

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

In the Matter of)	
)	
KM Radio of Independence, LLC)	File No.: EB-11-KC-0009
)	NAL/Acct. No.: 201232560001
Licensee of Stations KQMG and KQMG-FM,)	FRN: 0010976108
Independence, Iowa;)	Facility ID Nos.: 42077; 42080
and Owner of Antenna Structure #1053693)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: February 7, 2012

Released: February 7, 2012

By the District Director, Kansas City Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that KM Radio of Independence, LLC (KM Radio or Licensee), licensee of Stations KQMG and KQMG-FM, in Independence, Iowa, and owner of antenna structure number 1053693 (hereinafter referred to as “Tower”) also located in Independence, Iowa, apparently willfully and/or repeatedly violated Sections 11.35, 17.51, and 73.3526 of the Commission’s rules (Rules),¹ and Section 303(q) of the Communications Act of 1934, as amended (Act),² by failing (with respect to both of its stations) to: maintain operational emergency alert system (EAS) equipment; exhibit required obstruction lighting on the Tower; and maintain and make available a complete public inspection file. Furthermore, specifically with respect to Station KQMG-FM, we find that KM Radio apparently willfully violated Section 73.1560(b) of the Rules³ by operating Station KQMG-FM with more than authorized transmitter output power. After adjusting the possible forfeiture based on the Licensee’s limited financial resources, we conclude that KM Radio is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000). In addition, no later than thirty (30) calendar days from the date of this NAL, KM Radio must submit a statement signed under penalty of perjury that it has repaired its EAS equipment and tower lighting, it is operating within authorized power limits, and it is maintaining two complete public inspection files for Stations KQMG and KQMG-FM.

II. BACKGROUND

2. On January 28, 2011, in response to a complaint, an agent from the Enforcement Bureau’s Kansas City Office (Kansas City Office) contacted the Federal Aviation Administration (FAA) and learned that no one had contacted the FAA about a light outage on the Tower,⁴ and that a Notice to

¹ 47 C.F.R. §§ 11.35, 17.51, 73.3526.

² 47 U.S.C. § 303(q).

³ 47 C.F.R. § 73.1560(b).

⁴ See 47 C.F.R. § 17.48 (requiring owners of registered antenna structures that have been assigned lighting specifications to report immediately to the FAA any observed or otherwise known extinguishment of any flashing obstruction light not corrected within 30 minutes).

Airmen (NOTAM) had not been issued for the Tower.⁵ On January 29, 30, and 31, 2011, an officer with the Independence police department observed that only one non-flashing center red beacon on the Tower was lighted after sunset. On January 31, 2011, KM Radio notified the FAA about the lighting outages on the Tower. On February 9, 2011, agents from the Kansas City Office confirmed that all lights on the Tower were dark, except for a non-flashing center red beacon.

3. On February 10, 2011, agents from the Kansas City Office inspected the main studio of Stations KQMG and KQMG-FM during regular business hours. In response to a request to inspect the stations' public inspection files, the agents were provided a single consolidated file for the two stations. The public inspection file contained no issues/programs lists for either station after 2001.⁶ Stations KQMG and KQMG-FM also had no logs of any EAS tests being sent or received.⁷ The operator on duty acknowledged that only one EAS test had been received since November 1, 2010, the date he joined the stations, and that no EAS tests had been sent. When the agents requested that a test be sent, the stations were unable to transmit the audio for the EAS test.⁸ The operator on duty also stated that, since he joined the stations on November 1, 2010, all of the lighting on the Tower except for the center beacon had been out and that no repairs had been made. The agents also observed the power meter for Station KQMG-FM's unattended transmitter operating at 1.87 kW, which is 108% of its authorized transmitter output power. Neither station had any station logs, and both unattended transmitters could not be accessed remotely.

4. On February 28, 2011, the Kansas City Office issued a Letter of Inquiry (*LOI*) to KM Radio.⁹ In its response, KM Radio stated that: (1) its EAS logs are unavailable and were either misplaced or not maintained¹⁰; (2) its management did not know that its EAS equipment was damaged prior to receipt of the *LOI*, and that it is in the process of repairing its EAS equipment;¹¹ (3) its management did not learn of the Tower light outage until it received the *LOI*, and that it has instructed its engineer to make the needed repairs¹²; (4) its Tower may not have been observed visually on a daily basis, and that it has instructed all employees to monitor and report any light outages;¹³ and (5) it took transmitter readings one week prior to the inspection, and that any overpower operations were inadvertent.¹⁴

⁵ The FAA issued a NOTAM for the antenna structure on January 28, 2011, at the agent's request.

⁶ KM Radio acquired both stations in 2003. *See* File No. BAL-20030815AET, granted October 2, 2003.

⁷ The agents only found a note in the station records, dated November 1, 2010, that a "part" for the EAS printer was on order.

⁸ During the test, the stations's audio for the regular programming was not muted.

⁹ *See* Letter from Robert C. McKinney, District Director, Kansas City Office, to KM Radio (Feb. 28, 2011) (on file in EB-11-KC-0009).

¹⁰ Letter from Aaron P. Shainis, Counsel for KM Radio of Independence, LLC, to Robert C. McKinney, District Director, Kansas City Office at 1 (Apr. 4, 2011) (on file in EB-11-KC-0009) (*LOI Response*).

¹¹ *Id.*

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 3.

III. DISCUSSION

5. 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 thereunder, shall be liable for a forfeiture penalty.¹⁵ 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.¹⁶ 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,¹⁷ and the Commission has so interpreted the term in the Section 503(b) context.¹⁸ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁹ The term “repeated” means the commission or omission of such act more than once or for more than one day.²⁰

A. Failure to Maintain Operational EAS System Equipment

6. Every broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to refrain from participation and the request is approved by the Commission.²¹ The EAS enables the President and state and local governments to provide immediate communications and information to the general public.²² State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.²³ Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station. As the nation’s emergency warning system, the EAS is critical to public safety, and we recognize the vital role that broadcasters play in ensuring its success. The Commission takes seriously any violations of the Rules implementing the EAS and expects full compliance from its licensees.

¹⁵ 47 U.S.C. § 503(b).

¹⁶ 47 U.S.C. § 312(f)(1).

¹⁷ See 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 . . .”).

¹⁸ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (*Southern California Broadcasting Co.*).

¹⁹ 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).

²⁰ 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.”

²¹ See 47 C.F.R. §§ 11.11, 11.41.

²² See 47 C.F.R. §§ 11.1, 11.21.

²³ See 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials, and National Weather Service personnel in order to properly activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

7. Specifically, Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and Attention Signal generating and receiving equipment are installed and operational so that the monitoring and transmitting functions are available when the station is in operation.²⁴ On February 10, 2011, agents from the Kansas City Office observed that, while Stations KQMG and KQMG-FM were operating, the stations were unable to transmit an EAS test. KM Radio admitted that it did not have any EAS logs and had no evidence that any EAS tests had ever been sent or received by the stations.²⁵ On February 10, 2011, the operator on duty stated that the stations had not sent an EAS test since at least November 1, 2010.²⁶ Thus, based on the evidence before us, we find that KM Radio apparently willfully and repeatedly violated Section 11.35(a) of the Rules by failing to maintain fully operational EAS equipment while the stations were in operation.

B. Failure to Maintain Required Obstruction Tower Lighting

8. 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.²⁷ Section 17.51(a) of the Rules requires all red obstruction lighting to be exhibited from sunset to sunrise unless otherwise specified.²⁸ The Tower is 130 meters above ground in overall height and is required to be painted and lit.²⁹ KM Radio's management does not know when the lights on its Tower first became inoperable,³⁰ but, according to its station operator, all of the Tower's lights, except for a center non-flashing red beacon, were out at least as of November 1, 2010. A local police officer also confirmed that all, but one, of the Tower's lights were not working as of January 29, 2011. KM Radio did not contact the FAA about the Tower light outage until January 31, 2011. Further, KM Radio admitted that its employees may not have been visually monitoring the Tower's lights on a daily basis.³¹ Thus, based on the evidence before us, we find that KM Radio apparently willfully and repeatedly violated Section 303(q) of the Act and Section 17.51(a) of the Rules by failing to exhibit required red obstruction lighting on the Tower after sunset from at least November 1, 2010, until January 31, 2011.

C. Failure to Operate Station at Authorized Power Level

9. Section 73.1560(b) of the Rules states that "the transmitter output power of an FM station, . . . which is authorized for output power more than 10 watts must be maintained as near as practicable to the authorized transmitter output power and may not be less than 90% nor more than 105%

²⁴ See 47 C.F.R. § 11.35(a).

²⁵ See *LOI Response* at 1.

²⁶ Section 11.35(b) of the Rules allows licenses to operate for 60 days pending the repair or replacement of defective EAS equipment without further FCC authority. Entries must be made in the broadcast station log showing the date and time the equipment was removed and restored to service. See 47 C.F.R. § 11.35(b). KM Radio did not order any replacement parts for its EAS equipment until after the inspection, so KM Radio cannot claim that its operations fell under this exception. See *LOI Response* at 1.

²⁷ See 47 U.S.C. § 303(q).

²⁸ See 47 C.F.R. § 17.51(a).

²⁹ See Antenna Structure Registration database for antenna structure number 1053693. See also 47 C.F.R. § 17.21 (requiring antenna structures more than 60.96 meters in height to be painted and lighted).

³⁰ See *LOI Response* at 2.

³¹ See *id.* See also 47 C.F.R. § 17.47(a) (requiring owners of antenna structures that are required to be lighted to make an observation of the antenna structure's lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights).

of authorized power.”³² On February 10, 2011, agents from the Kansas City Office observed the power meter for Station KQMG-FM’s unattended transmitter operating with 108% of authorized power. KM Radio maintained no station logs and was unaware of when it began operating overpower. Although KM Radio asserts its violation was inadvertent, we find this apparent violation willful because KM Radio consciously operated Station KQMG-FM on February 10, 2011. Moreover, on February 10, 2011, KM Radio had no means to monitor remotely its FM unattended transmitter,³³ as the telephone line to the transmitter had been disconnected. As such, KM Radio’s failure to ensure a connection for the unattended transmitter also renders this apparent violation willful. Based on the evidence before us, we find that KM Radio apparently willfully violated Section 73.1560(b) of the Rules by operating Station KQMG-FM with more than authorized transmit power.

D. Failure to Maintain and Make Available a Public Inspection File

10. Section 73.3526(a) of the Rules states that “[e]very permittee or licensee of an AM, FM, TV or a Class A station in the commercial broadcast services shall maintain a public inspection file containing the material” set forth in this Section.³⁴ The public inspection file must be maintained at the main studio of the station,³⁵ and must be available for public inspection at any time during regular business hours.³⁶ Section 73.3526(e)(12) of the Rules states that commercial AM and FM broadcast stations must retain in the file “every three months a list of programs that have provided the station’s most significant treatment of community issues during the preceding three month period. . . . The lists described in this paragraph shall be retained in the public inspection file until final action has been taken on the station’s next license renewal application.”³⁷ On February 10, 2011, in response to a request made during normal business hours, KM Radio provided a single—and not separate files for each station, as required under the Rules—public inspection file for Stations KQMG and KQMG-FM. In addition, the agents found that the single public inspection file contained no issues/programs lists after 2001. Based on the evidence before us, we find that KM Radio apparently willfully and repeatedly violated Section 73.3526 of the Rules by failing to maintain complete public inspection files for Stations KQMG and KQMG-FM.

E. Proposed Forfeiture and Reporting Requirement

11. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for: (1) failure to maintain operational EAS equipment is \$8,000; (2) failure to comply with prescribed lighting and/or marking is \$10,000; (3) exceeding power limits is \$4,000; and (4) violation of public file rules is \$10,000.³⁸ 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,

³² 47 C.F.R. § 73.1560(b).

³³ KM Radio also had no means to monitor remotely its unattended AM transmitter, which had a broken AM antenna current meter. Agents, however, were unable to determine whether Station KQMG was operating overpower.

³⁴ 47 C.F.R. § 73.3526(a)(2).

³⁵ 47 C.F.R. § 73.3526(b).

³⁶ 47 C.F.R. § 73.3526(c).

³⁷ 47 C.F.R. § 73.3526(e)(12).

³⁸ See *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.

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.³⁹

12. Applying the base forfeiture amounts, KM Radio would be apparently liable for a total forfeiture of \$42,000, consisting of the following: (1) \$8,000 for non-operational EAS equipment; (2) \$10,000 for failure to display required lighting on the Tower; (3) \$4,000 for exceeding power limits; and (4) \$20,000 for violation of public inspection file rules (\$10,000 for each station). During our investigation, KM Radio submitted financial and other information concerning its stations which, after our review, establishes that it would be unable to pay a \$42,000 forfeiture. With regard to an individual's or entity's inability to pay claim, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.⁴⁰ Having reviewed KM Radio's submitted documentation (including gross revenue figures), and after applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that KM Radio is apparently liable for a \$10,000 forfeiture.

13. In addition to the proposed forfeiture, we direct KM Radio to submit a written statement signed under penalty of perjury, pursuant to Section 1.16 of the Rules,⁴¹ by an officer or director of KM Radio, stating that the Licensee has repaired its EAS equipment and tower lighting, it is operating its stations within authorized power limits, and it is maintaining two separate and complete public inspection files for Stations KQMG and KQMG-FM. This statement must be provided to the Kansas City Office at the address listed in paragraph 18 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

14. 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, KM Radio of Independence, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 303(q) of the Act, and Sections 11.35, 17.51, 73.1560(b), and 73.3526 of the Rules.⁴²

15. **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 Order, KM Radio of Independence, LLC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking cancellation of the proposed forfeiture.⁴³

³⁹ 47 U.S.C. § 503(b)(2)(E).

⁴⁰ 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).

⁴¹ 47 C.F.R. § 1.16.

⁴² See 47 U.S.C. §§ 303(q), 503(b), 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 11.35, 17.51, 73.1560(b), 73.3526.

⁴³ Because the proposed forfeiture already considers the Licensee's financial circumstances, which we have determined supports a claim for inability to pay a \$42,000 forfeiture, we will not entertain any request for further reduction of the \$10,000 forfeiture based on that claim. The Licensee, however, may still submit a written statement seeking cancellation of the proposed forfeiture if it can demonstrate that the Bureau committed legal error in its findings of fact and/or conclusions of law.

16. **IT IS FURTHER ORDERED** that KM Radio of Independence, LLC **SHALL SUBMIT** a statement as described in paragraph 13 to the Kansas City Office within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

17. Payment of the forfeiture must be made by credit card, check, or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account number and FRN 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. 20554.⁴⁴ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or E-mail: ARINQUIRIES@fcc.gov. KM Radio shall send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

18. The written statement seeking cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.⁴⁵ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Kansas City Office, 520 NE Colbern Rd., 2nd Floor, Lee’s Summit, MO, 64086 and include the NAL/Acct. No. referenced in the caption. KM Radio also shall e-mail the written response to SCR-Response@fcc.gov.

19. **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 regular mail to KM Radio of Independence, LLC at 3654 West Jarvis Avenue, Skokie, Illinois 60076, and to its counsel, Aaron P. Shainis, Shainis & Peltzman, Chartered, 1850 M Street NW, Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Ronald D. Ramage
District Director,
Kansas City Office
South Central Region
Enforcement Bureau

⁴⁴ See 47 C.F.R. § 1.1914

⁴⁵ 47 C.F.R. §§ 1.16, 1.80(f)(3).