

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

In the Matter of)	
)	
Vicot Chery)	File Number: EB-09-NY-0318
)	NAL/Acct. No: 201132380001
Spring Valley, New York)	FRN: 0019471259
)	
)	

FORFEITURE ORDER

Adopted: November 25, 2013

Released: November 26, 2013

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Vicot Chery for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (Act).¹ The noted violations involved Mr. Chery's operation of an unlicensed radio transmitter on the frequency 90.5 MHz in Spring Valley, New York.

II. BACKGROUND

2. On October 22, 2010, the Enforcement Bureau's New York Office (New York Office) issued a Notice of Apparent Liability for Forfeiture (NAL)² to Mr. Chery for operation of an unlicensed radio station on 90.5 MHz from within a building leased by Mr. Chery for the operation of his businesses – P.C. Taxi Services, LLC and P.C. Auto Repair, Inc.³ In response to the NAL,⁴ Mr. Chery urges cancellation or reduction of the proposed forfeiture because he claims that (1) he was “not aware of what was going on”⁵ at the station, (2) he was contacted by FCC agents without the knowledge of his attorney, and (3) the proposed forfeiture would pose an “absolute hardship.”⁶

¹ 47 U.S.C. § 301.

² *Vicot Chery*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 14596 (Enf. Bur. 2012) (NAL). 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 NAL, 25 FCC Rcd at 14598.

⁴ Letter from Mitchell P. Schecter, Counsel for Vicot Chery, to New York Office, Northeast Region, Enforcement Bureau, at 1 (Jan. 7, 2011) (on file in EB-09-NY-0318) (NAL Response).

⁵ We note that, in the NAL Response, counsel for Mr. Chery mistakenly refers to events taking place in a “house.” The unlicensed station at issue here, however, was located in Mr. Chery's place of business – P.C. Taxi and P.C. Auto Repair.

⁶ *Id.*

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁷ Section 1.80 of the Commission's rules (Rules),⁸ and the *Forfeiture Policy Statement*.⁹ In examining Mr. Chery'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 discussed below, we have considered Mr. Chery's response in light of these statutory factors, and find that neither cancellation nor reduction of the forfeiture is warranted.

4. First, we affirm the *NAL*'s finding that Mr. Chery violated Section 301 of the Act. 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.¹¹ For the purposes of Section 301 of the Act, the word "operate" has been interpreted to mean "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."¹² In other words, the use of the word "operate" in Section 301 of the Act captures not just the "actual, mechanical manipulation of radio apparatus"¹³ but also operation of a radio station generally.¹⁴ 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."¹⁵

5. As discussed in the *NAL*, agents from the New York Office determined that, on October 26, 28, and 29, 2009, an unlicensed radio station was operating on 90.5 MHz from 301 Roosevelt Avenue in Spring Valley, New York, a building leased by Mr. Chery for the operation of his businesses. During the inspection on October 29, 2009, Mr. Chery showed the agents the location of the station's transmitter, which was in a locked room at his P.C. Taxi business, and in the upstairs attic located behind a stack of car tires and hidden from plain view. Mr. Chery was able to turn off the transmitter at the agents' request and the operation ceased. He also led the agents to the roof where the station's antenna was located and agreed to remove the antenna.¹⁶ In light of Mr. Chery's actions during the inspection, we reject his claim that he was not aware of the station's operation. In order to find that Mr. Chery willfully violated Section 301 of the Act, we are not required to determine that he intended to commit the violation. Moreover,

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 U.S.C. § 301.

¹² *See NAL*, 25 FCC Rcd at 14597. *See also 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).

¹³ *NAL*, 25 FCC Rcd at 14597.

¹⁴ *Id.*

¹⁵ *Id.* *See also Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9747 (1995), *recons. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

¹⁶ *NAL*, 25 FCC Rcd at 14597.

because Section 301 of the Act provides that “no person shall use or operate” radio transmission equipment, liability for unlicensed operation may be assigned to any individual taking part in the operation of the unlicensed station, regardless of who else may be responsible for the operation.¹⁷ Together, the facts show that Mr. Chery exercised control of the station and was involved in the general conduct or management of the station, and as such was the “operator” of the station. Based on the evidence before us, we find that Mr. Chery willfully and repeatedly violated Section 301 of the Act by operating the unlicensed radio station on 90.5 MHz in Spring Valley, New York.¹⁸

6. Mr. Chery also claims that the proposed forfeiture should be cancelled or reduced because he was contacted by the agents from the New York Office without the knowledge of his attorney. Specifically, Mr. Chery’s counsel claims that the agents conducted the inspection and interviewed Mr. Chery without his attorney present and therefore any “evidence taken under these circumstances should be discounted.”¹⁹ We disagree. First, the FCC inspection is 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”²⁰ The radio station at issue in this case was required to be licensed by the Commission. Second, the FCC inspection is not a criminal investigation and any questioning that occurs as part of the fact-finding process in a non-custodial, civil, administrative proceeding, does not require the presence of counsel.²¹ The FCC agents were investigating a complaint of an unlicensed radio station on 90.5 MHz and traced the source of the transmissions to the radio station operating from Mr. Chery’s business location, thereby prompting questions to Mr. Chery and the request to inspect as part of the fact-gathering process. Further, the facts of this case show that Mr. Chery voluntarily led the agents to certain parts of his business where the antenna and radio transmitter were

¹⁷ *Id.* (citing *Jean L. Senatus*, Forfeiture Order, 20 FCC Rcd 14418, 14420-21, para. 11 (Enf. Bur. 2005)).

¹⁸ 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 any rule, regulation or order issued by the Commission thereunder shall be liable for a forfeiture penalty. 47 U.S.C. § 503(b). 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, and defines the term “repeated” as the “commission or omission of such act more than once or for more than one day.” 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that the definitions of “willful” and “repeated” apply to both Sections 312 and 503(b) of the Act, and the Commission has so interpreted the terms in the Section 503(b) context. *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”); *see, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁹ *NAL Response* at 1.

²⁰ 47 U.S.C. § 303(n) (emphasis added). FCC agents are not required to obtain a warrant prior to conducting a radio station inspection. *See 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.”). *See also 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).

²¹ There is only a constitutional right to have counsel present during questioning that occurs during a custodial interrogation. “Custodial interrogation” is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). *See also Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1578 n. 6 (11th Cir. 1986) (*Miranda* warnings not required in non-custodial setting of administrative investigation); *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999) (plaintiff in a civil case has no constitutional right to counsel).

located, and also voluntarily responded to questions during the inspection. Indeed, it was not until after the inspection and a Notice of Unlicensed Operation (*NOUO*)²² was issued to Mr. Chery that the agents first became aware that Mr. Chery had retained counsel, when counsel submitted a response to the *NOUO*.²³ Based on all the foregoing reasons, we find no merit in Mr. Chery's argument and decline to reduce or cancel the forfeiture on these grounds.

7. Finally, we decline to cancel or reduce the forfeiture amount based on Mr. Chery's alleged inability to pay. The *NAL* specifically stated that a cancellation or reduction of the proposed forfeiture based on inability to pay will not be considered unless the petitioner provides (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles ; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.²⁴ Mr. Chery did not submit any documentation in support of his request for a reduction based on inability to pay and, although Enforcement Bureau staff provided Mr. Chery an additional opportunity to submit documentation in support of his request, no such documentation has been submitted to date.²⁵ We therefore have no basis for assessing Mr. Chery's inability to pay claim. We find that a forfeiture in the amount of \$10,000 is warranted.²⁶

IV. ORDERING CLAUSES

8. 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, Vicot Chery **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violation of Section 301 of the Act.²⁷

9. 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.²⁸ 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.²⁹ Vicot Chery shall send electronic notification of payment to NER-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.³⁰ 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

²² Notice of Unlicensed Operation to Vicot Chery (Nov. 4, 2009).

²³ See Letter from Mitchell P. Schecter, Counsel for Vicot Chery, to New York Office, Northeast Region, Enforcement Bureau, dated November 12, 2009; see also Letter from Mitchell P. Schecter, Counsel for Vicot Chery, to New York Office, Northeast Region, Enforcement Bureau (June 24, 2010) (on file in EB-09-NY-0318).

²⁴ *NAL*, 25 FCC Rcd at 14599, para. 13.

²⁵ Staff contacted counsel for Mr. Chery via telephone on January 5, 2011.

²⁶ See, e.g., *San Jose Navigation, Inc.*, Forfeiture Order, 22 FCC Rcd 1040, 1043 (2007) (in assessing an inability to pay claim, the Commission requires the claimant to provide reliable and objective documentation that reflects its current overall financial status).

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

²⁸ 47 C.F.R. § 1.80.

²⁹ 47 U.S.C. § 504(a).

³⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

(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.

10. Any request for making 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. 20554.³¹ 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.

11. **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 Vicot Chery at his address of record, and to his counsel, Mitchell P. Schecter, at 250 Route 59, Spring Valley, New York 10977.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt
Regional Director, Northeast Region
Enforcement Bureau

³¹ See 47 C.F.R. § 1.1914.