

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

In re Application of	)	
	)	
Saver Media, Inc.	)	Facility ID No. 190414
	)	NAL/Account No. MB-201441410029
to Modify the Construction Permit for	)	FRN: 0022637102
KQTC(FM), Eldorado, Texas	)	File No. BMPH-20130725ADU

**MEMORANDUM OPINION AND ORDER  
AND  
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: July 31, 2014**

**Released: July 31, 2014**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. We have before us an application ("Application") filed by Saver Media, Inc. ("Saver") to modify the construction permit for KQTC(FM), Eldorado, Texas ("Station"). We also have before us an Informal Objection ("Objection") filed by Danny Ray Boyer ("Boyer").<sup>1</sup> For the reasons set forth below, we find that Saver apparently willfully and repeatedly violated Section 319(a) of the Communications Act of 1934, as amended ("Act"),<sup>2</sup> by prematurely constructing facilities proposed in the Application. We conclude that Saver is apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000).<sup>3</sup> We also grant in part and deny in part the Objection, and grant the Application.

**II. BACKGROUND**

2. Tony Cuellar ("Cuellar") was the winning bidder for the Eldorado, Texas allotment in FM Auction 93.<sup>4</sup> Cuellar timely filed an application ("2012 CP Application") for a construction permit for a new FM station at Eldorado, Texas.<sup>5</sup> Boyer filed a Petition to Deny this application. Therein, he claimed that Cuellar had attempted to or intended to deceive the Commission regarding a past felony conviction. We denied the Petition to Deny and granted the 2012 CP Application on February 20, 2013.<sup>6</sup>

<sup>1</sup> Boyer filed a Supplement to Informal Objection ("Supplement") on January 23, 2014. Tony Cuellar ("Cuellar") – one of the principals of Saver – filed responses on February 3, 2014 and May 9, 2014.

<sup>2</sup> 47 U.S.C. § 319(a).

<sup>3</sup> We issue this Notice of Apparent Liability pursuant to Sections 319(a) and 503(b) of the Communications Act of 1934, as amended ("Act"), and Section 1.80 of the Commission's rules ("Rules"). See 47 U.S.C. §§ 319(a), 503(b); 47 C.F.R. § 1.80. We have delegated authority to do so under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

<sup>4</sup> *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction 93*, Public Notice, 27 FCC Rcd 4056 (WTB/MB 2012).

<sup>5</sup> File No. BNPH-20120529ALB.

<sup>6</sup> Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Anthony T. Lepore, Esq. and Lee J. Peltzman, Esq. (dated Feb. 20, 2013).

Shortly thereafter, Cuellar filed an application ("Assignment Application") to assign the Station's construction permit to Saver. The Assignment Application indicated that Saver was a Texas corporation owned by Cuellar and his wife.<sup>7</sup> Boyer did not oppose this application. We granted it on April 10, 2013. A few months later, Saver filed the Application. Boyer then filed the Objection. Therein, he asserts that Saver engaged in premature construction of the facilities proposed in the Application and that Saver violated certain Federal Aviation Administration ("FAA") rules regarding tower lighting. He also alleges that Saver and/or Cuellar misrepresented facts to the Commission in the 2012 CP Application and the Assignment Application.

### III. DISCUSSION

#### A. Premature Construction

3. Section 319(a) of the Act states, in pertinent part, that "[n]o license shall be issued under the Authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission."<sup>8</sup> Section 319 was enacted to ensure that applicants do not use incurred expenses as a means of exerting improper pressure upon the Commission to grant an application.<sup>9</sup> It forecloses the Commission from issuing a license when the "entire station" has been constructed prior to the grant of a construction permit.<sup>10</sup> This prohibition on premature construction of a broadcast station is not absolute though. The Commission has sanctioned certain types of pre-authorization construction, including site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other preliminary steps having no intrinsic broadcast use.<sup>11</sup> Pre-authorization construction of towers or installation of radio antennas, however, is strictly prohibited.<sup>12</sup>

4. Boyer alleges that Saver prematurely constructed the facility proposed in the Application in violation of Section 319(a) of the Act.<sup>13</sup> He submits evidence that Saver has constructed the tower on which it proposes to mount the Station's transmitter and has taken delivery of a transmitter building. Boyer notes that this tower is approved for the frequency assigned to the Station and no others. Thus, he argues that "the tower has no other purpose other than to serve this proposed facility."<sup>14</sup> Saver does not dispute that it constructed the tower. Instead, it explains that it plans to lease space on the tower to other

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<sup>7</sup> File No. BAPH-20130228AKP.

<sup>8</sup> 47 U.S.C. § 319(a).

<sup>9</sup> See, e.g., *Patton Communications Corp.*, Letter, 81 FCC 2d 336, 337 (1980) ("*Patton*"); *WSAV, Inc.*, Memorandum Opinion and Order, 19 FCC 736 (1955), *aff'd sub nom. WJIV-TV, Inc. v. FCC*, 231 F.2d 725 (D.C. Cir 1956).

<sup>10</sup> *Christian Broadcasting of the Midlands, Inc.*, Order, 103 FCC 2d 375, 378 ¶ 5 (1986) ("*Christian Broadcasting*").

<sup>11</sup> See, e.g., *Manahawkin Communications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 342, 355-56 ¶ 22 (2001) (premature construction does not warrant denial of the application); *Wendell & Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679-80 ¶ 24 (1998). See also *MCI Communications Corporation*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 509 ¶ 5 (1988), *modified*, Supplemental Order, 4 FCC Rcd 7299 (1988), *appeal dismissed by judgment sub nom. TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990); *Christian Broadcasting*, 103 FCC 2d at 377 ¶ 3, *Patton*, 81 FCC 2d at 337-38.

<sup>12</sup> *Westinghouse Broadcasting Co., Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1171, 1173 ¶¶ 12-13 (1974), *Merrimack Valley Communications, Inc.*, Memorandum Opinion and Order, 20 FCC 2d 161, 163 ¶¶ 8-9 (1969), *rehearing denied*, Memorandum Opinion and Order, 21 FCC 2d 440 (1970).

<sup>13</sup> Objection at 2-3.

<sup>14</sup> Objection at 3.

entities for the provision of other communications services.<sup>15</sup> Saver acknowledges that the tower is not yet approved for the frequencies utilized by these other services but states that it will have all frequencies approved by the Federal Aviation Administration (“FAA”) prior to installation of any equipment on the tower. Finally, Saver notes that it has not mounted the Station’s antenna on the tower.

5. Saver appears to be arguing that it constructed the tower for a legitimate alternative purpose and thus did not violate the prohibition against premature construction. However, Saver has not adequately demonstrated that it constructed the tower for any such purpose. For instance, Saver mentions leasing tower space to another company for installation of a “wireless internet hub” but does not offer a copy of any agreement with that company. In addition, Saver does not identify any other Commission licensees authorized to use the tower. Given this, we find that Saver apparently willfully and repeatedly violated Section 319 of the Act.

#### **B. Tower Lighting**

6. Section 303(q) of the Act states that antenna structure owners shall maintain the lighting of antenna structures as prescribed by the Commission.<sup>16</sup> Based on FAA recommendations, the Commission requires that antenna structures exceeding 200 feet above ground level be lit with red obstruction lighting at night.<sup>17</sup> It also has specified that, during construction of an antenna structure for which red obstruction lighting is required, at least two red obstruction lights must be installed at the uppermost point of the structure.<sup>18</sup> In addition, as the height of the antenna structure exceeds each level at which permanent obstruction lights will be required, the Commission requires that two similar lights be installed at each such level. If an obstruction light on an antenna structure is extinguished or malfunctioning and such extinguishment or malfunction is not corrected within 30 minutes, the Commission requires the owner of the antenna structure to immediately report this to the nearest Flight Service Station or office of the FAA.<sup>19</sup>

7. Boyer alleges that, at various times during its construction, the tower lacked temporary or permanent obstruction lighting and that this violated Commission rules governing tower lighting.<sup>20</sup> In response, Saver states that the medium intensity strobe system required by the FAA was installed and fully operation as of January 25, 2014.<sup>21</sup> Saver submits an email from its technical consultant explaining that he was unable to install the system at the time the tower reached 200 feet about ground level because the manufacturer “had not yet shipped” it.<sup>22</sup> The consultant notes that, as specified in Section 17.48 of the Rules, he contacted the Flight Service Station and requested issuance of a Notice to Airmen (“NOTAM”). He indicates that he contacted the Flight Service Station and obtained two additional NOTAMs, the last of which was valid through January 25, 2014.

8. We find that Saver complied with the Commission’s rules governing tower lighting. While the tower did not have obstruction lighting or did not have all required obstruction lighting at

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<sup>15</sup> Letter from Tony Cuellar to Rodolfo F. Bonacci, Assistant Chief, Audio Division, Media Bureau (rec’d Feb. 3, 2014).

<sup>16</sup> 47 U.S.C. § 303(q).

<sup>17</sup> 47 C.F.R. § 17.21.

<sup>18</sup> 47 C.F.R. § 17.45.

<sup>19</sup> 47 C.F.R. § 17.48.

<sup>20</sup> Supplement at 3.

<sup>21</sup> February Letter at 1.

<sup>22</sup> See Electronic Message from John Parle to Rodolfo F. Bonacci, Assistant Chief, Audio Division, Media Bureau (rec’d Jan. 22, 2014).

various times during its construction, Saver – via its consultant – took the steps required to ensure that the lack of lighting was reported to the FAA and that NOTAMs were issued.

### C. Misrepresentation

9. Boyer alleges that Saver and/or Cuellar made misrepresentations to the Commission in two earlier applications related to the Station, which we granted on February 20, and April 10, 2013.<sup>23</sup> Boyer essentially seeks to indirectly challenge our grants of these applications. The deadlines for filing petitions for reconsideration of these grants expired well before Boyer filed the Objection on September 20, 2013. Because the time period for filing petitions for reconsideration is prescribed by statute,<sup>24</sup> the Commission may not, with one extremely narrow exception not applicable here, waive or extend the filing period.<sup>25</sup> We find – as the Commission has – that indirect challenges to Commission decisions adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.<sup>26</sup>

### D. Proposed Forfeiture

10. Under Section 503(b)(1)(B) of the Act, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>27</sup> 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.<sup>28</sup> 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,<sup>29</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>30</sup> Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’

<sup>23</sup> Specifically, Boyer claims that, despite his representations to the contrary, Cuellar lacked reasonable assurance of the availability of the site specified in his application for the Station’s existing construction permit. Boyer also claims that Cuellar and Saver falsely certified that Saver Media Inc. existed at the time they filed an application to assign the Station’s license to Saver. We granted the former application on February 20, 2013 and the latter application on April 10, 2013. See Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Anthony T. Lepore, Esq. and Lee J. Peltzman, Esq. (dated Feb. 20, 2013); *Broadcast Actions*, Public Notice, Report No. 47968 (rel. April 16, 2013).

<sup>24</sup> 47 U.S.C. § 405(a) (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of.”).

<sup>25</sup> See *Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) (“[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration.”). See also *Metromedia Inc.*, Memorandum Opinion and Order, 56 FCC 2d 909, 909-10 ¶ 2 (1975) (Commission may not waive 30-day filing period to accept a petition for reconsideration filed one day late); *Fortuna Systems Corp.*, Order on Reconsideration, 3 FCC Rcd 5122, 5123 ¶ 9 (CCB 1988). Specifically, the courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances. See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

<sup>26</sup> See, e.g., *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 228 n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

<sup>27</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

<sup>28</sup> 47 U.S.C. § 312(f)(1).

<sup>29</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>30</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) *recon denied*, 7 FCC Rcd 3454 (1992).

when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”<sup>31</sup>

11. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(8) of the Rules establish a base forfeiture amount of \$10,000 for construction and operation without an instrument of authorization.<sup>32</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “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.”<sup>33</sup> Considering the record as a whole and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we believe that a \$10,000 forfeiture is appropriate here.<sup>34</sup> Specifically, Saver did prematurely construct the facilities proposed in the Application. In addition, Saver did not disclose the premature construction to the Commission voluntarily.<sup>35</sup>

#### IV. CONCLUSION/ORDERING CLAUSES

12. It appearing that no further substantial question concerning the Application remains, and that the public interest will be served by authorization of the facilities applied for, we will grant the Application. Accordingly, IT IS ORDERED that the application to modify the construction permit of KQTC(FM), Eldorado, Texas, filed by Saver Media, Inc. (File No. BMPH-20130725ADU) IS GRANTED.

13. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that Saver Media, Inc., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars (\$10,000) for its apparent willful and repeated violation of Section 319(a) of the Communications Act of 1934, as amended.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this NAL, Saver Media, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No.

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<sup>31</sup> 47 U.S.C. § 312(f)(2).

<sup>32</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(8), note to paragraph (b)(8), Section I.

<sup>33</sup> 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(8).

<sup>34</sup> See, e.g., *Davidson Media*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8492 (MB 2006) (proposing a \$4,000 forfeiture for six missing issues and programs lists).

<sup>35</sup> See *Rasa Communications Corp.*, Letter, 11 FCC Rcd 13243 (MMB 1996) (proposing a \$7500 forfeiture for unauthorized construction and operation where the facilities actually constructed varied little from those authorized by the Commission and presented only a “slight” threat to air navigation and a “slight” threat of radio interference, and the permittee voluntarily disclosed the unauthorized construction and operation to the Commission) (“*Rasa*”); *Spectrum Broadcasting Corp.*, Letter, 12 FCC Rcd 7724 (MMB 1997) (proposing \$10,000 forfeiture for unauthorized construction and operation where there was voluntary disclosure of the unauthorized construction and operation but a greater variance between the facilities actually constructed and those authorized than in *Rasa* and where, unlike *Rasa*, the antenna was mounted at a higher elevation than authorized); *California State University at Sacramento*, Letter, 14 FCC Rcd 3825 (MMB 1999) (proposing a \$5000 forfeiture despite variation between constructed facilities and authorized facilities that was more substantial than in *Rasa* because the violation was limited to unauthorized construction and was voluntarily disclosed).

and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Heather.Dixon@fcc.gov.

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent 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 respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.<sup>36</sup>

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Saver Media, Inc., 601 Culwell Street, San Angelo, Texas 76903, and to its counsel, John C. Trent, Esq., Putbrese Hunsaker & Trent, P.C., 200 South Church Street, Woodstock, Virginia 22664.

20. IT IS FURTHER ORDERED that the Informal Objection filed by Danny Ray Boyer on September 20, 2013 IS GRANTED IN PART and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>36</sup> See 47 C.F.R. § 1.1914.