

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

In the Matter of)	File No.: EB-SED-14-00016720 ¹
)	
Midessa Television Limited Partnership)	NAL/Acct. No.: 201432100028
)	
)	FRN: 0001663863

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 14, 2014

Released: October 14, 2014

By the Commission:

I. INTRODUCTION

1. We propose a penalty of \$86,400 against Midessa Television Limited Partnership (Midessa) for apparently operating three broadcast auxiliary services (BAS) stations without authorizations and operating an additional six BAS stations at variance with their respective authorizations, all in conjunction with its full power and low power television stations. We take this action as part of our duty to prevent unlicensed radio operations from potentially interfering with authorized radio communications in the United States, including emergency communications between first responders, such as public safety, law enforcement, emergency medical, and emergency personnel, and to ensure the efficient administration and management of wireless radio frequencies. Midessa's apparent violations continued for a number of years, including for a substantial time after it became aware of its unauthorized operations, thus warranting a significantly increased penalty.

2. As discussed below, Midessa² apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),³ and Sections 1.903(a) and 1.947(a) of the Commission's rules (Rules).⁴

II. BACKGROUND

3. On April 23, 2013, Midessa submitted applications for three new "as built" stations (WQRY297, WQRY299, and WQRY300)⁵ and six modified stations (KWT86, KWT87, KWU20, WLE595, WLE613, and WLG239).⁶ The modifications primarily involved updates to the licensed

¹ The investigation initiated under File No. EB-SED-13-00010511 was subsequently assigned File No. EB-SED-14-00016720. Any future correspondence with the FCC concerning this matter should reflect the new case number.

² Midessa operates KWES-TV, channel 9, the NBC affiliated television station in the Midland/Odessa, Texas, television market. Midessa also operates KWAB-TV, a satellite station of KWES-TV, and KTLE-LP, a low-power television station in Odessa, Texas, that is an affiliate of Spanish-language network Telemundo. The company uses BAS facilities (e.g., TV Intercity Relays and TV Studio Transmitter links) to provide audio and video feeds between its studio and transmitter sites to support its broadcasting operations.

³ 47 U.S.C. § 301.

⁴ 47 C.F.R. §§ 1.903(a), 1.947(a).

⁵ See Universal Licensing System (ULS) File Nos. 0005751019 (WQRY297) (license granted Aug. 14, 2013); 0005751023 (WQRY299) (license granted August 14, 2013); 0005751027 (WQRY300) (license granted Aug. 14, 2013).

⁶ See Universal Licensing System (ULS) File Nos. 0005750934 (KWT86) (license modified Aug. 14, 2013); 0005750934 (KWT87) (license modified August 14, 2013); 0005750978 (KWU20) (license modified Aug. 14,

(continued....)

locations of several of Midessa's transmit/receive sites to reflect the as-built locations, changes to the authorized frequencies, and recharacterization of sites from analog to digital.⁷ In the applications, Midessa disclosed that it had operated three BAS stations without an authorization and six BAS stations at variance from its authorization.⁸

4. Because it appeared that Midessa operated its BAS facilities in violation of the Rules, the FCC's Wireless Telecommunications Bureau referred this matter to the Enforcement Bureau (Bureau) for investigation and possible enforcement action. On November 7, 2013, the Bureau's Spectrum Enforcement Division directed the company to submit a sworn written response to a series of questions relating to Midessa's apparent unauthorized operations.⁹

5. Midessa responded on January 31, 2014, and admitted that it operated three BAS facilities without authorization and failed to operate six BAS facilities in accordance with their respective authorizations.¹⁰ Midessa noted that it learned of the violations in May 2012 in the course of conducting an audit of its BAS facilities.¹¹ Midessa stated that, even after interviewing former station staff, it could not identify the exact dates the violations occurred, but that they probably were ongoing at various times for at least four years.¹² Further, Midessa stated that it could not rule out the possibility that some of the stations were noncompliant at the times of their acquisitions in 1991 and 2001.¹³

III. DISCUSSION

A. Operation of Unauthorized BAS Licenses

6. Section 301 of the Act¹⁴ and Section 1.903(a) of the Rules¹⁵ prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by radio except under, and in accordance with, a Commission-granted authorization. Section 301 of the Act requires that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."¹⁶ Section 1.947(a) of the Rules states that all "major modifications" to BAS licenses require prior Commission approval.¹⁷ Section 1.929(d)(1) of the Rules specifies that the types of

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2013); 0005751000 (WLE595) (license modified August 14, 2013); 0005751005 (WLE613) (license modified Aug. 14, 2013); 0005751010 (WLG239) (license modified Aug. 14, 2013).

⁷ *Id.*

⁸ *Id.*

⁹ See Letter from John D. Poutasse, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, to Robert H. Drewry, Vice President, LCI Television of Texas, Inc. (Nov. 7, 2013) (on file in EB-SED-14-00016720).

¹⁰ See E-mail from Kelly Donohue, Wilkinson Barker Knauer, LLP, Counsel for Midessa Television Limited Partnership, to John D. Poutasse, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau, Attachment at 2-4 (Jan. 31, 2014) (on file in EB-SED-14-00016720) (LOI Response).

¹¹ *Id.*, Attachment at 1.

¹² *Id.*, Attachment at 3.

¹³ *Id.*

¹⁴ 47 U.S.C. § 301.

¹⁵ 47 C.F.R. § 1.903(a).

¹⁶ 47 U.S.C. § 301.

¹⁷ 47 C.F.R. § 1.947(a).

modifications that occurred here—changes to television BAS coordinates, frequency, bandwidth, antenna height, and emission type—are considered major modifications.¹⁸

7. As a Commission licensee, Midessa was required to maintain and operate its BAS facilities as authorized in order to continue to operate. Midessa admitted that it operated three BAS facilities without an authorization and that it operated six other BAS facilities at variance with their authorizations.¹⁹ In addition, although Midessa is not clear as to the precise duration of the violations, it admitted that it continued to operate the BAS facilities without Commission authority from May 2012, when it claimed to have first learned of the violations, until April 23, 2013, when it submitted its applications. Moreover, Midessa conceded that some of the stations may have been operated in violation of the Rules for at least four, but possibly as many as twenty-two years. By operating three stations (WQRY297, WQRY299, and WQRY300) without an authorization, Midessa apparently violated Section 301 of the Act and Section 1.903(a) of the Rules; and by operating six other stations (KWT86, KWT87, KWU20, WLE595, WLE613, and WLG239) at variance with their respective authorizations, Midessa apparently violated Section 301 of the Act and Section 1.947(a) of the Rules.²⁰

B. Proposed Forfeiture

8. 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.²¹ 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.²² The Commission may also assess a forfeiture for violations that are merely

¹⁸ 47 C.F.R. § 1.929(d)(1).

¹⁹ Midessa acknowledges that the six BAS stations were not operated as authorized. Specifically, as indicated in its applications and as Midessa notes, the following six major modification applications were submitted to bring the licenses into conformance with the stations’ existing operations: KWT86 (change to emission type and increase in antenna height greater than 3 meters); KWT87 (changes to emission type, assigned frequency, and coordinates of operation); KWU20 (changes to emission type, assigned frequency, and coordinates of operation and increases in antenna beamwidth, antenna azimuth greater than 1 degree, and antenna height greater than 3 meters); WLE595 (change to coordinates of operation); WLE613 (change to emission type); and WLG239 (changes to emission type, assigned frequency, and coordinates of operation and increases to antenna height greater than 3 meters and EIRP greater than 3 dB). See LOI Response, Attachment at 2; Universal Licensing System (ULS) File Nos. 0005750934 (KWT86) (license modified Aug. 14, 2013); 0005750934 (KWT87) (license modified August 14, 2013); 0005750978 (KWU20) (license modified Aug. 14, 2013); 0005751000 (WLE595) (license modified August 14, 2013); 0005751005 (WLE613) (license modified Aug. 14, 2013); 0005751010 (WLG239) (license modified Aug. 14, 2013).

²⁰ 47 U.S.C. § 301; 47 C.F.R. §§ 1.903(a), 1.947(a).

²¹ 47 U.S.C. § 503(b).

²² 47 U.S.C. § 312(f)(1). 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, and the Commission has so interpreted the term in the Section 503(b) context. 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., *S. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

repeated, and not willful.²³ The term “repeated” means the commission or omission of such act more than once or for more than one day.²⁴ Based on the record before us, Midessa’s apparent violations of Section 301 of the Act and Sections 1.903(a) and 1.947(a) of the Rules are both willful and repeated.

9. In determining the appropriate forfeiture amount, Section 503(b)(2)(E) of the Act directs us to consider factors such as “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 such other matters as justice may require.”²⁵ Section 1.80(b) of the Rules sets a base forfeiture of \$10,000 for operation of a station without Commission authority and a base forfeiture of \$4,000 for unauthorized emissions, using an unauthorized frequency, and construction or operation at an unauthorized location.²⁶ Given the apparent violations at issue here, the base forfeiture is \$54,000 (\$30,000 for the three BAS stations operated without authorization plus \$24,000 for the six BAS stations that were not operating as authorized).

10. Midessa asserts that a \$4,000 base forfeiture should apply to the three violations for operating BAS stations without authorizations.²⁷ Midessa argues that its situation is akin to cases involving BAS studio transmitter links in which the Commission assessed a \$4,000, as opposed to a \$10,000, penalty after determining that the licensee had color of authority to operate the BAS studio transmitter links pursuant to its existing license for its full-power station.²⁸ We disagree. Our review of Commission precedent shows that the Bureau’s most recent enforcement actions have consistently applied a \$10,000 base forfeiture for unlicensed BAS operations, even when the licensee had a valid license for its associated full-power station.²⁹

11. Given the totality of the circumstances, and consistent with the *Forfeiture Policy Statement*, we also conclude that an upward adjustment of \$32,400 is warranted for the extended duration

²³ 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).

²⁴ See 47 U.S.C. § 312(f)(2); *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 9; *supra* n.22.

²⁵ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(8); *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, 17100–01, para. 27 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999).

²⁶ 47 C.F.R. § 1.80(b). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17098–99, para. 22 (noting that “[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act”).

²⁷ See E-mail from Kelly Donohue, Wilkinson Barker Knauer, LLP, Counsel for Midessa Television Limited Partnership, to John D. Poutasse, Chief, Spectrum Enforcement Division, FCC Enforcement Bureau (Feb. 14, 2014) (on file in EB-SED-14-00016720).

²⁸ *Id.*

²⁹ See *Jeannine M. Mason*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 10748, 10750, para 7 (Enf. Bur. 2013) (proposing a penalty of \$10,000 for operating a BAS associated with a full-power station without authorization), *aff’d*, Forfeiture Order, DA 14-1213 (Enf. Bur. Aug. 22, 2014) (reducing forfeiture to impose no monetary penalty due to demonstrated inability to pay); *Mt. Rushmore Broad., Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8278, 8280, para. 6 (Enf. Bur. 2012) (proposing a total forfeiture of \$20,000 for operating a BAS associated with a full-power station without a license for at least 15 years); *Mt. Rushmore Broad., Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8273, 8275, para. 6 (Enf. Bur. 2012) (proposing a total forfeiture of \$20,000 for operating a BAS associated with a full-power station without a license for at least 10 years); *Mt. Rushmore Broad., Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8268, 8270, para. 6 (Enf. Bur. 2012) (proposing a total forfeiture of \$20,000 for operating a BAS associated with a full-power station without a license for at least 15 years).

of the violations.³⁰ In this regard, we are particularly mindful that Midessa's unlicensed and unauthorized operation continued for at least four years, including a substantial period after becoming aware of the violations. In applying the applicable statutory factors, we also consider whether there is any basis for a downward adjustment of the proposed forfeiture. Here, we do not find a basis for a downward adjustment of the proposed penalty. Consistent with Section 301 of the Act, licensees who find themselves out of compliance with the licensing requirements should immediately cease unauthorized operation and seek operating authority and/or modify their authorizations before continuing to operate.³¹ Even though Midessa disclosed the violations prior to our investigation, Midessa acknowledged in its LOI Response that it became aware of the violations in May 2012, approximately one year prior to its disclosure in its license applications and modifications, yet continued its unauthorized operation of the nine BAS stations in violation of the Act and the Rules.³² Consistent with precedent, we decline to downwardly adjust the proposed forfeiture in light of Midessa's delayed disclosure of the violations and its lengthy unauthorized operation.³³

12. Therefore, after applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors, and in view of the particular facts and circumstances of this case, we conclude that Midessa is apparently liable for a total forfeiture of \$86,400 for its unauthorized operation of three BAS stations and its failure to operate six additional BAS licenses in accordance with its authorization.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,³⁴ and 1.80 of the Commission's rules,³⁵ Midessa Television Limited Partnership is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eighty-six thousand four hundred dollars (\$86,400) for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended,³⁶ and Sections 1.903(a) and 1.947(a) of the Commission's rules.³⁷

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules,³⁸ within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture,

³⁰ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

³¹ See 47 U.S.C. § 301.

³² LOI Response, Attachment at 1.

³³ In several analogous cases the Bureau, under delegated authority, has declined to downwardly adjust a proposed forfeiture when the violator's attempts to come into compliance were dilatory, as is the circumstance here. See, e.g., *Miller Breweries East, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 127, 130, para. 12 (Enf. Bur. 2008) (finding that a downward adjustment was unwarranted when the violator waited seven months to notify Commission staff and seek authority to operate the station); *Domtar Indus., Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 13811, 13816, para. 15 (Enf. Bur. 2006) (finding that a downward adjustment was unwarranted when the violator waited eight months to notify Commission staff and seek authority to operate the station); *Am. Paging Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 10417, 10420, para. 12 (Wireless Telecomm. Bur. 1997) (finding that a downward adjustment for voluntary disclosure was unwarranted when the violator did not reveal its violation until approximately one month after having various conversations with Commission staff regarding Special Temporary Authority (STA) and that a downward adjustment for good faith attempts to comply was unwarranted when the violator continued to operate the station without authorization after its STA request had been denied).

³⁴ 47 U.S.C. § 503(b).

³⁵ 47 C.F.R. § 1.80.

³⁶ 47 U.S.C. § 301.

³⁷ 47 C.F.R. §§ 1.903(a), 1.947(a).

³⁸ 47 C.F.R. § 1.80.

Midessa Television Limited Partnership **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 17 below.

15. 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. Midessa Television Limited Partnership shall send electronic notification of payment to Ricardo Durham at Ricardo.Durham@fcc.gov, Josh Zeldis at Josh.Zeldis@fcc.gov, and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁹ 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 that Midessa Television Limited Partnership should follow based on the form of payment it selects:

- 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.

16. 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. 20554.⁴⁰ If Midessa Television Limited Partnership has 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.

17. 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 Commission’s rules.⁴¹ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Ricardo Durham at Ricardo.Durham@fcc.gov and to Josh Zeldis at Josh.Zeldis@fcc.gov.

18. 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 practices; or (3)

³⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁰ See 47 C.F.R. § 1.1914.

⁴¹ 47 C.F.R. §§ 1.16, 1.80(f)(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.

19. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail, return receipt requested, to Robert H. Drewry, Vice President, Midessa Television Limited Partnership, 500 Montgomery Square, Suite 305, Lawton, Oklahoma 73501 and to David D. Oxenford, Esq., Counsel for Midessa Television Limited Partnership, Wilkinson Barker Knauer, LLP, 2300 N Street, N.W., Suite 700, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary