR-Response@fcc.gov.

16. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Forfeiture Order.⁴⁵ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴⁶ Ely Radio, LLC, shall send electronic notification of payment to WR-Response@fcc.gov on the date said payment is made.

17. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁷ 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.

18. Any request for full payment 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. 20554.⁴⁸ 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.

⁴⁵ 47 C.F.R. § 1.80.

⁴⁶ 47 U.S.C. § 504(a).

⁴⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁸ See 47 C.F.R. § 1.1914.

19. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Ely Radio, LLC, 5010 Spencer, Las Vegas, Nevada, 89119, and to its counsel of record, Peter Gutmann, Womble Carlyle Sandridge & Rice, PLLC, 1401 I Street, NW, 7th Floor, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau