

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

In the Matter of)	
)	
Thomas Costa)	File No.: EB-FIELDSCR-12-00004683
)	NAL/Acct. No.: 201332560001
Iowa City, IA)	FRN: 0022089429
)	

FORFEITURE ORDER

Adopted: April 4, 2013

Released: April 4, 2013

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, we issue a monetary forfeiture in the amount of one thousand two hundred dollars (\$1,200) to Thomas Costa for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (Act),¹ by operating radio transmitting equipment on the frequency 87.9 MHz in Iowa City, Iowa, without Commission authorization. As discussed below, we deny Mr. Costa's request for cancellation of the forfeiture, but grant, in part, his request for reduction based on his inability to pay claim.

II. BACKGROUND

2. On October 19, 2012, the Kansas City Office of the Enforcement Bureau's South Central Region issued a Notice of Apparent Liability for Forfeiture (*NAL*), which found Mr. Costa in violation of Section 301 of the Act and, thereby, proposed a \$10,000 monetary forfeiture.² As reflected in the *NAL*, in response to a complaint, the Bureau's agents determined that an unlicensed radio station operated on the frequency 87.9 MHz from a residence in Iowa City, Iowa, on September 17 and 18, 2012.³ The agents, accompanied by the property owner, located the station's antenna and transmitter in a room in the basement workroom that Mr. Costa was renting.⁴ Mr. Costa later admitted to the agents that he installed the radio station equipment, but denied operating the station. Instead, Mr. Costa claimed that the equipment was owned by several individuals (who he refused to identify) who gave him rent money each month for use of the basement room which he, in turn, gave to the property owner to pay the rent.⁵ Mr. Costa asserted that the alleged operators of the station did not provide him with their names or contact information in order to protect him and them from the Commission.⁶ Mr. Costa also stated that he was told by the unnamed operators that he could expect the Commission to inspect the station at some point and

¹ 47 U.S.C. § 301.

² *Thomas Costa*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 13207 (Enf. Bur. 2012). A comprehensive recitation of the facts and history of this case can be found in the *NAL* and is incorporated herein by reference.

³ *See id.* at 13207, paras. 2-3.

⁴ *Id.* at 13207, para. 3.

⁵ *Id.*

⁶ *Id.*

order him to cease operations.⁷ In the *NAL*, the Bureau found that, despite Mr. Costa's statements to the contrary, the overall record evidence supported finding that he either consciously operated the unlicensed radio station and/or otherwise was involved in the general conduct or management of the station for purposes of finding him in violation of Section 301 of the Act.⁸

3. On December 5, 2012, Mr. Costa submitted a response to the *NAL*, requesting cancellation or, in the alternative, a reduction of the forfeiture.⁹ In his response, Mr. Costa continues to deny operating the station, and also denies stating to the agents that he installed the radio equipment.¹⁰ Mr. Costa now claims that he merely "prepared the room for [his unnamed "acquaintances"] by installing lighting and an electrical outlet" and subleased the room to these unnamed "acquaintances."¹¹ In addition, Mr. Costa argues that the forfeiture should be canceled on procedural grounds because: (1) the agents were not entitled to enter his room because they lacked a search warrant and, therefore, any evidence obtained from that room should have been rendered inadmissible; and (2) the Bureau was required to send him a citation prior to issuing a notice of apparent liability for forfeiture. Alternatively, if the forfeiture is not canceled, Mr. Costa asks the Bureau to reduce the forfeiture to \$1 because he "has a very modest income as a maintenance man, as well as very substantial US Federal income taxes and a large outstanding student loan."¹² We address below each of these issues in turn.

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹³ Section 1.80 of the Commission's rules (Rules),¹⁴ and the *Forfeiture Policy Statement*.¹⁵ In examining Mr. Costa's response, Section 503(b)(2)(E) 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.¹⁶ As discussed below, we have fully considered Mr. Costa's response to the *NAL* in light of these statutory factors and find that cancellation of the forfeiture is not warranted; however, we find that some reduction of the forfeiture is justified based solely on his inability to pay claim.

⁷ *Id.*

⁸ *See id.* at 13209, paras. 6–7.

⁹ *See* Letter from Peter Franck, Counsel for Thomas Costa, to Ronald Ramage, District Director, Kansas City Office, South Central Region, Enforcement Bureau (Dec. 5, 2012) (on file in EB-FIELDSCR-12-00004683) (*First NAL Response*). Mr. Costa asked for an extension to file his response, which we granted. *See* e-mail from Ronald Ramage, District Director, Kansas City Office, South Central Region, Enforcement Bureau to Peter Franck, Counsel for Thomas Costa (Nov. 13, 2012, 11:00 A.M. C.S.T.) (on file in EB-FIELDSCR-12-00004683).

¹⁰ *First NAL Response* at 2.

¹¹ *Id.*

¹² *See* Peter Franck, Counsel for Thomas Costa, to Ronald Ramage, District Director, Kansas City Office, South Central Region, Enforcement Bureau (Jan. 29, 2013) (on file in EB-FIELDSCR-12-00004683) (*Second NAL Response*).

¹³ 47 U.S.C. § 503(b).

¹⁴ 47 C.F.R. § 1.80.

¹⁵ *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), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁶ 47 U.S.C. § 503(b)(2)(E).

A. Mr. Costa Engaged in Unlicensed Operations

5. We affirm the *NAL*'s finding that Mr. Costa willfully and repeatedly violated Section 301 of the Act.¹⁷ 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 accordance with the Act and with a license granted under the provisions of the Act.¹⁸ For the purposes of Section 301, the word "operate" has been interpreted to mean both the technical operation of the station, as well as "the general conduct or management of a station as a whole, as distinct from the specific technical work involved in the actual transmission of signals."¹⁹ In other words, the use of the word "operate" in Section 301 captures not just the "actual, mechanical manipulation of radio apparatus,"²⁰ but also operation of a radio station generally.²¹ To determine whether an individual is involved in the general conduct or management of the station, we can consider whether such individual exercises control over the station, which the Commission has defined to include ". . . any means of actual working control over the operation of the [station] in whatever manner exercised."²²

6. Despite Mr. Costa's assertion that he did not operate the unlicensed radio station, the available record evidence demonstrates that, at the very least, he was involved in the general conduct and/or management of the station, which is sufficient to find him in violation of Section 301. In this case, it is undisputed that on September 17 and 18, 2012, an unlicensed radio station operated on the frequency 87.9 MHz from a basement workroom in Iowa City, Iowa, that Mr. Costa was renting. It is also undisputed that Mr. Costa was aware that the Commission might direct him to cease the unlicensed operations, yet he continued to operate the unlicensed radio station and/or permitted and facilitated the ability of other unnamed individuals (based on his unfounded assertion of their existence) to operate the station. In fact, by his own admission, he installed lighting, installed an electrical outlet, and subleased the room for these unnamed individuals, thereby providing them with the ability to engage in the unlicensed operations. Furthermore, if we accept as true Mr. Costa's argument that he did not install the radio equipment that was used (an argument which is inconsistent with the statement he originally gave to the agents at the time of the inspection), he cannot deny the fact that, even under that circumstance, he would have had to authorize and provide access to the rented basement to his unnamed "acquaintances" so that they could operate the unlicensed station.²³ Therefore, regardless of whether Mr. Costa physically operated the radio station or not (and we continue to believe that he did operate the station), the foregoing

¹⁷ 47 U.S.C. § 301. See *NAL*, *supra* note 2.

¹⁸ 47 U.S.C. § 301.

¹⁹ See *Campbell v. United States*, 167 F.2d 451, 453 (5th Cir. 1948) (comparing the use of the words "operate" and "operation" in Sections 301, 307, and 318 of the Act, and concluding that the word "operate" as used in Section 301 of the Act means both the technical operation of the station as well as the general conduct or management of the station).

²⁰ *Id.*

²¹ *Id.* See also 47 U.S.C § 307(c)(1).

²² See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, 9747 (1995), *recons. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

²³ Mr. Costa asserts that because the property owner turned off the unlicensed station's transmitter during the station inspection, he could be considered an operator of the station. See *First NAL Response* at 6. While the property owner turned off the transmitter during our inspection, we have insufficient evidence (and Mr. Costa provides none) to find that the property owner operated, or was complicit in operating, the unlicensed radio station. In addition, we note that, during the inspection, Mr. Costa never stated that the property owner was in any way involved with the operation of the unlicensed station.

facts make clear that Mr. Costa nonetheless had sufficient control over the station and its operations for purposes of finding him in violation of Section 301.

B. The Bureau's Inspection and Resulting Enforcement Action Were Appropriate

7. In his response, Mr. Costa also argues that the agents' search of the basement room was an illegal trespass that necessitated a warrant and, therefore, any evidence obtained should be inadmissible.²⁴ We disagree. First, it is well established that FCC agents are not required to obtain a search warrant prior to conducting a radio station inspection.²⁵ Second, the inspection was authorized under Section 303(n) of the Act, which states that the Commission has the "authority to inspect *all* radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1)."²⁶ Third, the agents' inspection, in any event, was not a criminal investigation and the administrative forfeiture proceeding (as is the case here) is not subject to the same rules of evidence applicable to a criminal court, thereby making much of Mr. Costa's procedural claims inapplicable.²⁷ Finally, we find nothing in the record in this case to support Mr. Costa's suggestion that the agents conducted themselves in an improper manner. As the record reflects, the agents asked the owner of the property to inspect the radio station located in the premises. The owner took the agents to a room in the basement and opened a locked door, after which the owner stated that he rented the room to Mr. Costa. Thus, the agents had no reason to question whether the property owner had the authority to open the locked door.²⁸ Based on all the foregoing, we find that the inspection conducted by the agents was lawful and appropriate.

8. Mr. Costa is also mistaken that he was entitled to receive a citation prior to issuance of the *NAL*. Although Section 503(b) of the Act requires issuance of citations prior to forfeitures in certain circumstances, it specifically excludes situations where individuals are found "engaging in activities for which a license, permit, certificate, or other form of authorization is required."²⁹ By transmitting on a

²⁴ See *id.* at 4.

²⁵ See, e.g., *Joaquim Barbosa*, Forfeiture Order, 27 FCC Rcd 15334 (Enf. Bur. 2012) (search warrant not required to conduct Commission inspection of a radio station); *Norfolk Southern Railway Company*, Memorandum Opinion and Order, 11 FCC Rcd 519 (CIB 1996) ("The right to inspect a station is one of the cornerstones of the FCC's ability to ensure compliance with the Communications Act and the FCC regulations."); *Randall R. Gaines*, Revocation Order, 72 FCC 2d 871, 878, para. 13 (Rev. Board 1979) (search warrant is not required for an inspection of a CB radio station).

²⁶ 47 U.S.C. § 303(n) (emphasis added).

²⁷ See *Stephen Paul Dunifer*, Memorandum Opinion and Order, 11 FCC Rcd 718, 729 (1995) (forfeiture proceeding is not a criminal proceeding) (*Dunifer MOO*); *Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 3726 (MB 2011) (rules of evidence governing civil proceedings only apply to formal hearings before the Commission). See also 47 C.F.R. § 1.351.

²⁸ See *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (finding that officer's determination of consent to enter must be judged against objective standard; and that if facts available to officer at the moment warrant a person of reasonable caution to believe that consenting party had authority over premises, warrantless entry without further inquiry is lawful). Moreover, the rented room in question was not an apartment or residence, but rather a workroom located in the furnace room of the basement that also contained various things for general maintenance of the house (e.g., paint, tools, and a work bench), which led the agents to reasonably believe that the property owner had regular access to the basement workroom. See *U.S. v. Davis*, 967 F.2d 84 (2nd Cir. 1992) (holding that third party consent to search validates warrantless search if third party had access to the area searched and had either common authority over the area, a substantial interest in the area, or permission to gain access). Mr. Costa also provided a sworn statement from the property owner that he did not view the basement workroom as "his premises."

²⁹ 47 U.S.C. § 503(b).

frequency reserved for licensed broadcast services, Mr. Costa was engaged in an activity for which a license is required. Therefore, Mr. Costa was not entitled to receive a warning or citation prior to issuance of the *NAL* in this proceeding.³⁰

C. Inability to Pay Claim

9. Although Mr. Costa denies operating the unlicensed radio station, he requests in the alternative that we reduce the proposed forfeiture to \$1, based on his inability to pay claim.³¹ With regard to an individual's or entity's inability to pay claim, the Commission has determined that, in general, gross income or revenues are the best indicator of an ability to pay a forfeiture.³² Based on the financial documents provided by Mr. Costa, we find sufficient basis to reduce the forfeiture to \$1,200.³³ However, we caution Mr. Costa that a party's inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.³⁴ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.³⁵ Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Mr. Costa's financial circumstances. Accordingly, after consideration of the entire record (including Mr. Costa's response to the *NAL*), the *Forfeiture Policy Statement*, and the factors set forth in Section 503(b)(2)(E) of the Act,³⁶ we find that, although cancellation of the monetary forfeiture is not warranted, a reduction of the forfeiture amount from \$10,000 to \$1,200 is appropriate in this case.

IV. ORDERING CLAUSES

10. 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(f)(4) of the Commission's rules, Thomas Costa **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one thousand two hundred dollars (\$1,200) for violations of Section 301 of the Act.³⁷

³⁰ *Dunifer MOO*, 11 FCC Rcd at 728.

³¹ See *Second NAL Response*, *supra* note 12.

³² See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 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*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

³³ This forfeiture amount falls within the percentage range that the Commission has previously found acceptable. See *supra* note 32. If Mr. Costa finds it financially infeasible to make full payment of this amount within 30 days, he can request an installment plan, as described in paragraph 12, *infra*, of this Forfeiture Order.

³⁴ See 47 U.S.C. § 503(b)(2)(E) (requiring Commission to 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 such other matters as justice may require).

³⁵ *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur., Western Region 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay), *aff'd*, Memorandum Opinion and Order, DA 13-199 (Enf. Bur. Feb. 15, 2013); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued operation at variance with its construction permit constituted an intentional and continuous violation, which outweighed permittee's evidence concerning its ability to pay the proposed forfeitures).

³⁶ 47 U.S.C. § 503(b)(2)(E). See 47 C.F.R. § 1.80(b)(5).

³⁷ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4).

11. 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.³⁸ 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.³⁹ Thomas Costa shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made. 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.⁴⁰ 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.

12. 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. 20554.⁴¹ 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.

³⁸ 47 C.F.R. § 1.80.

³⁹ 47 U.S.C. § 504(a).

⁴⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴¹ See 47 C.F.R. § 1.1914.

13. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Thomas Costa at his address of record and to his counsel, Peter Franck, Law Offices of Peter Franck, 1939 Harrison Street, Suite 910, Oakland, CA 94612.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau