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

DISPATCHED BY

In Matter of)	CIB DOCKET NO. 98-44
)	
JOSEPH FRANK PTAK)	
San Marcos, Texas)	
)	
Order to Show Cause Why a Cease and)	
Desist Order Should Not Be Issued)	

Appearances

Joseph Frank Ptak, pro se; Pamela D. Hairston, Chief, Compliance Division, James W. Shook, Attorney and W. Riley Hollingsworth, Attorney, Compliance and Information Bureau

**SUMMARY DECISION
OF
ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Adopted: July 1, 1998

Released: July 6, 1998

PRELIMINARY STATEMENT

1. This is a ruling on Compliance and Information Bureau's Motion for Summary Decision that was filed on June 2, 1998. There has been no responsive pleading filed by the named respondent Joseph Frank Ptak ("Ptak"). See 47 C.F.R. §1.251(b) (fourteen days allowed to oppose motion for summary decision).

2. On June 16, 1998, there was filed by Mr. Ptak, in one pleading, Motions for Continuance and Extension of Time, Administrative Dispute Resolution, Telephone Status Conference Call, Appeal of Order 98M-62, and Stay of FCC Actions. The Bureau has not filed a responsive pleading. Since the Motion for Summary Decision is granted, the multiple forms of relief sought by Mr. Ptak become moot at this stage of the proceeding. There were no reasons stated that would warrant a stay. Mr. Ptak states that he has not had time to retain a competent replacement for former counsel who is deceased. There is no indication when or if such counsel will be retained. He also seeks an ADR forum. But this case does not qualify for any alternative resolution other than cessation of operations. Mr. Ptak requests a status conference. But a

conference was held on May 19, 1998, and Mr. Ptak failed to appear. Finally, Mr. Ptak seeks a change of venue to San Marcos for hearing this case. But in view of this final summary disposition, the question of venue for hearing is moot.

FINDINGS OF FACT

3. On April 6, 1998, pursuant to Section 312 (c) of the Communications Act of 1934, as amended, the Commission released Order to Show Cause and Opportunity for Hearing, FCC 98-60, directing Mr. Ptak to show cause why the Commission should not issue a cease and desist order which prohibits further unauthorized transmissions. The Commission also placed Mr. Ptak on notice pursuant to Section 1.80(g) of the Commission's Rules [47 C.F.R. §1.80(g)] to determine whether a forfeiture in the amount not to exceed \$11,000 should be imposed. See Order to Show Cause at Para. 12 and n.1.

4. On May 8, 1998, in accordance with Section 1.246 of the Commission's Rules, the Bureau mailed to Mr. Ptak by first class mail, return receipt requested, a Request for Admission of Facts and Genuineness of Documents ("Bureau Request"). See Motion For Summary Decision at Exh.1 and Exh.2.) The Return Receipt (Exh.2) shows that Mr. Ptak received the Bureau request on May 12, 1998. The Rules provide in pertinent part that:

"[e]ach of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof, --- the party to whom the request is directed serves upon the party requesting the admission either [a response or an objection].

47 C.F.R. §1.246(b). (Emphasis added.) It is determined from the record that responses or objections were due to be filed by May 22, 1998. Mr. Ptak filed late on June 16, 1998, a Response to Request for Admissions of Fact ("Ptak's Response"). Because the pleading was filed late, Mr. Ptak is in default. Therefore, the Bureau's Request is deemed admitted. Mr. Ptak's untimely Response will be considered only insofar as it contains relevant material that does not contradict the matters deemed admitted.

5. It is determined as findings of fact that Mr. Ptak is the owner or renter of a residence dwelling located at 505 Patricia Drive, San Marcos, Texas. From March 26, 1997, through May 22, 1998, and presumably to the present, Mr. Ptak himself and/or with the assistance and cooperation of others, has operated an unlicensed FM radio station at the Patricia Drive dwelling using the self-assigned call sign "KIND." The unlicensed station transmits daily (7 days per week) from eighteen (18) to twenty four (24) hours per day on 105.9 MHz.

6. The hearing record establishes and Mr. Ptak admits that he does not hold any authorization from the Commission to transmit radio signals on 105.9 MHz at San Marcos, Texas.¹ Mr. Ptak has transmitted a signal strength which has uniformly exceeded 250 microvolts/meter at 3 meters.² On April 9, 1997, Bureau inspectors James D. Wells and Lloyd P. Perry identified themselves as FCC employees and personally advised Mr. Ptak at the Patricia Drive dwelling that the operation of the station was in violation of federal law. These agents for the Commission ordered Mr. Ptak to discontinue operations. (Exhs. 3 and 4.) As a follow-up, by letter dated April 17, 1997, addressed to "Joseph Frank Ptak, 505 Patricia, San Marcos, TX 78666," the Bureau advised in bold type:

"Operation of radio transmitting equipment without proper authority granted by the Commission should cease immediately."

(Motion for Summary Decision, Exh. 1, Attachment A.) The same letter specifically advised Mr. Ptak that an "[u]nlicensed operation is a violation of Section 301 of the Act, 47 U.S.C. §301, and may subject the operator to substantial monetary fines, in rem forfeiture action, and criminal sanctions including imprisonment." (Motion for Summary Decision, Exh. 1, Attachment A.) Mr. Ptak admits having received the letter. (Ptak's Response, Para. 11.) Despite these warnings from the Commission staff, Mr. Ptak has continued to operate the station.

7. Mr. Ptak represented in his late-filed Response of June 12, 1998, that he is not the owner of the dwelling at 505 Patricia Drive but that he rents living quarters there. He contends that the Hays County Guardian, described by Mr. Ptak as a "multi-media news gathering organization," and "not Ptak solely", has operated the station. Mr. Ptak represents that "[o]n March 18, 1997, the Hays County Guardian applied for authorization to generate and emit radio frequency energy at 105.9 MHz from the FCC in a letter including a check for \$25 for processing fees ---." Mr. Ptak admits that on April 9, 1997, Commission inspectors Wells and Perry orally advised him to cease the station's operations. Mr. Ptak represents that he stated to these Commission agents that the station would continue to operate until a "Judge with proper jurisdiction" ordered the station operations to cease. Mr. Ptak asserts that "we were already in a dialogue with the Gettysburg office of the FCC for authorization via a waiver" and that

¹ The corresponding channel for the 105.9 MHz frequency is allocated to Round Rock, Texas, a community to the north of San Marcos. See Motion for Summary Decision at n.2. Mr. Ptak asserts that the frequency was taken over by a corporation that only was interested in broadcasting for the Austin market. A standard AAA road map shows that Austin is proximate to Round Rock, 40 to 45 miles distant from San Marcos.

² The declarations of James D. Wells and Lloyd P. Perry, Commission employees holding degrees in Electrical Engineering, attest to an opinion based on a first-hand determination of an external antenna height over 20 feet in height and a signal reception of over 10 miles that the radio transmitting equipment used by Mr. Ptak over frequency 105.9 exceed the low power limits prescribed by the Commission under 47 C.F.R. Part 15. See Motion for Summary Decision at Exhs. 3 and 4.

therefore there was no need to reply to the Bureau's letter of April 17, 1997, or to cease station operations. The substance of the position asserted by Mr. Ptak is that the station provides a local outlet for views that are protected by the First Amendment of the Constitution of the United States, that authorization has been requested and/or a waiver has been sought, and there has been no response. (See Ptak's Response, Paras. 7-12.)

CONCLUSIONS OF LAW

8. The Rules of practice provide that:

The party filing the motion --- must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, the Bureau has the burden of establishing that summary decision would be appropriate based on its papers. Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972). The Commission policy on summary decision has taken into consideration the possibility of unfairness in using summary decision against parties who appear without counsel. Id. at 488. But where as here, the issues are more simple than complex and the respondent has personal knowledge of the facts, the Presiding judge has discretion to apply summary decision.³ Id. Mr. Ptak has shown through his pleadings that he understands the procedures and the issues and that he has first-hand knowledge of the facts. Therefore, in view of the public interest in licensing radio stations, this case is deemed to be one that is appropriate for immediate summary disposition.

9. The Rules of Practice also provide that:

[A] party opposing the motion may not rest upon mere allegations or denials, but must show by affidavit or otherwise provided in this section, that there is a genuine issue of fact for determination at the hearing.

³ The case has been under investigation since at least April 9, 1997. Mr. Ptak has had ample opportunity to obtain legal representation by the time the Bureau filed its Motion for Summary Decision on June 2, 1998. Mr. Ptak has previously referred the Bureau staff to J. Patrick Wiseman, Esq. Mr. Ptak has advised in a recent pleading that Mr. Wiseman is deceased. But there has been no categorical denial by Mr. Ptak that there was no other legal advice available to him. From the nature of pleadings filed by Mr. Ptak, it appears that there is legal counsel advising Mr. Ptak.

47 C.F.R. §1.251(d). There is no reason why Mr. Ptak could not have filed appropriate affidavits or declarations if there was a defense to the central issue of his operating the station without a license. Even his late-filed Response admits that he received the Bureau's warning of April 17, 1997, and that he intends to continue operating the station without a license or waiver to operate without a license. The ultimate fact is admitted: Mr. Ptak continues to operate a radio station on 105.9 MHz and he will not terminate operations unless ordered by a Judge. Thus, there remains no genuine issue of material fact to litigate.

Cease And Desist

10. Section 301 of the Communications Act of 1934, as amended, (the "Act") provides:

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 this Act and with a license in that behalf granted under the provisions of this Act.

47 U.S.C. §301. Under Part 15 of the Commission's Rules, there is an exception provided for licensing where the strength of the emissions do not exceed a set standard.

The field strength of any emissions within the permitted 200 kHz band shall not exceed 250 microvolts/meter at 3 meters. The emission limit in this paragraph is based on measurement instrumentation employing an average detector. ---.

47 C.F.R. §15.239(b). The Declarations of Commission agents James D. Wells and Lloyd P. Perry, both of whom are Electrical Engineers, constitute substantial evidence that the Commission has used "sophisticated mobile automatic direction finding (MADF)" to measure the station's signal. That signal was monitored "approximately 10 miles South of San Marcos" as exceeding the power limits prescribed in Part 15 of the Rules. (See Motion for Summary Decision at Exh. 3, Wells Declaration; and Exh. 4, Perry Declaration.)

11. The Bureau has shown by a preponderance of substantial evidence that summary decision is warranted on the issue of the unauthorized operation of an unlicensed radio station and the issuance of a cease and desist order. See U.S. v. Dunifer, 1998 WL 315121 (N.D. Cal. 1998). In issuing an injunction against an unlicensed station operator, the U.S. District Court in Dunifer enforced the Commission's findings and conclusions that the licensing regulations do not violate the Constitution and that enforcement of the requirement for radio broadcasters to be licensed does not require a specific showing that the unlicensed radio transmission has caused or may cause harmful interference. See In re Application for Review of Stephen Paul Dunifer, Memorandum Opinion and Order FCC 95-333, released August 2, 1995, at Para. 22, 11 F.C.C. Rcd 718, 720-21 (1995). Under both Dunifer decisions, Mr. Ptak's Constitutional defense is summarily defeated and the Bureau has made a sufficient showing for a cease and desist order.

12. Nor is there an equitable defense available based on Mr. Ptak's letter application for instructions about a license and/or request for a waiver. The Commission has set procedures for processing applications for licenses (47 C.F.R. §73.3573) and for requesting a waiver (47 C.F.R. §1.3). The Commission need not grant a waiver unless an application sets out adequate reason why the rules should be waived." U.S. v. Storer Broadcasting Co., 351 US 192, 205 (1986). In order to justify a waiver, the Mass Media Bureau would require a correctly completed license application. U.S. v. Dunifer, supra at 3, 5. The Commission is only required to consider a "correctly plead application for a waiver" which is "meritorious." U.S. v. Dunifer, supra at 5, citing Wait Radio v. F.C.C., 418 F. 2d 1153, 1156 (D.C. Cir. 1969). Since Mr. Ptak has only submitted informal and unsupported waiver requests by letter, he has not met the standard requiring the Commission to give any consideration to the request. Mr. Ptak, and/or any person or entity with whom he may be associated, has failed to make application under the prescribed procedure for a license to operate on frequency 105.9 MHz at San Marcos, Texas, or for a waiver from licensing.

13. The mere submission of correspondence without the proper application form does not comply with the Commission Rules. The correspondence includes five letters. The latest is dated March 18, 1998. The letters merely inform the Commission on how the station will continue to be operated without a license or waiver. There is no indication that Mr. Ptak is serious about undertaking any license application procedure or waiver request. Mr. Ptak has stated in his various letters: "Well we recently heard about a court case in California about micro-radio [Dunifer] and we realized that was our station." "So if you do not have a category for what we are or what we are doing (free speech), then how about issuing us one of your waivers. it would be greatly appreciated." (Undated letter.) "The last we hear from you all was for us to apply for a license so you could consider us for a waiver. Give us a break, we are still trying to figure how to apply for a license under 100 watts when you don't issue licenses under 100 watts. Maybe you are all into eastern paradox but we do not really appreciate being sent on a wild goose chase by your office." (Letter dated November 30, 1997.) "So ya'll still have'nt told us how to apply for a license under 100 watts when ya'll don't issue license (sic) under 100 watts. That's why originally we asked for a waiver!" (Letter dated January 10, 1998) "[W]e have already asked for a waiver and this is more then due since we don't cross no state lines and we are out of your jurisdiction, but if you put a federal station over our state station then by golly your (sic) have gone to far and violated our state rights." (Letter dated January 24, 1998.) "Before we went on the air, we told the FCC what we planned to do and asked for the licensing requirements which would be appropriate for our type of transmission [less than 100 watts]." "We are using new technology to provide our community with a vital service and [we] are the microbroadcasting 'good guys'." (Letter dated March 18, 1998.) These letters were written to the agency while Mr. Ptak was broadcasting in direct contradiction to the oral and written warnings and instructions from Messrs. Wells and Perry to cease operations. The letters are direct evidence of a clear intent to continue broadcasting without a license or a waiver.

14. The Presiding Judge has taken into account the extensive pleadings and the correspondence filed by Mr. Ptak since the commencement of this case. Except for ex parte communications that were rejected⁴, the Presiding Judge has considered each of the issues raised or has stated reasons why the issues cannot be considered. At the Prehearing Conference which Mr. Ptak failed to attend⁵, bench rulings were made on a rash of requests for discovery, change of venue, extension of filing dates, in forma pauperis relief, modified filing dates, Constitutionality Of the Order to Show Cause and compliance with the Administrative Procedure Act; and multiple motions for party status. See Order FCC 98M-62, released May 22, 1998. Mr. Ptak emphatically takes the clearly erroneous position that notwithstanding the statutory requisite for license or waiver, the United States Constitution protects the unlicensed radio broadcasting activities in San Marcos, Texas. There is no intention to cease those activities without an Order from an adjudicative forum. There would be no authority or purpose for reconsidering the Constitutional issues that Mr. Ptak previously sought to raise in this case which have been resolved by the Commission and U.S. District Court Dunifer decisions. C.f. 47 C.F.R. §1.106(a)(1) and (b)(3) (requests for reconsideration not authorized and those which fail to rely on new facts or circumstances may be dismissed as repetitious). There is no showing made by Mr. Ptak in any pleading that justifies further delaying the relief sought by the Bureau for an order prohibiting further broadcasting in San Marcos on 105.9 MHz.

Forfeiture

15. "[U]nlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act." Robert J. Hartman, 9 F.C.C. Rcd 2057 (FOB 1994), citing Mebane Home Telephone Co., 51 Radio Reg. 2d (P&F) 926 (CCB 1982). Section 503 (b)(2)(C) of the Act provides for a forfeiture in an amount not to exceed \$11,000 for each day of a continuing violation not to exceed \$82,500 for any single act or failure to act. 47 U.S.C.

⁴ See Order FCC 98M-53, n.3, released May 1, 1998 (ex parte communication from John Backus soliciting listeners); and Order FCC 98M-68, released June 3, 1998 (ex parte correspondence from Mayor of San Marcos). These ex parte communications were not considered by the Presiding Judge but were processed in accordance with the Rules. See 47 C.F.R. §1.1208 and §1.1214.

⁵ Mr. Ptak did not contact the Bureau or the Presiding Judge to ask for a telephone conference until June 16, 1998, which was after the Bureau filed its Motion for Summary Decision. As a logistical matter, it is necessary to arrange in advance for a courtroom speakerphone. Without an advance request, there is no facility at an initial conference for a party to participate by telephone. The applicable Rule provides that an "initial prehearing conference shall be scheduled for 30 days after the effective date of the order designating a case for hearing, unless good cause is shown for scheduling such conference at a later date." 47 C.F.R. §1.248(a). The initial prehearing conference was set in the assignment order for May 19, 1998. Order FCC 98M-46, released April 16, 1998. Mr. Ptak did not contact the Bureau or the Presiding Judge to indicate that he could not or would not attend the initial conference or to indicate that he desired to participate by speakerphone.

§503(b)(2)(C). In determining a forfeiture penalty, there is to be considered "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." 47 U.S.C. §503(b)(2)(D).

16. In seeking a forfeiture, the Bureau argues that the continuing violations of Mr. Ptak in his operating the unlicensed San Marcos station without a waiver are willful and repeated. The evidence discloses that the violations have been occurring since before the on-site inspection on April 9, 1997, and that the explicit verbal admonitions from Commission agents Wells and Perry to cease operations were not obeyed. By letter dated April 17, 1998, Mr. Ptak received a "Warning for Unlicensed Operation of Radio Transmitting Equipment" wherein he was advised to "cease immediately." (Motion for Summary Decision, Att. A.) Yet he continued operating the station. The nature, circumstances, extent and gravity of the ongoing violation warrants a forfeiture in the amount sought by the Bureau.

17. There is no evidence in the record that would indicate an inability on the part of Mr. Ptak to pay a forfeiture in the amount of \$11,000.⁶ See 47 C.F.R. §503(b)(2)(D); 47 C.F.R. §1.80(f)(3). See also Dunifer, supra; Group Six Communications, Inc. 8 F.C.C. Rcd 3111, Para. 4 (1993); Metro Media Broadcasting, Inc., 8 F.C.C. Rcd 323 Paras. 4-5 (1992). Mr. Ptak has not made any good faith effort to comply with the Act or with the Commission's licensing requirements under the Rules or to seek a waiver under the Rules. He failed to follow set procedures in applying for a waiver and he blatantly continues to operate. Further, he has consistently maintained an intention to continue operating the station unlawfully until ordered to cease by a Judge. Therefore, there is no cause shown by Mr. Ptak for not imposing a forfeiture of \$11,000 in addition to ordering him to cease and desist.

Rulings

Accordingly, IT IS ORDERED that effective upon the release date of this Summary Decision,⁷ Joseph Frank Ptak SHALL CEASE AND DESIST from making radio transmissions within the United States unless and until he first obtains a license or waiver from the Federal Communications Commission.

IT IS FURTHER ORDERED that effective upon the release date of this Summary Decision, all persons in active concert or participation with Joseph Frank Ptak SHALL CEASE AND DESIST from doing any act, whether direct or indirect, to cause unauthorized radio transmissions or to enable any such radio transmission to occur.

⁶ The request to proceed in forma pauperis was denied for a failure to state a sufficient basis. See Order FCC 98M-62, released May 22, 1998, at 3.

⁷ 47 C.F.R. §1.103(a) (effective date of any Commission action shall be the date of public notice of such action).

IT IS FURTHER ORDERED that pursuant to Section 503(b)(2)(C)(D) of the Communications Act of 1934, as amended and Section 1.80(g) of the Commission's Rules, Joseph Frank Ptak IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$11,000 for operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED that pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Summary Decision shall constitute an Order of Forfeiture in the amount of \$11,000.

IT IS FURTHER ORDERED that within 30 days after the date this Summary Decision becomes final,⁸ Joseph Frank Ptak shall pay the full amount of the forfeiture by check or money order made payable to the Federal Communications Commission. The remittance should identify the payor and be marked "NOH Control No. 98-44; FCC 98D-2" and mailed to the following address:⁹

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

IT IS FURTHER ORDERED that a copy of this Summary Decision shall be sent to Joseph Frank Ptak by prepaid Certified Mail Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁸ This Summary Decision becomes final and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case. 47 C.F.R. §1.276(b) and 47 C.F.R. §1.251(e).

⁹ 47 C.F.R. §1.80(g)(h) (instructions for payment of forfeiture under Notice of Opportunity for Hearing [NOH]).