

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 10-435-JAW
)	
GLENN A. BAXTER,)	
)	
Baxter.)	

**MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW**

NOW COMES Plaintiff, the United States of America, by undersigned counsel, and hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, as supported by the Statement of Undisputed Materials Facts (“Facts”), filed separately, as well as the accompanying Declarations and Exhibits.

BACKGROUND

On behalf of the Federal Communications Commission (“FCC”), the United States filed this civil action against Glenn Baxter (“Baxter”), a resident of Belgrade Lakes, and licensee of amateur radio station K1MAN to enforce an FCC monetary Forfeiture Order, dated March 29, 2006 (Docket #4-2), pursuant to 47 U.S.C. § 503(b) (Facts ¶ 1).

On about September 15, 2004, the FCC’s Enforcement Bureau (“EB”) issued Baxter a Warning Notice, which requested information regarding his method of station control and what action, if any, Baxter was taking in response to various complaints of broadcasting interference (“First Warning Notice” at 1; attached as Exhibit 1d to the Declaration of Evan Roth (“Roth Declaration”)) (Facts ¶ 2). By letter dated October 14,

2004, Baxter responded to the First Warning Notice and asserted as follows: “[n]o corrective actions are necessary at K1MAN” and “[n]o changes are needed with regard to station control which is in full compliance with all FCC rules” (“First Baxter Response”; attached as Exhibit 1e to the Roth Declaration) (Facts ¶ 4). The First Baxter Response further stated that “K1MAN is in full compliance with all FCC rules, state laws, and federal laws. I encourage you to take ‘enforcement actions’ and look forward to seeing you in court (s)” (Facts ¶ 5).

On about October 29, 2004, EB issued Baxter a second Warning Notice (“Second Warning Notice,” attached as Exhibit 1f to the Roth Declaration) (Facts ¶7). The Second Warning Notice explained that Baxter’s First Response was insufficient and that, as an FCC licensee, Baxter is obligated to provide the information EB requested (Facts ¶ 8). By letter dated November 2, 2004, Baxter responded in writing to the Second Warning Notice (“Second Baxter Response”; attached as Exhibit 1g to the Roth Declaration) (Facts ¶ 11). Among other things, the Second Baxter Response asserted as follows: “[m]y letter to you dated 14 October 2004 in response to your letter to me dated 15 September 2004 provided all the information required by FCC rules and by federal law” (Facts ¶ 12).

On November 25, 2004, FCC personnel monitored and heard Baxter’s amateur station K1MAN on 14.275 MHz between 9:21 a.m. and 2:35 p.m. EST. During that time, Baxter’s station transmitted numerous on-the-air references to his web page (www.K1MAN.com) as well as subscriptions to his newsletter (Facts ¶ 13). On November 27, 2004, FCC personnel monitored Baxter’s amateur station and found that the station began transmitting over the ongoing communications of other stations at 5:54

p.m. EST on 3.890 MHz, interfering with the communications of the other licensees (Facts ¶ 14). On December 1, 2004, beginning at or about 2:35 p.m., EST, FCC agents monitored and observed that Baxter's amateur station broadcast a pre-recorded program lasting nearly seventy minutes on the frequencies 3.975 MHz and 14.275 MHz. The pre-recorded program consisted of a telephone interview of Mr. Jeff Owens conducted by Baxter discussing Baxter Associates, Baxter's company. During the interview, Baxter discussed fees for his company's services, franchising opportunities for investors, and franchise marketing plans. Nothing in the program related to amateur radio and no station call sign was given until the conclusion of the seventy-minute program (Facts ¶ 15). On December 8, 2004, FCC agents found that Baxter's amateur station commenced transmitting at 7:10 p.m. EST on top of existing radio communications on 3.890 MHz (Facts ¶ 16). On March 30, 2005, FCC monitoring personnel found Baxter advertising the www.K1MAN.com website address (Facts ¶ 17). On March 31, 2005, at 7:28 P.M. EST, FCC monitoring personnel heard Baxter's amateur station commence transmissions over existing communications of other stations on 3.890 MHz (Facts ¶ 18).

On about June 7, 2005, EB issued to Baxter a Notice of Apparent Liability for \$21,000 due to Baxter's apparent willful and/or repeated violation of several FCC rules ("Notice of Apparent Liability," attached as Exhibit A to the First Amended Complaint, Docket #4-1) (Facts ¶ 19). In the Notice of Apparent Liability, EB found that Baxter apparently willfully and repeatedly violated section 97.101(d) of the FCC's rules, 47 C.F.R. § 97.101(d), by transmitting over communications of other stations on 3.890 MHz on November 27, 2004, December 8, 2004, and March 31, 2005 (Facts ¶ 20). EB also found that Baxter apparently willfully and repeatedly violated Section 97.113(a)(3)

of the FCC's rules, 47 C.F.R. § 97.113(a)(3), because Baxter transmitted on repeated occasions regarding matters in which he has a pecuniary interest such as the pre-recorded interview on December 1, 2004 (Facts ¶ 21). Finding that the December 1, 2004, pre-recorded seventy-minute interview with no station identification constituted a "broadcast" and an impermissible one-way transmission, EB also concluded that Baxter apparently willfully violated Section 97.113(b) of the FCC's rules, 47 C.F.R. § 97.113(b) (Facts ¶ 22). The FCC also found that the Baxter failed to exercise station control on December 19, 2004 in violation of 47 C.F.R. § 97.105 (Facts ¶ 23). EB also concluded that Baxter had failed to provide information in his November 2, 2004 response regarding station control and the control operator identity, and that his response was therefore insufficient (Facts ¶ 24). EB also concluded that Baxter apparently willfully and repeatedly failed to comply with a Bureau directive to file information regarding control of his amateur station issued pursuant to the authority granted in section 308(b) of the Act, 47 U.S.C. § 308(b) (Facts ¶ 25).

