

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

In the Matter of)	
)	
Ace of Hearts Disc Jockey Service, Inc.)	File No.: EB-09-TP-0185
)	NAL/Acct. No.: 201132700003
Licensee of Station W277AN)	FRN: 0008590853
Cape Canaveral, Florida)	Facility ID No.: 143943
)	

FORFEITURE ORDER

Adopted: April 23, 2012

Released: April 23, 2012

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

I. INTRODUCTION

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of eleven thousand dollars (\$11,000) to Ace of Hearts Disc Jockey Service, Inc. (Ace), licensee of translator station W277AN (Station), in Cape Canaveral, Florida, for willful and repeated violation of Sections 73.1350 and 74.1235(e) of the Commission's rules (Rules).¹ The noted violations involved Ace operating its Station with unauthorized antenna equipment and with more than authorized power. In addition to the monetary forfeiture, we direct Ace to submit no later than thirty (30) calendar days from the date of this Order a statement signed under penalty of perjury that it is operating its Station consistent with its license authorization.

II. BACKGROUND

2. On March 8, 2011, the Enforcement Bureau's Tampa Office (Tampa Office) issued a Notice of Apparent Liability for Forfeiture and Order (NAL)² to Ace for its use of an unauthorized transmitting antenna system and its overpower operation. As discussed in detail in the NAL, on October 28, 2009, and on February 7, September 22, and September 24, 2010, agents from the Tampa Office measured the field strength of Station W277AN's signal and determined that the Station was operating with more than its authorized transmitter power output (TPO).³ On February 26 and September 22, 2010, agents from the Tampa Office observed that the meter on the Station's amplifier showed the Station operating with more than its authorized TPO.⁴ On February 7, February 26, and September 22, 2010, agents from the Tampa

¹ 47 C.F.R. §§ 73.1350, 74.1235(e).

² *Ace of Hearts Disc Jockey Service, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 3481 (Enf. Bur. 2011) (NAL). A comprehensive recitation of the facts and history of this case found in the NAL is incorporated herein by reference.

³ When operating with its authorized transmitter output power of 61 watts, the expected field strength for Station W277AN's signal is 47 mV/m. On October 28, 2009, and on February 7, September 22, and September 24, 2010, agents from the Tampa Office measured the field strength for Station W277AN's signal at 82 mV/m, 92 mV/m, 74 mV/m, and 82 mV/m, respectively.

⁴ On February 26 and September 22, 2010, agents from the Tampa Office observed that the meter on the amplifier for

Office confirmed that a photograph taken on October 28, 2009, was accurate and that the Station was using a two-antenna array, although its authorization specified use of only one antenna.⁵ In view of the record evidence, the *NAL* proposed a \$13,000 forfeiture against Ace for willfully and repeatedly violating Sections 73.1350 and 74.1235(e) of the Rules, and required Ace to submit a sworn statement to the Bureau within 30 days confirming that it is now operating at authorized power levels and with an authorized antenna system. Ace responded to the *NAL*, stating that it is now in conformity with the Rules, and also requesting cancellation or reduction of the proposed forfeiture, arguing that its operation in excess of the authorized TPO may have been caused by an unknown third party; that the antenna issue was due to a typographical error on an application; that some of the violation dates are barred by the statute of limitations; that it has a history of compliance; and that it is unable to pay the forfeiture.⁶ We discuss below each of these arguments in turn.

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),⁷ Section 1.80 of the Rules,⁸ and the *Forfeiture Policy Statement*.⁹ In examining Ace'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.¹⁰ As we discuss below, we have considered Ace's response in light of these statutory factors, and determine that a forfeiture in the amount of \$11,000 is warranted.

A. Failure to Operate at Authorized Transmitter Power Output (TPO)

4. We affirm our finding in the *NAL* that Station W277AN willfully and repeatedly operated with more than authorized TPO, in violation of Section 74.1235(e) of the Rules. Section 74.1235(e) of the Rules states that in no event shall a station authorized under this subpart be operated with a TPO in excess of the transmitter certificated rating and the TPO shall not be more than 105 percent of the authorized level.¹¹ As the record reflects, Station W277AN is authorized to operate with a TPO of 0.061 kW or 61 watts,¹² yet the Station was found to be operating in excess of its authorized level on several occasions. In its *NAL Response*, Ace admits that the meter on Station W277AN's amplifier showed that the Station was operating

Station W277AN registered a power output of 172 watts and 140 watts, respectively, which is 280% and 229% over the station's authorized power.

⁵ License File Number BLFT-20070220AA0. The license specifically describes the antenna type as "Non-Directional, OMB MP-1." Based on manufacturer specifications, the OMB MP-1 consists of only one antenna section.

⁶ See Letter from Randy Bennett, Principal Owner, Ace of Hearts Disc Jockey Services, Inc., to District Director, Tampa Office (Mar. 8, 2011) (on file in EB-09-TP-0185) (*NAL Response*).

⁷ 47 U.S.C. § 503(b).

⁸ 47 C.F.R. § 1.80.

⁹ *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*).

¹⁰ 47 U.S.C. § 503(b)(2)(E).

¹¹ 47 C.F.R. § 74.1235(e).

¹² See License File Number BLFT-20070220AA0.

with more than its authorized TPO during the inspection on February 26, 2010, when Randy Bennett, Ace's principal owner and chief operator, was present.¹³

5. Although Ace admits that its Station was operating overpower, it argues that no forfeiture should be imposed based on its theory that the overpower operation on various dates possibly could have been caused by "tampering" on the part of an unknown third party.¹⁴ In support of its argument, Ace explains that it regularly inspected its transmitter site at least once a month and found no problems,¹⁵ and that, therefore, the "alleged power findings . . . by the agents on September 22 and 24, 2010 defies logic"; as such, it suggests that the overpower operation was likely attributable to "tampering on the part of an unrelated third party."¹⁶ We find this explanation unpersuasive, especially since Ace provides no evidence of any tampering by an unknown third party. Moreover, we find it implausible that an unrelated third party would know when Ace would conduct inspections of its transmitter and ensure that the power levels were properly set on those dates; and then, at the same time, know when the Commission would conduct unannounced inspections and measurements and, in anticipation of such inspections, deliberately adjust the transmitter to reflect overpower operations only during those dates. There is also no reason (and Ace provides none) to question the accuracy of the agent's observations and the corresponding measurements taken on October 28, 2009, and on February 7, February 26, September 22, and September 24, 2010. Based on the evidence before us, we find that Ace not only violated Section 74.1235(e) of the Rules willfully and repeatedly, but did so deliberately, given the further violations after the February 26, 2010 inspection, when Ace's principal owner, Mr. Bennett, was present.

B. Operation with Unauthorized Antenna Equipment

6. We also affirm our finding in the *NAL* that Station W277AN operated its station with an unauthorized antenna system. Section 73.1350 of the Rules states that each licensee is responsible for maintaining and operating its broadcast station in a manner which complies with the technical rules set forth elsewhere in this part and in accordance with the terms of the station authorization.¹⁷ In the *NAL*, we found that although Station W277AN's license authorizes it to operate with only one antenna,¹⁸ the photographs taken by agents on October 28, 2009, as well as direct observations by agents on February 7, 2010,

¹³ Ace asserts that during the inspection on February 26, 2010, an agent from the Tampa Office told it that he usually gives "a first time offender" a "mulligan," and complains that the agents failed to disclose the previous measurements that were taken on October 28, 2009, and February 7, 2010. *See NAL Response* at 4. Ace seems to suggest that these facts (if true) mitigate the willfulness of the violation, but we disagree. Not only do the Bureau's agents deny Ace's assertions, but even if the assertions were true, neither fact has any bearing on the willfulness of the violation. Furthermore, independent of the October 28, 2009, and February 7, 2010, violation dates, the TPO violation was twice violated in September 2010, and determined to have been repeated and willful.

¹⁴ *See Affidavit of Randy Bennett Attachment A to NAL Response* at 2.

¹⁵ *See Affidavit of Randy Bennett Attachment F to NAL Response* at 1-2. Ace included affidavits from two individuals who state they observed the Station operating within tolerances on September 4, 2010. *See Affidavit of Michael David, Volunteer Board Member of Brevard Youth Education Broadcasting Corporation, Inc.*, dated March 28, 2011; *Affidavit of Stacey Kile, Volunteer Board Member of Brevard Youth Education Broadcasting Corporation, Inc.*, dated March 31, 2011. Although Ace asserts that it noted all repairs and issues in the transmitter log, Ace provided agents from the Tampa Office a copy of its transmitter log on February 26, 2010, but there were no entries in the log. Similarly, on September 22, 2010, agents from the Tampa Office again observed the Station's transmitter log located at the transmitter site and still found no entries in the log, leaving Ace with no written documentation of any measurements that it alleges were taken by the Station on the particular dates it said it did.

¹⁶ *Affidavit of Randy Bennett Attachment F to NAL Response* at 2.

¹⁷ 47 C.F.R. § 73.1350.

¹⁸ *See License File Number BLFT-20070220AA0.*

February 26, 2010, and September 22, 2010, revealed that Station W277AN was operating with a two-antenna array transmission system, at variance with the Station's authorization. In response, Ace asserts that it always intended to use a two-antenna array, but mistakenly submitted, as a result of a typographical error, a license application with an antenna code of MP-1 (reflecting a request for one antenna), rather than MP-2 (reflecting a request for use of a two-antenna array).¹⁹ Such mistake, however, does not ordinarily serve to justify a station operating at variance with its license authorization. In this regard, we emphasize not only the importance of building and operating a station consistent with the terms of its authorization, but also the importance of reviewing and ensuring the accuracy of the information contained in the authorization, which Ace apparently did not do. Since there is no dispute that Ace's license did not authorize a two-antenna array transmission system, we conclude that Ace willfully²⁰ and repeatedly violated Section 73.1350 of the Rules. We further conclude, however, that mitigating factors exist that serve to justify reducing the proposed forfeiture. Specifically, we find that Ace's use of a two-antenna array did not have a significant impact on its transmitter output power,²¹ and did not otherwise preclude compliance with the other technical requirements specified in its license.²² Furthermore, Ace has since filed a license modification application with the FCC's Media Bureau to authorize use of a two-antenna array.²³ Therefore, given the particular factual circumstances of this case, we reduce the proposed forfeiture for the antenna violation from \$5,000 to \$3,000.

C. Denial of Statute of Limitations Argument

7. We deny Ace's request for cancellation of the forfeiture based on its contention that several of the violation dates referenced in the *NAL* are untimely. Citing Section 503(b)(6) of the Act,²⁴ Ace argues that any "item more than 1 year from the March 8th, 2011 *NAL* should be dismissed."²⁵ Ace's understanding of how Section 503(b)(6) of the Act operates, however, is incorrect. Section 503(b)(6) states: "[n]o forfeiture penalty shall be determined or imposed . . . if the violation charged occurred—(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of such license, whichever is earlier . . ." In this case, the first violation occurred on October 28, 2009. Although that date is more than one year prior to issuance of the *NAL*, subsection (ii) of Section 503(b)(6) of the Act authorizes a forfeiture penalty if the violation(s) occurred after the commencement of Ace's current license term, which began March 21, 2007,²⁶ thereby capturing the various dates specified in the *NAL* in which Ace was found to be in violation of the Commission's rules. Therefore, the forfeiture penalty is not barred by the statute of limitations.

¹⁹ See Affidavit of Randy Bennett Attachment F to *NAL Response* at 2-3. On June 1, 2011, Ace requested a modification of its license, which would, among other things, authorize its use of a two-antenna array. See License File No. BPFT-20110603AAA.

²⁰ Ace admitted that it intended to operate its system with a two-antenna array, and that such use is not authorized by the specific terms of its station license. *Id.*

²¹ See Affidavit of Randy Bennett Attachment F to *NAL Response* at 3.

²² See, e.g., *Family Educational Association, Inc.*, Forfeiture Order, 20 FCC Rcd 18867 (Enf. Bur. 2005) (assessing forfeiture at base forfeiture amount to licensee who replaced old system with non-directional antenna for use at night, when authorized to use a directional antenna at night). See also *CellPhone-Mate Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 8988 (Enf. Bur. 2010) (reducing base forfeiture amount of violation because device was authorized but improperly labeled due to a typographical error).

²³ See License File No. BPFT-20110603AAA.

²⁴ 47 U.S.C. § 503(b)(6).

²⁵ *NAL Response* at 4.

²⁶ See License File No. BLFT-20070220AA0.

D. Denial of Prior History of Compliance Claim

8. We deny Ace's request for reduction of the forfeiture based on its claim that it has a history of compliance with the Commission's rules. The record shows that Ace repeatedly and deliberately continued to operate overpower after being informed during the inspection on February 26, 2010, that the Station was operating overpower in violation of the Rules. As such, given the multiple times in which it was found in violation of Section 74.1235(e) after it had received warnings of the violation, it is factually incorrect for Ace to assert that it has a history of compliance. Furthermore, there is precedent indicating that Randy Bennett, Ace's principal owner and chief operator, was involved in an unauthorized transfer of a station. In 2011, the Bureau issued a consent decree and adopting order, in which a licensee admitted that it was engaged in an unauthorized transfer of a station with a licensee that was controlled by Mr. Bennett.²⁷ Specifically, David Carus & Associates admitted that it transferred full ownership of FM Translator Stations W264AS and W272BA, and Aural Studio Transmitter Link WQEQ835 (the Stations) to Community Radio Foundation of Florida, Inc. (Community Radio Foundation) without prior Commission approval, and that Mr. Bennett was a party to the unauthorized transfer based on his control of Community Radio Foundation.²⁸ Given the foregoing, we disagree with Ace's assertion that it has a history of compliance with the Commission's Rules and, therefore, deny its request for reduction on that basis.

E. Denial of Inability to Pay Claim

9. We also deny Ace's request for cancellation or reduction of the forfeiture based on its claim that it is unable to pay the forfeiture. The financial information that Ace submitted does not sufficiently establish and convince us that it would be unable to pay the forfeiture. With regard to an individual's or entity's inability to pay, the Commission has "consistently interpreted Section 503 and our rules as requiring consideration of all financial sources available to that licensee, not just the revenue of that specific licensee."²⁹ Because the financial information provided in the *NAL Response* was insufficient for the Bureau to confirm Ace's financial circumstances, the Bureau's Tampa Office afforded Ace the opportunity to provide additional information, including an explanation about other resources that appeared to contribute to its operations, yet were not reflected in the tax returns and financial statements submitted in its *NAL Response*.³⁰ Ace, however, filed an untimely response after already being granted an extension of the filing deadline.³¹ As such, we are dismissing the filing as untimely and, therefore, deny Ace's inability to pay claim based on the (insufficient) information in its *NAL Response*. However, even

²⁷ *David Carus & Associates*, Order, 26 FCC Rcd 7521 (Enf. Bur. 2011).

²⁸ *Id.* at 7526, 7530.

²⁹ *SM Radio, Inc.*, Order on Review, 23 FCC Rcd 2429 (2008) (affirming Bureau's rejection of request for reduction based on inability to pay because licensee failed to provide financial data concerning all potential sources of income available to it, thereby rendering the record insufficient to substantiate the request).

³⁰ Letter from Ralph Barlow, District Director, Tampa Office, to Randy Bennett, Ace of Hearts Disc Jockey Services, Inc. (Aug. 17, 2011) (on file in EB-09-TP-0185) (*First Finances LOI*); Letter from Ralph Barlow, District Director, Tampa Office, to Randy Bennett, Ace of Hearts Disc Jockey Services, Inc. (Oct. 7, 2011) (on file in EB-09-TP-0185) (granting extension of time in which to submit a response); Letter from Ralph Barlow, District Director, Tampa Office, to Randy Bennett, Ace of Hearts Disc Jockey Services, Inc. (Oct. 25, 2011) (on file in EB-09-TP-0185) (*Second Finances LOI*); Letter from Ralph Barlow, District Director, Tampa Office to Randy Bennett, Ace of Hearts Disc Jockey Services, Inc. (Jan. 4, 2012) (on file in EB-09-TP-0185) (granting extension of time in which to submit second response).

