

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

In the Matter of)	
)	File No. EB-03-TP-029
Wilner Simon)	
110 Triangle Street)	NAL/Acct. No. 200432700016
Port Charlotte, Florida)	
)	FRN 0010511020
)	

FORFEITURE ORDER

Adopted: August 9, 2004

Released: August 11, 2004

By the Chief, 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 Wilner Simon for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“*Act*”).¹ The noted violation involves Mr. Simon’s operation of a radio station without Commission authorization.

II. BACKGROUND

2. On February 20, 2003, agents from the FCC Enforcement Bureau’s Tampa Field Office (“*Tampa Office*”) observed an FM radio station operating on the frequency 107.5 MHz in the Port Charlotte, Florida area. Commission records showed no license issued for a station on this frequency in the Port Charlotte area. Using direction-finding techniques, the agents determined the source of the signal to be a residence located at 110 Triangle Street, Port Charlotte, Florida. The agents took field strength measurements of the station’s signal and determined that the station required a license to operate. The agents inspected the radio station and interviewed the operator, Wilner Simon. The agents orally warned Mr. Simon about the unlicensed radio operation. Mr. Simon voluntarily relinquished the unlicensed radio equipment to the agents.

3. On January 8, 2004, two agents from the Tampa Office observed a signal on the frequency 87.6 MHz in the Port Charlotte area. Using direction-finding techniques, the agents determined the source of the signal to be a residence at 110 Triangle Street, Port Charlotte, Florida. The agents could detect the signal at a distance of more than three miles from the source. Commission records showed no license issued for a station on this frequency in the Port Charlotte area.

4. On January 13, 2004, using direction-finding techniques, the two agents again detected a signal on the frequency 87.6 MHz. Using direction-finding techniques, the agents determined the source of the signal to be a residence located at 110 Triangle Street, Port Charlotte, Florida. A vertical dipole antenna was mounted on a tower attached to the residence. No audio or modulation could be detected on

¹47 U.S.C. § 301.

the signal's main carrier, but the agents observed that the signal broadcast a subcarrier, known also as Subsidiary Communications Authority, which is a separate audio or data channel transmitted along with the main audio signal over a broadcast station signal. Based on the field strength measurements taken by the agents, the station required a Commission authorization to operate.

5. Later on January 13, 2004, the agents attempted an inspection of the radio station broadcasting on 87.6 MHz at 110 Triangle Street, Port Charlotte, Florida. No one answered the agents' knocks on the door of the residence. However, the station broadcasting from this location ceased broadcasting while the agents knocked on the door.

6. On January 15, 2004, the agents interviewed Mr. Simon, the owner of the residence at 110 Triangle Street, Port Charlotte, Florida. Mr. Simon admitted to operating a broadcast station utilizing a subcarrier transmission from his residence on January 13, 2004 without an FCC license. Mr. Simon stated that his broadcasts were providing a service to the community. Mr. Simon also stated that he did not intend to cease broadcasting despite the agents' warnings of possible civil and criminal enforcement sanctions for unlicensed radio operation.

7. On April 20, 2004, the Tampa Office issued a *Notice of Apparent Liability for Forfeiture* to Mr. Simon in the amount of ten thousand dollars (\$10,000) for the apparent willful and repeated violation of Section 301 of the Act.² In response, Mr. Simon alleges he did not intend to violate the law, that he tried to obtain permits and/or licenses for his station, and that there are no alternatives to breaking the law because such alternatives are too costly and time-consuming. Moreover, Mr. Simon alleges that the Commission's licensing rules violate the First Amendment and that the Commission seized equipment in Mr. Simon's home pursuant to an illegal and unlawful search and seizure.

III. DISCUSSION

8. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,³ Section 1.80 of the Commission's Rules ("Rules"),⁴ 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) ("*Forfeiture Policy Statement*"). In examining Mr. Simon's response, 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 other such matters as justice may require.⁵

9. 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. Agents explained the requirements of Section 301 and the consequences for violating that provision to Mr. Simon on February 20, 2003. Such warnings, however, did not deter Mr. Simon from broadcasting without a license. Using direction-finding techniques, agents determined that Mr. Simon again operated radio transmitting equipment without the required

²*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432700016 (Enf. Bur., Tampa Office, April 20, 2004) ("*NAL*").

³47 U.S.C. § 503(b).

⁴47 C.F.R. § 1.80.

⁵47 U.S.C. § 503(b)(2)(D).

authorization on January 8 and 13, 2004. During the January 15, 2004 interview, Mr. Simon admitted that he operated a broadcast station without a license and stated he would continue to do so. Mr. Simon's response to the *NAL* does not dispute any of these facts. We find that Mr. Simon willfully⁶ and repeatedly⁷ violated Section 301 of the Act by operating radio transmitting equipment without the required authorization from the Commission on January 8 and 13, 2004.

10. Although Mr. Simon did not deny he violated Section 301 of the Act, his response challenges the constitutionality of the Act and the Commission's actions. Mr. Simon argues the Commission's licensing requirements and processes violate the First Amendment, because they limit who may use the radio airwaves. Mr. Simon also argues the Commission unlawfully searched his home and seized his equipment, without a warrant and without his consent. We disagree with all of Mr. Simon's assertions. The U.S. Supreme Court has repeatedly held that there is no constitutional right to use radio facilities without a license.⁸ In addition, the Commission's licensing processes are irrelevant to whether Mr. Simon operated radio transmitting equipment without the required authorization. Finally, on February 20, 2003 and January 15, 2004, Mr. Simon voluntarily agreed to the agents' request to inspect the radio station located on his premises. Therefore, a search warrant was not required. Moreover, Mr. Simon voluntarily relinquished the FM transmitting equipment he was using and signed a receipt, which stated he was the sole owner of the equipment and that he freely transferred title to such equipment to the Commission on February 20, 2003. Thus, the Commission never seized any of Mr. Simon's equipment.⁹

11. Finally, Mr. Simon requests that, if he is found to have violated the Act, the proposed forfeiture be reduced to \$50.00, because he exercised good faith to comply with the rules. As evidence of his good faith, he points out that he tried to obtain a low power FM ("LPFM") license. Although Mr. Simon may have applied for a LPFM license, he also knowingly transmitted without a license. Such actions do not constitute good faith efforts to comply with the Rules and do not warrant a reduction in the forfeiture amount.

12. We have examined Mr. Simon's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Mr. Simon willfully and repeatedly violated Section 301 of the Act and find no basis for cancellation

⁶Section 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" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁷As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

⁸See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); and *United States v. Dunifer*, 997 F.Supp. 1235 (N.D. Calif. 1998), aff'd on other grounds, 219 F.3d 1004 (9th Cir. 2000).

⁹We note that Mr. Simon's response alleged the Commission twice seized his equipment. This statement is factually incorrect. Mr. Simon voluntarily relinquished unlicensed radio equipment on February 20, 2003. The Commission has not received or seized any other equipment from Mr. Simon.

or reduction of the \$10,000 forfeiture proposed for this violation.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,¹⁰ Wilner Simon **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willfully and repeatedly violating Section 301 of the Act.

14. 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.¹¹ 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. 200432700016, and 0010511020. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹²

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Wilner Simon, 18265 Poston Ave, Port Charlotte, Florida 33948 and Pine Scott Price, 126 E. Olympia Ave., #405, Punta Gorda, Florida 33950.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁰47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹¹47 U.S.C. § 504(a).

¹²See 47 C.F.R. § 1.1914.