

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

April 24, 1996

IN REPLY REFER TO:
612CB0001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Duane L. Day, President
Rio Virgin Telephone Company
P.O. Box 189
Estacada, Oregon 97023

Re: Rio Virgin Telephone Company
Beaver Dam Mountain, Utah
CAR-45855-01

Dear Mr. Day:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Cable Services Bureau by Section 0.321 of the Commission's Rules. We are also considering the above-referenced application for a license in the Cable Television Relay Service (CARS). Rio Virgin Telephone Company (hereinafter Rio Virgin) has incurred liability in the amount of Fifteen Thousand Dollars (\$15,000) based on the following apparent repeated violation of the Commission's Rules:

Construction and operation of a CARS Station without Commission authorization, from March 9, 1995 to May 1, 1995, in violation of Section 301 of the Communications Act of 1934, as amended.

This matter came to the Commission's attention during the course of an application filed by Rio Virgin on March 3, 1995 (CAR-45477-01), and subsequently withdrawn on June 20, 1995 by the applicant, because of the threat of interference to a CARS station, WAD-857, licensed to Falcon Telecable (Falcon), a competing cable operator in Mesquite. The application proposed a transmit site at Beaver Dam Mountains, 12 miles west of Santa Clara, Utah, to a receive antenna located in Mesquite, Nevada. Falcon, on April 28, 1995, filed a Petition to Deny the application, raising issues of unauthorized construction and operation of the proposed station by Rio Virgin. In its May 11, 1995 opposition, Rio Virgin contended that its construction and operation of the station was based on an "express delegation" of authority from the Hughes Aircraft Company (Hughes). In its May 18, 1995 reply, Falcon contended that such authority could not be delegated by Hughes, and that operation of the station, prior to Commission licensing, was without Commission authorization.

On June 20, 1995, Rio Virgin filed the above-referenced application seeking authority for the operation of a CARS station with the same transmit and receive locations, and using the same equipment, as in the withdrawn application. This pending application and the previous application were filed for the purpose of relaying television broadcast signals in order to provide its subscribers with better quality signals than were available over-the-air. The June 20, 1995 application proposed a change in frequencies to avoid interference to Falcon's CARS station. Falcon filed a Petition to Deny the application on August 4, 1995, repeating the arguments it raised with respect to the prior application of unauthorized operation. Rio Virgin again claimed in its opposition, filed on August 17, 1995, that operation of the CARS facility was based on an "express delegation" from Hughes. Falcon's reply, filed on August 29, 1995, emphasized that Rio Virgin had admitted that Falcon's allegations are true, and that without Falcon's petitions, the Commission would not have been aware of the unauthorized operation. Subsequently, the Commission requested further information which both Rio Virgin and Falcon supplied on November 20, 1995 and December 5, 1995, respectively. Based on information contained in these pleadings, the Commission has become aware of certain facts which led to the issuance of this Notice of Apparent Liability. In addition, we address here disposition of the above-referenced CARS application.

According to information supplied to the Commission by Falcon in its petitions to deny, and admitted by Rio Virgin in its oppositions, it appears that on or about March 9, 1995, Rio Virgin began operation of a CARS microwave facility, transmitting from an antenna located at Beaver Dam Mountains, 12 miles west of Santa Clara, Utah, to a receive antenna located in Mesquite, Nevada. Rio Virgin contends in its oppositions that operation of the CARS facility, prior to Commission licensing, was based upon an "express delegation" of authority from Hughes, the holder of an experimental license issued by the Commission (KM2XCO, File No. 1370-EX-R-94). It appears that Peregrine Communications, Inc. (Peregrine), a telecommunications consulting company, recommended the use of Hughes equipment for the CARS system, which Peregrine was to design and install for Rio Virgin. Rio Virgin entered into a contract with Peregrine on December 28, 1994 for the purchase, installation, and testing of the Hughes CARS equipment. On February 7, 1995, Hughes sent a letter to Rio Virgin concerning testing of the equipment to evaluate its performance, along with a copy of Hughes' FCC license. The letter clearly states that "tests may be conducted under parts 5.202(e) and (f) of the FCC rules and Regulations, pursuant to our license KM2XCO." The license states that operation is to be "In accordance with Sec. 5.202 (e) and (f) of the Commission's Rules." According to Rio Virgin in its November 20, 1995 supplement, construction of the CARS facility began on February 8, 1995 and was completed on or about February 13, 1995. Rio Virgin issued a check to Peregrine for the full contract amount on February 27, 1995. As stated above, Rio Virgin began operation of the CARS facility on or about March 9, 1995, "after . . . review of the Hughes authorization," and ceased operation of the facility on May 1, 1995, "upon advice of counsel," in order to resolve the issues of unauthorized operation raised by Falcon.

Section 5.202 and subsections (e) and (f) of the Commission's Rules state:

§5.202 Scope of service

Stations operating in the Experimental Radio Service will be permitted to conduct the following type of operations:

- (e) Field strength surveys by persons not eligible for authorization in any other service.
- (f) Demonstration of equipment to prospective purchasers for proposed stations in existing services by persons engaged in the business of selling radio equipment.

Rio Virgin states in its oppositions to Falcon's petitions that its operation of the CARS facility was well publicized, and emphasizes that it did not attempt in any manner to conceal such operation. In addition, Rio Virgin states that it did not charge any additional fees to its cable subscribers based on use of the microwave facilities. The applicant states that it relied on the representations of Peregrine and Hughes in its operation of the CARS facility. According to the pleadings, Peregrine's representative advised Rio Virgin that he had been advised by Hughes that "Hughes would allow the testing of equipment under its Experimental License . . . and that such permission was generally available to prospective purchasers . . . to evaluate performance as long as no fees were charged for the transmissions." As stated above, Hughes' representative advised Rio Virgin that such tests were to be conducted pursuant to Sections 5.202 (e) and (f) of the Commission's Rules.

It appears that of the two cited sections of the rules, Rio Virgin relied upon Section 5.202 (f) for testing of the CARS microwave equipment. However, that section specifically states that operation is for "demonstration of equipment to *prospective purchasers* for proposed stations in existing services." (emphasis added) It is clear from the facts that Rio Virgin purchased the equipment on February 27, 1995 and began operation of said equipment on or about March 9, 1995. Whatever "express delegation" Rio Virgin claims to have relied on would have ceased on February 27, 1995, when Rio Virgin was no longer a "prospective purchaser" and the facility no longer was being operated under authority of Section 5.202 (f). The fact that Rio Virgin publicized the operation of the facility and did not charge subscribers an additional fee is irrelevant. After purchase of the equipment, Rio Virgin had no authorization for operation of the CARS facility and any such operation was apparently in violation of Section 301 of the Communications Act of 1934, as amended.

In its petitions to deny, Falcon requests that the Commission require Rio Virgin to dismantle its facilities, stating that "this has long been the established remedy for premature construction and operation," citing *Westinghouse Broadcasting Co., Inc.* 49 FCC 2d 1171 (1974). Falcon contends that since Rio Virgin is already operating its cable system, the Commission should not be deterred from issuing such a drastic remedy. However, the more recent cases cited by Falcon do not impose such a remedy for premature construction and/or unauthorized operation. Rather, these cases impose a forfeiture for such actions. See *Virginia RSA 6 Cellular Limited Partnership*, 6 FCC Rcd 405 (1991), *recon.*, 7 FCC Rcd 8022 (1992); *Data Investments, Inc.*, 6 FCC Rcd 4496 (1991), *recon. denied*, 8 FCC Rcd 8704 (1993); *Dover Radio Page, Inc.* 4 FCC Rcd 4107 (Com. Carr. Bur. 1989); and *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988) *appeal dismissed*, *TeleSTAR, Inc. v. FCC*, 901 F. 2d 1131 (D.C. Cir. 1990). We believe that the imposition of a forfeiture is a sufficient sanction, and that the remedy requested by Falcon is not

appropriate in this matter. Although Rio Virgin is currently operating its cable television system in Mesquite, Nevada, it is doing so without benefit of the improved signal quality that would be provided by the proposed CARS microwave system.

Based on the above facts, it appears that Rio Virgin has operated a CARS microwave facility without Commission authorization in violation of Section 301 of the Communications Act. As a Commission regulatee, Rio Virgin should have been aware of the requirements imposed by the Commission regarding licensing of the facility in question. In determining the amount of the forfeiture, the Bureau is guided by Section 503(b)(2) of the Communications Act, which states that the Commission shall take into account the nature, circumstances, extent and gravity of the prohibited acts.

In view of the foregoing, after careful consideration of the apparent facts and circumstances currently before us, and taking into account the factors enunciated in Section 503(b)(2) of the Act, we believe that Rio Virgin's violation of Section 301 of the Communications Act of 1934, as amended, warrants the imposition of a monetary forfeiture of fifteen thousand dollars (\$15,000).

With regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

With regard to the application for a CARS station license filed by Rio Virgin Telephone Company (CAR-45855-01), Commission staff has reviewed the application and found it to be in order. As stated above, we believe that the Notice of Apparent Liability is a sufficient sanction in this matter, and that the remedies requested by Falcon are not appropriate. Accordingly, CAR-45855-01, filed by Rio Virgin Telephone Company, IS HEREBY GRANTED, and the Petition to Deny CAR-45855-01, filed by Falcon Telecable, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment
cc: Sylvia Lesse, Esq.
Arthur H. Harding, Esq.