The FCC sent a copy of the Notice of Apparent Liability to Baxter by certified mail, return receipt requested, and by first class mail; the Notice of Apparent Liability ordered Baxter to pay the full amount of the proposed forfeiture, or to file a written statement seeking reduction or cancellation of the proposed forfeiture, within thirty days (Facts ¶ 26). By letter dated June 16, 2005, Baxter responded to the Notice of Apparent Liability. Baxter did not assert a substantive response; instead, he cited the fifth and sixth amendments and requested all "documentation regarding the alleged apparent liability and ... a trial like hearing before the full Commission" ("Baxter Response to Notice of Apparent Liability," attached as Exhibit 2i to the Webber Declaration) (Facts ¶ 27).

On about March 29, 2006, based on the Notice of Apparent Liability and Baxter's response, the FCC issued a \$21,000 Forfeiture Order against Baxter for willfully and repeatedly causing interference to ongoing communications, willfully and repeatedly broadcasting communications in which Baxter had pecuniary interest, willfully failing to exercise station control, and willfully and repeatedly failing to respond to a Bureau directive ("Forfeiture Order" ¶¶ 1, 16, attached as Exhibit B to the First Amended Complaint, Docket #4-2); (Facts ¶ 28). The FCC sent a copy of the Forfeiture Order to Baxter by certified mail, return receipt requested, and by first class mail. Baxter signed for the copy sent by certified mail (Facts ¶ 29). Among other things, the Forfeiture Order provided notice to Baxter that if he did not pay the Forfeiture within thirty days, the case could be referred for collection by the U.S. Department of Justice (Facts ¶ 30).

On about June 20, 2006, the FCC sent Baxter a letter demanding full payment of the Forfeiture within thirty days ("Demand Letter," attached as Exhibit C to the First Amended Complaint, Docket #4-3) (Facts ¶ 31). On about September 18, 2006, EB sent Baxter a Certificate of Forfeiture, which he received soon thereafter ("Certificate of Forfeiture," attached as Exhibit D to the First Amended Complaint, Docket #4-4); (Facts ¶ 32). Despite EB's demand, Baxter has not paid the Forfeiture (Webber Declaration ¶ 20) (Facts ¶33).

ARGUMENT

I. Summary Judgment Standards

Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). A

dispute is “genuine” if a reasonable jury could resolve the point in the favor of the non-moving party. *Rodríguez-Rivera v. Federico Trilla Reg'l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008). A fact is “material” if it is potentially outcome determinative. *Id.*

Summary Judgment is the appropriate procedure when, as here, the FCC files a federal court action to enforce an administrative penalty. *United States v. Simon*, 2009 WL 1444406 (M.D.Fla. May 21, 2009); *United States v. Rowland*, 2003 WL 22319074 (M.D.Fla. July 8, 2003). *Cf. United States v. Louis*, 2006 WL 4835921 (M.D.Fla. Sept. 8, 2006) (default judgment).

II. Baxter Willfully and Repeatedly Violated FCC Amateur Station Rules

Section 403 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 403, provides that the FCC has full authority and power at any time to institute an inquiry, on its own motion, in any case or matter concerning any complaint of any activity authorized pursuant to the Act. 47 U.S.C. § 403. Section 308 (b) of the Act provides that the FCC may require a licensee to provide written statements of fact to determine, among other things, whether such license should be revoked. 47 U.S.C. § 308(b).

Section 97.101(b) of the FCC’s rules provides that each amateur station licensee must cooperate in selecting transmitting channels and in making the most effective use of the amateur service frequencies. 47 C.F.R. § 97.101(b). The rule further provides that no frequency will be assigned for the exclusive use of any station. *Id.* Section 97.101(d) of the FCC’s rules provides that no amateur operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal. 47 C.F.R. § 97.101(d). Section 97.113(a) of the FCC’s rules prohibits an amateur station from

transmitting any communications in which the station licensee or control operator has any pecuniary interest. 47 C.F.R. § 97.113(a). Section 97.113(b) of the FCC's rules provides that, except in events related to immediate safety of human life or protection of property where no other means of communications is reasonably available, an amateur station shall not engage in any form of broadcasting, transmitting one-way communications or any activity related to program production or news gathering for broadcast purposes. 47 C.F.R. § 97.113(b).

Pursuant to Section 503(b) of the Act, any person whom the FCC determines to have willfully or repeatedly failed to comply with the provisions of the Act or any rule, regulation or order issued by the FCC shall be liable to the United States for a forfeiture penalty. 47 U.S.C. §503(b).

Section 312(f)(1) of the Act, which applies to violations for which forfeitures are assessed under Section 503(b), provides that "[t]he term 'willful,' when used with reference to the commission or omission of any act, 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...." 47 U.S.C. § 312(f)(1). Section 312(f)(2) of the Act, which also applies to violations for which forfeitures are assessed under Section 503(b), provides that "[t]he term 'repeated,' 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."

In this case, the agency's determination regarding Baxter's conduct is set forth in the two Warning Notices, the Notice of Apparent Liability, the Forfeiture Order, the

Demand Letter, and the Certificate of Forfeiture. *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (“agency opinions, like judicial opinions, speak for themselves”) (quoting *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994)). *See also*, *Kansas State Network v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (“In general, an agency’s action should be reviewed based upon what it accomplishes and the agency’s stated justifications”). Based on those official agency findings, as corroborated by the transcripts of Baxter’s communications and the agency’s declarations, Baxter has willfully and repeatedly caused interference to ongoing communications, willfully and repeatedly broadcast communications in which Baxter has pecuniary interest, and willfully and repeatedly failed to respond to a Bureau directive, all in violation of Commission rules and the Communications Act. Accordingly, Baxter is liable to the United States for a forfeiture penalty pursuant to 47 U.S.C. § 503(b), Section 1.80 of the Commission’s Rules (“Rules”), 47 C.F.R. 1.80 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).

III. Baxter’s Forfeiture Amount is Reasonable and Appropriate

As referenced above, Section 503 of the Act grants authority to the FCC to issue forfeiture penalties against any person who “willfully or repeatedly” violates the Act. 47 U.S.C. § 503(b). In the context of the Act, a willful violation requires only that the violator knew he was doing the act, irrespective of any intent to violate the Act. 47 U.S.C. § 312(f)(1).

The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to In-corporate the Forfeiture Guidelines (“Forfeiture Policy Statement”) sets

the base forfeiture amount at \$7,000 for willful or malicious interference, \$3,000 for failure to file required information, and \$3,000 for violation of transmitter control. 12 F.C.C.R. 17087, 17112–15 (1997). There are no base forfeiture amounts for violations of the rules prohibiting broadcasting or communications regarding matters in which the operator has a pecuniary interest. The FCC concluded that these violations are similar to violations of the FCC's requirements pertaining to broadcasting of lotteries and contests, which carry a base forfeiture amount of \$4,000 for each violation. *Id.*

In assessing the forfeiture amount, the statutory factors set forth in section 503(b)(2)(E) must be taken into account. The factors include the nature, circumstances, extent, and gravity of the violations, as well as the violator's culpability, history of prior offenses, ability to pay, and other such matters as justice may require. 47 U.S.C. § 503(b)(2)(E). See also Forfeiture Policy Statement, 12 F.C.C.R. at 17100-17101 (discussion of aggravating and mitigating factors). Therefore, if the factors warrant, the base penalty is generally imposed for a single violation of the Act.

In accordance to Section 503(b) of the Communications Act, as amended, 47 U.S.C. § 503(b), Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, and the Forfeiture Policy Statement, the FCC proposed a \$21,000 monetary forfeiture against Defendant in the Notice of Apparent Liability for Forfeiture. The FCC found Defendant liable for \$7,000 for willful or malicious interference in violation of Section 97.101(d) of the Rules, 47 C.F.R. § 97.101(d); \$3,000 for failure to file required information in violation of Section 308(b) of the Communications Act, as amended, 47 U.S.C. § 308(b); \$4,000 for broadcasting an impermissible one-way communication in violation of Section 97.113(b) of the Rules, 47 C.F.R. § 97.113(b); \$4,000 for transmitting communications

about which the operator has a pecuniary interest in violation of the Section 97.113(a) of the Rules, 47 C.F.R. § 97.113(a); and \$3,000 for failure to control his station in violation of Section 97.105(a) of the Rules, 47 C.F.R. § 97.105(a). In the Forfeiture Order, the FCC affirmed that the forfeitures assessed in the NAL were warranted based upon its review of Defendant's June 16, 2005 response to the NAL, the Communications Act, FCC Rules, and the Forfeiture Policy Statement.

The Government's First Amended Complaint (Docket #4) seeks recovery of a forfeiture in the amount of only \$18,000 because the only FCC agent to observe Defendant's failure to control his station in violation of Section 97.105(a) of the Rules is deceased. The Government, therefore, has elected not to pursue recovery of the \$3,000 monetary forfeiture assessed for this violation.

CONCLUSION

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the Court grant summary judgment in its favor.

Respectfully submitted,

Richard W. Murphy
Attorney for the United States
Under Authority Conferred by
28 U.S.C. § 515

Dated: May 18, 2011

/s/ Evan J. Roth, AUSA
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Certificate of Service

I, Evan J. Roth, AUSA, hereby certify that on May 18, 2011, I caused a copy of the foregoing to be mailed, postage prepaid, to:

Mr. Glenn A. Baxter
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/s/ Evan J. Roth, AUSA