

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

In the Matter of)	
)	
Estevan J. Gutierrez)	File No.: EB-11-SD-0024
)	NAL/Acct. No.: 201132940006
Las Vegas, New Mexico)	FRN: 0021017025

FORFEITURE ORDER

Adopted: November 6, 2013

Released: November 7, 2013

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to Estevan J. Gutierrez for willfully and repeatedly violating Sections 301 and 333 of the Communications Act of 1934, as amended (Act).¹ The noted violations involved Mr. Gutierrez's operation on a frequency without authorization, and his willful and malicious interference with licensed operations.

II. BACKGROUND

2. On September 1, 2011, the Enforcement Bureau's San Diego Office (San Diego Office) issued a Notice of Apparent Liability for Forfeiture (NAL) for twenty-five thousand dollars (\$25,000) to Mr. Gutierrez for operation, without authorization, on frequency 159.150 MHz, a frequency licensed to the Las Vegas, New Mexico, Police Department (LVPD),² and his willful and malicious interference with the LVPD's licensed operations on that frequency.³ In response to the NAL, Mr. Gutierrez does not deny the violations, but requests cancellation or reduction of the forfeiture based on his inability to pay.⁴

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁵ Section 1.80 of the Commission's rules (Rules),⁶ and the Forfeiture Policy Statement.⁷

¹ 47 U.S.C. §§ 301, 333.

² The City of Las Vegas, New Mexico, is the licensee of Station WPVX804, with authorization to operate on 159.150 MHz in and around Las Vegas, New Mexico.

³ *Estevan J. Gutierrez*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 12542 (Enf. Bur. 2011) (NAL). A comprehensive recitation of the facts and history of this case can be found in the NAL and is incorporated herein by reference.

⁴ See Letter from Estevan J. Gutierrez to San Diego Office, Western Region, Enforcement Bureau (Sep. 15, 2011) (on file in EB-11-SD-0024) (NAL Response); see also Letter from Estevan J. Gutierrez to San Diego Office, Western Region, Enforcement Bureau (Apr. 23, 2012) (on file in EB-11-SD-0024).

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ *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).

In examining Mr. Gutierrez's *NAL 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.⁸

4. We affirm the *NAL*'s finding that Mr. Gutierrez violated Sections 301 and 333 of the Act.⁹ 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.¹⁰ Section 333 of the Act states that no person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed under this Act.¹¹ As reflected in the *NAL*, on February 15 and 16, 2011, an agent from the San Diego Office, accompanied by LVPD officers, used direction-finding techniques to locate Mr. Gutierrez's transmissions on frequency 159.150 MHz as Mr. Gutierrez moved about Las Vegas, New Mexico, causing interference to the LVPD's operations on frequency 159.150 MHz.¹² Once the agent finally located Mr. Gutierrez's transmission emanating from a duplex unit, Mr. Gutierrez was apprehended and arrested by the LVPD officers. A review of the Commission's records confirmed that Mr. Gutierrez did not have a license to operate on frequency 159.150 MHz in Las Vegas, New Mexico. Based on the undisputed evidence, we conclude that Mr. Gutierrez willfully and repeatedly violated Sections 301 and 333 of the Act by operating on frequency 159.150 MHz without the required Commission authorization and by willfully and maliciously interfering with the LVPD's licensed operations on frequency 159.150 MHz.

5. In response to the *NAL*, Mr. Gutierrez requests cancellation or reduction of the \$25,000 forfeiture, asserting that his financial circumstances make it difficult for him to pay the forfeiture.¹³ With regard to an individual's or entity's inability to pay a claim, the Commission has determined that gross income or revenues are generally the best indicator of an ability to pay a forfeiture.¹⁴ Mr. Gutierrez has produced no documentation to support his claim of an inability to pay. In addition, we note that a party's inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.¹⁵ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.¹⁶ Given

⁸ 47 U.S.C. § 503(b)(2)(E).

⁹ See *NAL supra* note 3.

¹⁰ 47 U.S.C. § 301.

¹¹ 47 U.S.C. § 333. The legislative history for Section 333 identifies willful and malicious interference as "intentional jamming, deliberate transmission on top of the transmissions of authorized users already using specific frequencies in order to obstruct their communications, repeated interruptions, and the use and transmission of whistles, tapes, records, or other types of noisemaking devices to interfere with the communications or radio signals of other stations." H.R. Rep. No. 101-316, at 13 (1989).

¹² See *NAL*, 26 FCC Rcd at 12542-43, paras. 2-3. The LVPD Deputy Chief informed the agent that the Mr. Gutierrez's use of the frequency included obscenities and threats against police officers and their families, that it required the LVPD to use a backup channel for their dispatch operations, and that during the previous three days, Mr. Gutierrez made over 400 transmissions on 159.150 MHz, including giving false information to the fire department. See *id* at 12542, para. 2 n. 3.

¹³ See *NAL Response*.

¹⁴ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 8640 (2000) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues).

¹⁵ See 47 U.S.C. § 503(b)(2)(E).

¹⁶ See, e.g., *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur. 2011) (holding that violator's repeated acts of malicious and intentional interference outweighed evidence concerning his ability to pay), *aff'd*,

the evidence presented in this case, we find that all the aforementioned Section 503(b)(2)(E) factors militate against cancellation or reduction of the forfeiture notwithstanding Mr. Gutierrez's purported financial circumstances. There is nothing on the record in this case that warrants any leniency or mitigation of the proposed forfeiture amount, given the undisputed evidence that Mr. Gutierrez willfully and maliciously interfered with the public safety radio operations of the LVPD for multiple days, and only stopped after he was apprehended and arrested. Therefore, after consideration of the entire record and the factors listed above, we find that a forfeiture in the amount of \$25,000 is warranted.¹⁷

IV. ORDERING CLAUSES

6. 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, Estevan J. Gutierrez **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for violations of Sections 301 and 333 of the Act.¹⁸

7. 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.¹⁹ 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.²⁰ Estevan J. Gutierrez shall send electronic notification of payment to WR-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.²¹ 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

Memorandum Opinion and Order, 28 FCC Rcd 1170 (Enf. Bur. 2013); *Hodson Broadcasting*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued unauthorized operation outweighed its inability to pay claim); *Whisler Fleurinor*, Forfeiture Order, 28 FCC Rcd 1087 (Enf. Bur. 2013) (rejecting inability to pay claim because violator's demonstrated inability to pay was outweighed by the gravity of repeated operation of an unlicensed radio station).

¹⁷ If Mr. Gutierrez believes that paying this amount presents financial difficulties, we note that he could always pursue an installment plan to lessen the immediate impact of the forfeiture. *See infra* para. 8.

¹⁸ 47 U.S.C. §§ 301, 333, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4).

¹⁹ 47 C.F.R. § 1.80.

²⁰ 47 U.S.C. § 504(a).

²¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

8. Any request for 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. 20554.²² 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.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Estevan J. Gutierrez at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

²² See 47 C.F.R. § 1.1914.