³¹ Ace was required to submit its response to the *Second Finances LOI* by January 17, 2012. Ace's response was post-marked January 23, 2012, and was not received by the Tampa Office until January 24, 2012.

if the additional information were timely filed, the filing did not serve to support Ace's inability to pay claim, but instead raised further questions not only about the scope of its financial resources (which appeared to be more significant than initially represented), but the credibility of the statements made in the filing (which appears contrary to evidence gathered by the Tampa Office).³² The overall record and circumstances of this case does not convince us that a reduction of the forfeiture is warranted; further, we note that the original forfeiture of \$13,000 in the *NAL* has now been reduced to \$11,000, thereby reducing the financial penalty imposed against Ace.

F. Reporting Requirement

10. We direct Ace to submit a written statement, pursuant to Section 1.16 of the Rules,³³ signed under penalty of perjury by an officer or director of Ace that it is currently operating its Station with authorized transmitter output power.³⁴ This statement must be provided to the Federal Communications Commission, Enforcement Bureau, South Central Region, Tampa Office, 4010 W. Boy Scout Blvd., Suite 425, Tampa, Florida 33607, within thirty (30) calendar days of the release date of this Forfeiture Order.

IV. ORDERING CLAUSES

11. 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, Ace of Hearts Disc Jockey Service, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for violations of Sections 73.1350 and 74.1235(e) of the Commission's rules.³⁵

12. **IT IS FURTHER ORDERED** that Ace of Hearts Disc Jockey Service, Inc. **SHALL SUBMIT** a statement as described in paragraph 10, above, to the Tampa Office within thirty (30) calendar days of the release date of this Forfeiture Order.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for enforcement pursuant to Section 504(a) of the Act.³⁶ Payment of the forfeiture must be made by check or similar instrument,

³² We find unconvincing Ace's assertions that no third party has paid for any of Ace's expenses and that Randy Bennett and/or Ace has no control over Brevard Youth Education Broadcasting Corporation d/b/a "WGRV the Groove." See Letter from Randy Bennett, Ace of Hearts Disc Jockey Service, Inc., to Ralph Barlow, District Director, Tampa Office at 2-3 (Jan. 12, 2012) (on file in EB-09-TP-0185). The record shows that Randy Bennett signed an agreement on behalf of Community Radio Foundation for space on the antenna structure where Ace's transmitter is located. Ace does not have a separate lease agreement with the antenna structure owner. "WGRV The Groove Radio" submitted at least one rental payment in January 2010 on behalf of Community Radio Foundation to the antenna structure owner where's Ace's transmitter is located. This check was signed by Randy Bennett and listed Mr. Bennett's home address as WGRV's. Mr. Bennett has also signed other checks for WGRV The Groove Radio in 2009 and 2010 to pay antenna structure rent on behalf of Community Radio Foundation and "Space Coast Public Radio, Inc."

³³ 47 C.F.R. § 1.16.

³⁴ On August 12, 2011, agents from the Tampa Office measured Station W277AN operating with a TPO of 64 watts. On that same day, the agents also observed the Station's transmitter set to operate at 64 watts. Ace significantly reduced its TPO, but was still operating with slightly more power than the authorized TPO of 61 watts.

³⁵ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 73.1350, 74.1235(e).

³⁶ 47 U.S.C. § 504(a).

payable to the order of the Federal Communications Commission. The payment must include the NAL/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. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. If payment is made, Ace of Hearts Disc Jockey Service, Inc. shall send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

14. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Ace of Hearts Disc Jockey Service, Inc. at 6050 Babcock Street SE, Unit 23, Palm Bay, Florida 32909.

FEDERAL COMMUNICATIONS COMMISSION

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