

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

In the matter of)	File No. EB-02-AT-100
)	
Radio 810 Nashville, Limited)	NAL/Acct. No. 200232480004
Licensee, Station WMGC(AM))	
Murfreesboro, Tennessee)	FRN: 0006-3776-00

MEMORANDUM OPINION AND ORDER

Adopted: June 17, 2004

Released: June 21, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we grant in part the Petition for Reconsideration filed by Radio 810 Nashville, Limited (“Radio 810”), licensee of Station WMGC(AM), Murfreesboro, Tennessee. Radio 810 seeks reconsideration of the *Forfeiture Order*¹ in which the Chief, Enforcement Bureau (“Bureau”) found it liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000) for willfully violating Sections 73.1215(a), 73.1350(d)(2), and 73.1745(a) of the Commission’s Rules (“the Rules”).² The noted violations involve Radio 810’s failure to maintain properly calibrated indicating instruments, failure to terminate broadcast operation as required when Station WMGC(AM) operated in non-compliance with the technical rules, and exceeding the authorized transmitter power at Station WMGC(AM) by failing to reduce power at sunset.

2. On June 18, 2002, the District Director of the Commission’s Atlanta, Georgia Field Office (“Atlanta Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”)³ in the amount of \$10,000 to Radio 810. Radio 810 did not file a response to the NAL. On March 20, 2003, the Bureau issued the *Forfeiture Order*, which imposed a monetary forfeiture in the amount of \$10,000. Radio 810 filed a request for reconsideration of the *Forfeiture Order* on April 23, 2003. For the reasons set forth below, we reduce the forfeiture to seven thousand dollars (\$7000).

II. BACKGROUND

3. On March 26, 2002, the Commission’s Atlanta Office received a complaint that radio station WMGC was not reducing transmitter power after sunset as required by the station authorization.⁴ On April 16 and 17, 2002, an agent of the Atlanta Office monitored WMGC’s signal and determined that

¹*Radio 810 Nashville, Inc.*, 18 FCC Rcd 5464 (Enf. Bur. 2003) (“*Forfeiture Order*”).

²47 C.F.R. § 73.1215(a), 73.1350(d)(2), 73.1745(a).

³*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232480004 (Enf. Bur., Atlanta Field Office, released June 18, 2002) (“NAL”).

⁴WMGC’s station authorization requires that the station’s transmission power be reduced from 5000 watts to 6 watts after sunset each day.

the station did not operate at reduced transmitter power after sunset. The agent further determined that the station remained at a power level above the authorized night time power level of 6 watts until 8:10 p.m. Central Daylight Time (CDT). Local sunset was 7:15 p.m. CDT in April 2002.

4. On April 18, 2002, the Atlanta Office agent inspected Station WMGC. The agent found that the station's antenna base current meter at the authorized daytime power level of 5000 watts was 9.2 amperes, representing an error of 4.6 amperes from the correct level of 13.8 amperes. In addition, the agent found that the station's antenna base current meter at the required night time power level of 6 watts was 20 amperes, more than 42 times the minimum normal indication of approximately 0.47 amperes.

5. On June 18, 2002, the District Director of the Atlanta Office issued the *NAL* in the amount of \$10,000 to Radio 810. Radio 810 did not file a response to the *NAL*. On March 20, 2003, the Bureau issued the *Forfeiture Order*, imposing a monetary forfeiture of \$10,000 for willful violation of Sections 73.1215(a), 73.1350(d)(2), and 73.1745(a) of the Rules. In its petition for reconsideration, Radio 810 admits the violations as to operating over night time power limits but avers that this was inadvertent error due to the onset of daylight savings time. As to the violations regarding overage of base current meter readings, Radio 810 argues that the Atlanta Field agent did not use the correct equipment to take the measurements. In addition, Radio 810 argues that the *Forfeiture Order* is procedurally defective because it was mailed to the company's former address and was addressed to Radio 810's previous corporate name.

III. DISCUSSION

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, ("Act"),⁵ Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). In examining Radio 810's petition, Section 503(b) 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 such other matters as justice may require.⁷

7. As a threshold matter, we acknowledge that the *NAL* and the *Forfeiture Order* were addressed to the previous corporate name and address of the licensee. Accordingly, we will consider the instant Request for Reconsideration as if it were a response to the original *NAL*.⁸ Radio 810 argues that the *Forfeiture Order* was procedurally defective. However, we find that the *Forfeiture Order* was not defective, because the Commission considers the two companies to have the same ownership. In its application for assignment of license from Radio 810 Incorporated to Radio 810 Limited, Radio 810 stated that "Randolph Victor Bell is the President and (simple) majority shareholder (51 percent or more) of the two corporations involved in this transaction....This is an application to transfer the license of Radio Station WMGC(AM) from Radio 810 Nashville, Incorporated, to Radio 810 Nashville, Limited....[T]here is no monetary exchange between the two corporate entities."⁹ This case presents the

⁵47 U.S.C. § 503(b).

⁶47 C.F.R. § 1.80.

⁷47 U.S.C. § 503(b)(2)(D).

⁸The effect of an incorrect address in a Commission action is that the Commission will extend or waive its 30-day response period to permit filing of a response by the licensee in question. *See, e.g., 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites*, 10 FCC Rcd. 1335 (1994) at ¶ 204. We will consider Radio 810's petition as a response to the *NAL* pursuant to 47 C.F.R. § 1.80(f)(3). An opportunity to file a petition for reconsideration after issuance of this *Order* is provided pursuant to 47 C.F.R. 1.80(i).

⁹Application for Consent to Assign Broadcast Station License, FCC Form 316, Radio 810 Nashville, Inc., File No. BAL – 20011002AAA, filed October 2, 2001, Exhibits 2, 4.

situation of a *pro forma* change of corporate name and/or structure wherein the underlying controlling party remains the same. In such cases, accountability for corporate action does not change hands after the license is assigned.¹⁰

8. Section 73.1745(a) of the Rules states that no broadcast station shall operate at times, or with modes or power, other than those specified and made a part of the license. The agent from the Atlanta Office determined that Radio 810 was operating at its daytime power level until 8:10 p.m., 55 minutes after sunset, in violation of the terms of its license. Radio 810 argues that this violation was minor, inadvertent, and caused no danger to the public. Radio 810 provides an affidavit from Ted Johnson, General Manager of WMGC. Mr. Johnson states that in March, according to the clock in the remote control system, the station's power was automatically switched from daytime power to night time power at local sunset each day, 6:00 p.m. Central Standard Time ("CST"). For the month of April, Mr. Johnson states that local sunset was 6:15 p.m. and that Daylight Savings Time ("DST") went into effect April 7. Accordingly, from April 7 onward, the station was permitted to operate at daytime power until 7:15 p.m. Central Daylight Time ("CDT").

9. Mr. Johnson states he was present when the Atlanta Office agent inspected WMGC. Mr. Johnson goes on to declare that upon his being informed by the Atlanta Office agent that the station was operating over its power limit, he determined the over-power operations were due to an error in programming the remote control device. The remote control device was programmed to automatically advance the system time to DST. In addition, station personnel also manually advanced the device for DST. Mr. Johnson indicates that this double correction for DST resulted in operations past sunset. Mr. Johnson also states that upon discovery, this error was immediately corrected, as was the five-minute time discrepancy in the clock.

10. Radio 810's explanation for its over power operation does not take into account the fact that the Commission received a complaint about Radio 810's operations on March 26, 2002, almost two weeks before the start of DST in that year.¹¹ Radio 810 has no explanation for its over power operation prior to the commencement of DST. Moreover, we find not credible Radio 810's claim of double correction of the station's remote control device for DST, given the length of time after the commencement of DST that the violation existed. Even if Radio 810's explanation is true, however, double correction of the station's remote control device was a conscious and deliberate act, notwithstanding that such correction was not done with intent to violate the Rules or the terms of Radio 810's station license.¹²

11. We conclude that Radio 810's argument that the forfeiture should be cancelled because over-power operations were inadvertent is without merit. Section 503(b)(1)(B) of the Act provides that any person who "willfully or repeatedly" fails to comply with any provision of the Act or any rule, regulation or order issued by the Commission under the Act "shall be liable to the United States for a

¹⁰For a general discussion of the manner in which the Commission views *pro forma* assignments of license and transfers of control, see, *Federal Communications Bar Association's Petition for Forbearance From Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd. 6293 (1998).

¹¹*NAL*, ¶ 2.

¹²Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

forfeiture penalty.”¹³ The term “willful” means the “conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act”¹⁴ Accordingly, we conclude that Radio 810 willfully violated Section 73.1745(a) of the Rules.¹⁵

12. In addition, Radio 810’s arguments that its violation was minor and caused no danger to the public are without merit. The Commission has consistently found, to the contrary, that “[u]nauthorized presunrise operation, because of its potential for interference to other broadcast stations, has always been considered a serious matter....”¹⁶

13. Section 73.1350(d)(2) of the Rules requires AM stations to terminate operation within three minutes in the event the station operates in a manner not specified by the station license for the pertinent time of day or hours of operation. The Atlanta Field Office agent determined by field strength measurement that after sunset, Radio 810’s power was not reduced for the night, in violation of the terms of its station license. Radio 810 argues that assessing a forfeiture for this violation is duplicative with the forfeiture for Section 73.1745(a) of the Rules. We agree in this case; however, we clarify that Radio 810 violated both rules.

14. Radio 810’s operation at daytime power levels during prime evening listening time was capable of causing harmful interference. The Commission’s Rules concerning transmission systems generally require termination of operations within three hours, except where the mode of operation is not permitted. In that case, operations must be terminated within three minutes.¹⁷ Thus, we conclude, in this case, that Radio 810 did not have appropriate control of its station transmitter when it operated at daytime power during nighttime hours, and this is a separate rule violation. Moreover, for the same reasons that the violation of 73.1745(a) was willful, we likewise find that the violation of 73.1350(d)(2) was willful. However, under the specific facts of this case, we will consider that the forfeiture we proposed for violation of Section 73.1350(d)(2) is subsumed within the forfeiture we assess for Radio 810’s violation of Section 73.1745(a) of the Rules, and accordingly, we reduce the proposed forfeiture amount by three thousand dollars (\$3000).

15. Section 73.1215(a) of the Rules sets out the required specifications for instruments that display a linear scale. Section 73.1215(a)(5) of the Rules requires linear scale instruments to have a full-scale reading not greater than five times the minimum normal indication. In this case, a 6 watt power level the antenna base current meter should have been able to indicate an antenna base current of approximately 0.47 amperes. The scale necessary to determine this level of antenna base current should not be greater than approximately 2.3 amperes. Station WMGC was equipped with a base current meter that at the time of inspection was a linear scale meter with a full scale of 20 amperes, in violation of Section 73.1215(a) of the Rules.¹⁸ Thus, Radio 810 did not have an antenna current meter with sufficient

¹³47 U.S.C. § 503(b)(1)(B).

¹⁴47 U.S.C. § 312(f)(1); *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹⁵“The Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors and has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.” *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (internal quotation marks omitted) and cases cited therein.

¹⁶*Hale Broadcasting Corporation*, 79 FCC 2d 169 (1980) at ¶ 7.

¹⁷47 C.F.R. § 73.1350(d).

¹⁸Section 73.1215(f) of the Rules requires that licensees use equipment that accurately determines operational power levels. The Atlanta Office agent also found that Radio 810’s antenna base current meter gave a significantly inaccurate reading at daytime power levels; the meter read only 9.2 amperes, consistent with a transmitter power level of 2,200 watts, when it should have produced a reading of 13.8 amperes to accurately reflect the actual transmitter power level of 5000 watts that was measured by the agent with field strength measuring equipment.

range to accurately indicate the nighttime base current power of 6 watts. Radio 810 states that the meter in question had two levels and was capable of reading the lower nighttime power, but Radio 810 provides no evidence that the meter was capable of making accurate readings at the lower power level or any other evidence that would contradict the agent's findings at the time of inspection. Accordingly, we rely on the agent's observation on this point. The choice of antenna base current meters is a conscious decision by Radio 810's, and accordingly, we find the lack of required equipment to be a willful violation of Section 73.1215(a) of the Rules.

16. Radio 810 states that in any event, shortly after the inspection, it replaced the meter observed during the inspection with two separate meters to ensure compliance with the Rules. Correction of a violation after it has been found in an inspection is commendable, but does not warrant a reduction of forfeiture.¹⁹

17. Radio 810 claims that paying the forfeiture would be a substantial hardship. Radio 810 does not, however, provide the required documentation to support its claim. As explicitly stated in the *NAL*, we 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 ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.²⁰ Since Radio 810 did not provide financial documentation meeting any of these criteria, we cannot determine whether it is unable to pay the proposed forfeiture.

18. We have examined Radio 810's Request for Reconsideration pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Radio 810 willfully violated Sections 73.1215(a), 73.1350(d)(2), and 73.1745(a) of the Rules, but we find that the assessed forfeiture should be reduced to seven thousand dollars (\$7000).

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act²¹ and Section 1.106 of the Rules,²² Radio 810's Petition for Reconsideration, which we are treating as a Response to the March 20, 2003 *Forfeiture Order* **IS GRANTED IN PART AND DENIED IN PART** as discussed herein.

20. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²³ Payment shall be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note NAL/Acct. No. 200232480004, and FRN 0006-3776-00. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁴

¹⁹*AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994).

²⁰*NAL* at page 3.

²¹47 U.S.C. § 405.

²²47 C.F.R. § 1.106.

²³47 U.S.C. § 504(a).

²⁴*See* 47 C.F.R. § 1.1914.

21. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Mr. Randolph V. Bell, President, Radio 810 Nashville, Limited, 1920 Abrams Parkway, #387, Dallas, Texas 75214-6218, and to its counsel Matthew H. McCormick, Esq., Reddy Begley & McCormick, LLP, 2175 K Street, N.W., Suite 350, Washington, D.C. 20037-1845.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau