

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

In the Matter of	)	
	)	
FM Broadcast Station KNEC	)	File No. EB-99-DV-446
Arnold Broadcasting Company, Inc.	)	NAL/Acct. No. 915DV0001
Sterling, Colorado 80751	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 3, 2001**

**Released: January 5, 2001**

By the Chief, Enforcement Bureau:

1. In this Memorandum Opinion and Order ("Order"), we grant in part and deny in part the Petition for Reconsideration filed on February 24, 2000 by Arnold Broadcasting Company, Inc. ("Arnold"). Arnold seeks reconsideration of a *Forfeiture Order*,<sup>1</sup> in which the Chief, Enforcement Bureau, found that Arnold had willfully violated several sections of the Commission's Rules ("Rules"): Sections 11.35(a) (failure to install and maintain operable Emergency Alert System ("EAS") equipment); 11.61 (failure to conduct EAS tests and activations or maintain logs of tests or activations<sup>2</sup>); 17.4(g) (failure to post the antenna structure registration number at the base of the antenna tower); 73.1870 and 73.1350(b) (failure to designate and post the designation of a chief operator for the station); 73.1870(c)(3) (failure to have a chief operator review the station's records weekly and verify in the station log that KNEC operated in accordance with the Rules and its authorization); and 73.1225(c) and 73.1820(a) (failure to make the station's equipment performance measurements, written designation of chief operator, technical records, or EAS logs available to FCC representatives upon request<sup>3</sup>). In addition, KNEC's staff could not demonstrate compliance with 73.1350(a) and (b)(2) during the inspection by showing that the transmitter control system in place would allow station personnel to control the transmitter manually or via telephone line, nor could they show that they were capable of shutting the transmitter off within three minutes, as is required by the Rules. Although we determined that Arnold violated all of the aforementioned sections of the Rules, we held it liable only for violating Sections 11.35, 73.1350, 73.1820, and 73.1870, and we issued a \$16,000 forfeiture for violating only these sections. For the reasons discussed below, we affirm the issuance of the forfeiture but reduce the amount to \$14,000.

2. Arnold's Petition for Reconsideration ("Petition"), requests that the Enforcement Bureau ("Bureau") specify the amounts assessed for each violation and state whether we arrived at the forfeiture amount by using any upward or downward adjustments. In this regard, Arnold

<sup>1</sup> *Arnold Broadcasting Company, Inc.*, 15 FCC Rcd 2704 (Enf. Bur. 2000).

<sup>2</sup> *See also*, 47 C.F.R. §§ 11.54 and 11.55.

<sup>3</sup> 47 C.F.R. §§ 11.35, 11.61, 17.4, 73.1225, 73.1350, 73.1820, 73.1870.

argues that the forfeiture amount is excessive and should, at most, be \$11,000 in accordance with Section 1.80 of the Rules.<sup>4</sup> We calculated the forfeiture against Arnold as follows: \$8,000 base amount for the  $\S$  11.35 violation adjusted upward by \$2,000 (\$10,000); \$3,000 base amount for the  $\S$  73.1350 violations adjusted upward by \$1,000 (\$4,000); \$1,000 base amount for the  $\S$  73.1820 violation; and \$1,000 for the  $\S$  73.1870 violation. We made an upward adjustment of \$2,000 to the forfeiture amount for the  $\S$  11.35 violation because the principal of the licensee, Mr. William G. Arnold, has over 35 years experience in the broadcast industry and has served as a local EAS chairman. We made an upward adjustment for the  $\S$  73.1350 violation for being particularly egregious because of the potential for causing interference to other licensed stations should KNEC begin operating outside its authorized limits with no way of turning the transmitter off within three minutes in accordance with the Rules.

3. In its Petition, Arnold asserts that not conducting EAS tests and activations and not logging such tests and activations are violations that are subsumed within each other, and thus should not be considered separate violations for purposes of determining the forfeiture amount. Though these are separate violations, in this case we assessed a forfeiture amount against Arnold only for not having EAS equipment installed and operational. We did not assess a separate forfeiture amount for failing to conduct EAS tests and then another separate amount for not logging tests that it had not conducted.

4. Regarding the  $\S$  73.1225(c) violation, Arnold acknowledges that it did not have certain written records at the time of the inspection, but argues that "the fact the records did not exist does not constitute the separate violation of failure to make records available to FCC representatives upon request." Although we found that Arnold violated  $\S$  73.1225(c) by not making requested records available to the FCC agents conducting the inspection, it is not necessary to address this argument because we did not assess a separate forfeiture amount against Arnold for this violation.

5. Further, Arnold contends that the Bureau's finding that "it is unclear from the response whether KNEC's technical staff is able to determine the technical parameters of the transmitter" is insufficient to support a finding that Arnold did not have an adequate transmitter control system in place and thus, to assess a forfeiture. Section 73.1350(b) of the Rules requires that the licensee designate one or more technically competent persons to adjust the transmitter operating parameters for compliance with the technical rules and the station authorization. Further,  $\S$  73.1350(b)(2) requires that the transmitter control personnel be capable of turning off the transmitter at all times. If the transmitter control personnel are located at a remote site, they must be capable of turning the transmitter off within three minutes of the event that requires shut-down. In the response to the NAL, Mr. William G. Arnold stated that "KNEC operates according to automatic transmitter rules," and thus, "the operator at the studio can shut the transmitter off within three minutes by shutting the audio off." It may well be the case that KNEC operates under such a system; however, it was clear during the inspection that the duty operator, Jeremy Weathers, who was the only person at the station during the inspection other than the receptionist, was not aware of such an operational system and thus, could not use it to shut the transmitter off within three minutes. When asked, during the inspection, to demonstrate the transmitter control system, Mr. Weathers replied that the station could not be controlled from the studio manually or via telephone line, and stated that the only transmitter control for the station was at a site six

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<sup>4</sup> 47 C.F.R.  $\S$  1.80; *See also The Commission's Forfeiture Policy Statement and Amendment to Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 13 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

miles south of Yuma, Colorado. Mr. Weathers also stated that it would not be possible to drive from the studio to the transmitter site in three minutes. Section 73.1350(b) requires that there be someone at the station who is technically competent to effectuate compliance with the rule. It is not sufficient merely to have an operational system in place that complies with the rule. There must be someone at the station who knows how to operate the system. At the time of the inspection, there was not. Thus, KNEC was in violation of § 73.1350(b) at the time of the inspection and a separate forfeiture amount was assessed for this violation.

6. Regarding the EAS violations, Arnold asserts that no forfeiture should be assessed for KNEC's failure to have EAS equipment installed and operational because the EAS equipment had been timely ordered but had to be back-ordered by the manufacturer, and, thus, had not arrived by the time KNEC went on the air, resulting in a situation beyond KNEC's control. Arnold also contends that it was in the public interest to have KNEC on the air, even though it had no EAS equipment, because it was the only broadcast station in Yuma, Colorado. Section 11.11 of the Rules provides that AM and FM broadcast stations have installed and operational EAS equipment effective January 1, 1997. Arnold concedes that it violated this requirement; however, we believe that a reduction of \$2,000 to the base amount of \$8,000 is appropriate given Arnold's good faith effort to comply with the Rule by ordering equipment. However, we do not believe a further reduction on this basis is appropriate. Arnold knew it had EAS obligations. It ordered EAS equipment and its principal was an experienced broadcaster who had been a local EAS chairman; yet, it went ahead and violated the rule without first seeking and obtaining a waiver. Under these circumstances, we believe a balance of factors makes an \$8,000 forfeiture appropriate.

7. Arnold takes issue with the fact that the forfeiture amount was adjusted upward because the principal owner of Arnold Broadcasting is a "seasoned broadcaster," having been in the broadcast industry for 35 years and having also previously served as a local EAS chairman. Arnold contends that the Commission's *Forfeiture Policy Statement* does not provide for upward or downward adjustments based upon the experience of the broadcaster. It is true that the *Forfeiture Policy Statement* does not explicitly provide for upward or downward adjustments based upon the experience level of the licensee. However, the specific criteria for upward and downward adjustments can be affected by the degree of experience the licensee possesses inasmuch as this can be relevant to egregiousness or intent. Here, it is particularly troublesome that the principal of Arnold was found to be in violation of the EAS rules by not having EAS equipment installed and operational, when he had previously served as a local area EAS chairman. Thus, the forfeiture amount for the EAS violation was, appropriately, adjusted upward, although we now lower it to \$8,000 for the reasons discussed above.

8. Finally, Arnold asserts that the forfeiture amount should have been adjusted downward because the EAS violation was minor and because Arnold has a good history of overall compliance. We do not believe that not having the required EAS equipment, and therefore, not being able to participate in the EAS program is a minor EAS violation. Further, a search of the Commission's records indicates that at least four other broadcast stations of which Arnold is the licensee have been inspected and issued Official Notices of Violation between the time KNEC was inspected on May 19, 1999 and February 24, 2000, the date the Petition was filed. Consequently, although Arnold represents in its Petition that "during the entire period that Arnold has owned" stations KSTC, KNNG, KFTM, and KBRU, "none of them has ever been cited for any rule violations," that statement does not appear to be accurate. Therefore, no downward adjustment for an overall history of good compliance is warranted in this case.

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.106 of the Rules,<sup>5</sup> the Petition for Reconsideration of the *Forfeiture Order* in this proceeding is hereby **GRANTED IN PART AND DENIED IN PART**.

10. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, Arnold Broadcasting, Inc. must pay the amount of fourteen thousand dollars (\$14,000) within thirty (30) days of the release date of this Order. Payment may be made by check or money order, drawn on a U.S. financial institution, payable to the Federal Communications Commission.<sup>6</sup> The remittance should be marked "NAL/Acct. No. 915DV0001 and mailed to the following address:

Federal Communications Commission  
P.O. Box 73482  
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

11. **IT IS FURTHER ORDERED** that, a copy of this Order shall be sent by certified mail, return receipt requested, to Arnold Broadcasting Company, Inc., P.O. Box 830, 803 West Main, Sterling, Colorado 80751 and to its counsel David Tillotson, Esq., 4606 Charleston Terrace, N.W., Washington, DC 20007-1911.

#### FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>5</sup> 47 C.F.R. § 1.106.

<sup>6</sup> Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Requests for installment plans should be mailed to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554.