

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

In the Matter of)
M.J. Phillips Communications, Inc.) File No.: EB-FIELDNER-13-00011961
Licensee of Station WHB714) NAL/Acct. No.: 201432400012
West Seneca, New York) FRN: 0007293087
) Facility ID No.: 39517
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: August 28, 2014

Released: August 28, 2014

By the District Director, Philadelphia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$6,400 against M.J. Phillips Communications, Inc. (Phillips) for apparently operating its studio-transmitter link (STL) from an unauthorized location in West Seneca, New York. Unauthorized operations undermine the Commission’s radio licensing system and potentially cause interference to licensed communications. Although Phillips acknowledged that it operated the STL station from an unauthorized location, it continued to operate the station at variance from its license even after being warned by the Commission in writing that such action violated the law. This failure to come into compliance demonstrates an apparent disregard for the Commission’s authority warranting an increased penalty. In addition, we direct Phillips to submit, no later than 30 calendar days from the release date of this Notice of Apparent Liability for Forfeiture and Order (NAL), a statement, signed under penalty of perjury, stating that its STL station is now operated in compliance with the Commission’s rules and consistent with its license.

2. In this NAL, we find that Phillips, licensee of STL Station WHB714 in West Seneca, New York, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),¹ and Section 1.903(a) of the Commission’s rules (Rules)² by operating Station WHB714 from a location other than its licensed location without prior Commission authorization.

II. BACKGROUND

3. On March 6 and March 7, 2013, agents from the Enforcement Bureau’s Philadelphia Office (Philadelphia Office) conducted an inspection of Station WHB714 in response to a complaint of unauthorized operation. Agents used mobile direction finding techniques and determined that Station WHB714 was operating from 976-B Union Road, West Seneca, New York (Union Road Site).³ According to its authorization, however, the licensed location for Station WHB714 is 1224 Main Street, Niagara Falls,

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 1.903(a).

³ The antenna for the STL Station was located on the rooftop of the building adjacent to the main studio at the coordinates 42-49-31.92 North Latitude / 078-45-16.55 West Longitude.

New York (Main Street Site), a distance of 24.3 miles from the Union Road Site.⁴ Agents also discovered that Station WHB714 was operating on frequency 947.0 MHz, instead of its authorized frequency of 947.5 MHz. On March 25, 2013, the Philadelphia Office issued a Notice of Violation (First NOV) to Phillips for operating Station WHB714 at an unauthorized location on an unauthorized frequency.⁵ In its response to the First NOV, Phillips acknowledged that it was operating Station WHB714 from an unauthorized location and frequency.⁶ Phillips stated that it had retuned Station WHB714 to operate on its authorized frequency and was in the process of applying for authority to operate Station WHB714 from the Union Road Site.⁷

4. On October 24, 2013, agents from the Philadelphia Office re-inspected Station WHB714 and found that it was still operating from the unauthorized Union Road Site.⁸ During the inspection, Phillips was unable to provide the agents with any evidence that it had sought authorization from the Commission to operate Station WHB714 from the Union Road Site. On November 27, 2013, the Philadelphia Office issued a second Notice of Violation (Second NOV) to Phillips for operating Station WHB714 at an unauthorized location.⁹ In its response to the Second NOV, Phillips acknowledged that it continued to operate Station WHB714 at an unauthorized location, stating that its counsel failed to file the necessary application for authority to operate from the Union Road Site.¹⁰

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.¹¹ 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.¹² 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,¹³ and the Commission has so interpreted the term in the Section

⁴ STL Station WHB714 is authorized for operation at the coordinates 43-06-02.1 North Latitude, 079-03-13.1 West Longitude.

⁵ *M.J. Phillips Communications, Inc.*, Notice of Violation, V201332400021 (Enf. Bur. Mar. 25, 2013) (on file in EB-FIELDNER-13-00007256) (First NOV).

⁶ Letter from James R. Cooke, Counsel to M.J. Phillips Communications, Inc., to District Director, Philadelphia Office, Northeast Region, Enforcement Bureau (May 2, 2013) (on file in on file in EB-FIELDNER-13-00007256).

⁷ *Id.*

⁸ The agents also confirmed that Station WHB714 was operating on its licensed frequency.

⁹ *M.J. Phillips Communications, Inc.*, Notice of Violation, V201432400005 (Enf. Bur. Nov. 27, 2013) (on file in EB-FIELDNER-13-00011961) (Second NOV).

¹⁰ Letter from James R. Cooke, Counsel to M.J. Phillips Communications, Inc., to District Director, Philadelphia Office, Northeast Region, Enforcement Bureau (Jan. 3, 2014) (on file in EB-FIELDNER-13-00011961).

¹¹ 47 U.S.C. § 503(b).

¹² 47 U.S.C. § 312(f)(1).

¹³ 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

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503(b) context.¹⁴ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁵ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹⁶

A. Operation from an Unauthorized Location

6. The evidence in this case is sufficient to establish that Phillips violated Section 301 of the Act and Section 1.903(a) of the Rules. Section 301 of the Act prohibits the use or operation of 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.¹⁷ In addition, Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services, such as Station WHB714, must be used and operated only in accordance with the rules applicable to their particular service, and with a valid authorization granted by the Commission.¹⁸

7. On March 6 and March 7, 2013, Philadelphia Office agents found that Phillips was operating Station WHB714 from a site located approximately 24.3 miles from its authorized location. During a re-inspection on October 24, 2013, agents found that Phillips continued to operate Station WHB714 from the unauthorized Union Road Site. Based on the evidence before us, we find that Phillips apparently willfully and repeatedly violated Section 301 of the Act and Section 1.903(a) of the Rules by operating Station WHB714 from a location other than its licensed location without prior Commission authorization.

B. Proposed Forfeiture and Reporting Requirement

8. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operating at an unauthorized location is \$4,000.¹⁹ 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, 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.²⁰ As noted above, Phillips continued to operate its STL station at variance from its

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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 . . .”).

¹⁴ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992) (*S. Cal. Broad.*)

¹⁵ 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).

¹⁶ 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.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 9.

¹⁷ 47 U.S.C. § 301.

¹⁸ 47 C.F.R. § 1.903(a).

¹⁹ *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.

²⁰ 47 U.S.C. § 503(b)(2)(E).

license even after being warned by the Commission in writing that such action violated the law.²¹ Although Phillips stated that it failed to apply for authority to operate Station WHB714 from a new location due to its counsel's oversight, we note that inadvertent mistakes are not mitigating circumstances that can serve to justify a forfeiture reduction.²² Even if Phillips did file for authorization to operate Station WHB714 from a new location following the inspections, corrective action taken to come into compliance with the Act and Rules is expected, and such corrective action does not nullify or mitigate prior violations or associated forfeiture liability.²³ A search of Commission records indicates that Phillips is still licensed to operate Station WHB714 from the Main Street Site and has not received authorization to operate from the Union Road Site or any other location. Phillips apparent failure to come into compliance despite being warned in writing by the Commission demonstrates an apparent disregard for the Commission's authority. Thus, we find that a \$2,400 upward adjustment to the forfeiture is warranted.²⁴ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Phillips is apparently liable for a forfeiture in the amount of \$6,400.

9. We further order Phillips to submit a written statement, pursuant to Section 1.16 of the Rules,²⁵ signed under penalty of perjury by an officer or director of Phillips, stating that Station WHB714 is operating in compliance with Section 301 of the Act, Section 1.903(a), and its license, and detailing the specific actions taken by Phillips to come into compliance. The statement must be provided to the Philadelphia Office at the address listed in paragraph 12, below, within 30 calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Rules, M.J. Phillips Communications, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of six thousand four hundred dollars (\$6,400) for violations of Section 301 of the Act and Section 1.903(a) of the Rules.²⁶

11. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, M.J. Phillips Communications, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

²¹ See *supra* para. 4.

²² See, e.g., *S. Cal. Broad.*, 6 FCC Rcd at 4387, para. 3 (“[I]nadvertence’ . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”); *Emigrant Storage*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8917, 8920, para. 9 (Enf. Bur. 2012) (declining to downwardly adjust a forfeiture where the violation resulted from oversight and a change in personnel).

²³ See, e.g., *Mattoon Broad. Co.*, Forfeiture Order, 29 FCC Rcd 2925 (Enf. Bur. 2014); *Catholic Radio Network of Loveland, Inc.*, Forfeiture Order, 29 FCC Rcd 121 (Enf. Bur. 2014); *Argos Net, Inc.*, Forfeiture Order, 28 FCC Rcd 1126 (Enf. Bur. 2013).

²⁴ See *Brian Crow*, Notice of Apparent Liability for Forfeiture, DA 14-1031 (Enf. Bur. July 22, 2014) (upwardly adjusted proposed forfeiture by 50 percent when individual continued violations after being warned twice in writing by the Commission that such actions violated the Act and Rules); *Orloff Haines*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2903 (Enf. Bur. 2014) (upwardly adjusted proposed forfeiture by approximately 70 percent when individual continued violations after being warned twice in writing by the Commission that such actions violated the Act and Rules); *Carlton Lewis*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15975 (Enf. Bur. 2014) (same).

²⁵ 47 C.F.R. § 1.16.

²⁶ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 1.903(a).

12. **IT IS FURTHER ORDERED** that M.J. Phillips Communications, Inc. **SHALL SUBMIT** a written statement, as described in paragraph 9, above, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, One Oxford Valley Building Suite 404, 2300 East Lincoln Highway, Langhorne, PA 19047. M.J. Phillips Communications, Inc. shall also e-mail the written statement to NER-Response@fcc.gov.

13. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. M.J. Phillips Communications, Inc. shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁷ 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.

14. 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. 20554.²⁸ 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.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²⁹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, One Oxford Valley Building, 2300 East Lincoln Highway, Langhorne, Pennsylvania, 19047, and include the NAL/Acct. No. referenced in the caption. M.J. Phillips Communications, Inc. also shall e-mail the written response to NER-Response@fcc.gov.

²⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁸ See 47 C.F.R. § 1.1914.

²⁹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to M.J. Phillips Communications, Inc. at 9976-B Union Road, West Seneca, New York.

FEDERAL COMMUNICATIONS COMMISSION

David C. Dombrowski
District Director
Philadelphia Office
Northeast Region
Enforcement Bureau