

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

In the Matter of)	
)	
Cumulus Licensing Corporation)	File No. EB-01-CG-415
)	NAL/Acct. No. 200232320007
Licensee of Station WNAM(AM))	FRN 0002-8348-10
Oshkosh, Wisconsin)	

FORFEITURE ORDER

Adopted: October 16, 2003

Released: October 20, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Cumulus Licensing Corporation (“Cumulus”), licensee of AM Station WNAM, Oshkosh, Wisconsin, for willful violation of Section 73.49 of the Commission’s Rules (“Rules”).¹ The noted violation involves Cumulus’s failure to maintain an effective locked fence or other enclosure around the base of an antenna tower having radiofrequency potential at the base.

2. On August 16, 2002, the Commission’s Chicago, Illinois Field Office (“Chicago Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Cumulus for a forfeiture in the amount of seven thousand dollars (\$7,000).² Cumulus filed a response to the NAL on September 16, 2002.³

II. BACKGROUND

3. On August 7, 2001, while conducting tower safety inspections as part of a field-wide targeted tower safety compliance program, an agent from the Chicago Office inspected the five antenna structures used as an antenna array for WNAM, Oshkosh, Wisconsin. The agent observed that the fence surrounding one of the antenna structures had fallen over, allowing unrestricted access to the base of the antenna.

4. On September 6, 2001, the Chicago Office issued a Notice of Violation (“NOV”) to Cumulus for failure to maintain an effective locked fence or other enclosure around the base of an antenna structure having radiofrequency potential at the base. In its response, dated September 18, 2001,

¹ 47 C.F.R. § 73.49.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232320007 (Enf. Bur., Chicago Office, released August 16, 2002).

³ The Wisconsin Broadcasters Association (“WBA”), which is not a party to the proceeding, filed comments on the NAL on September 25, 2002.

Cumulus stated that its market manager, Jeff Schmidt, supervised the completion of a new fence on September 18, 2001.

5. On August 16, 2002, the Chicago Office issued an *NAL* finding Cumulus apparently liable for a \$7,000 forfeiture for failure to maintain an effective locked fence or other enclosure around the base of its antenna tower in willful violation of Section 73.49 of the Rules. In its response, Cumulus requests cancellation of the proposed forfeiture.

III. DISCUSSION

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, (“Act”),⁴ Section 1.80 of the Rules,⁵ 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) (“*Policy Statement*”). In examining Cumulus’s response, Section 503(b) of the Act requires that the Commission take into account 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 other such matters as justice may require.⁶

7. Section 73.49 of the Rules requires broadcast licensees to maintain an effective locked fence or other enclosure around the base of an antenna tower having radiofrequency potential at the base. At the time of the inspection on August 7, 2001, the fence surrounding one of the WNAM antenna structures had fallen over, allowing unrestricted access to the base of the antenna. Cumulus’s response to the *NAL* indicates that the fence was not fixed until September 18, 2001. Accordingly, we conclude that Cumulus violated Section 73.49 of the Rules.

8. Cumulus contends, among other things, that a forfeiture should not be imposed because WNAM’s station engineer makes weekly visits to the tower site, and the engineer did not notice the fencing problem because the tower at issue is located about a quarter mile from the main tower site and is surrounded by tall corn which hinders the fence’s visibility during the months of August and September. We think that a licensee’s regular visits to a tower site to ensure that the tower is in full compliance with Commission rules are, in appropriate circumstances, entitled to substantial weight in determining whether to issue a forfeiture and, if so, for how much. However, in order to fully credit a licensee for such visits, it is essential that the licensee actually inspect each tower at the site. Here, the licensee indicates that its station engineer visited the main tower site, but never checked the tower at issue, which was only about a quarter mile away. Based on the record, it is apparent that the licensee did not inspect this tower for more than a month, from at least August 7, the date the FCC agent observed the violation, until on or around September 15, when Cumulus received the NOV from the Chicago Office.⁷ Moreover, while the licensee contends that tall corn surrounding the tower at issue hindered the fence’s visibility, we do not believe that this justifies the engineer’s failure to check the tower. In any event, there is no tall corn visible in the

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ Cumulus states that it received the NOV on or around September 15, 2001, and arranged for the fence’s repair by September 18, 2001.

area surrounding the tower fence in the photographs taken by the FCC agent at the time of his inspection. To the contrary, these photographs show that the tower fence is easily visible and accessible.⁸ Furthermore, we disagree with Cumulus's assertion that this situation is similar to *Vernon Broadcasting, Inc.*⁹ In that case, the Commission canceled the proposed forfeiture based on its finding that the licensee had inspected the tower at issue shortly prior to the inspection by the FCC agent. As noted above, the licensee in the instant case did not inspect the tower at issue for at least a month. Moreover, when the licensee inspected a nearby tower, it made a conscious decision not to inspect the tower at issue.

9. We also disagree with Cumulus's argument that its history of overall compliance with the Commission's rules supports cancellation of the proposed forfeiture. Commission records indicate that on October 26, 2000, the FCC's Tampa, Florida Field Office found that Cumulus had failed to install Emergency Alert System equipment at three Tallahassee, Florida broadcast stations, and that on August 12, 2002, the FCC's Kansas City, Missouri Field Office found that Cumulus had violated the public inspection file rule at two Kansas broadcast stations.¹⁰ In light of these recent violations, we do not believe that Cumulus is entitled to any reduction of the proposed forfeiture based on its history of overall compliance.

10. Finally, Cumulus states that WNAM is a participant in the WBA's Alternative Broadcast Inspection Program ("ABIP")¹¹ and holds a valid certificate of compliance for WNAM. Cumulus asserts that this certificate entitles it to at least one warning from the Commission before any forfeiture is imposed. We disagree. WBA provided and we have reviewed a copy of the ABIP agreement in effect at the time of the inspection and the *NAL*.¹² Although this agreement states that the Field Office will not conduct a routine inspection of a broadcast station that holds a valid certificate of compliance, nothing in the agreement suggests that such a station is entitled to a warning prior to issuance of a forfeiture for a violation observed during a targeted compliance program. Indeed, under the ABIP agreement submitted by the WBA, the Field Office expressly reserved the right to inspect a station during the period covered by a certificate of compliance on the basis of, among other things, a complaint or a targeted compliance program, such as the targeted tower safety compliance program which led to the issuance of the *NAL* in this case.

⁸ The inspecting agent also noted that the tower fence was visible from the main highway and the access road.

⁹ 60 RR 2d 1275 (1986).

¹⁰ See *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200132700002 (Enf. Bur., Tampa Office, released October 26, 2000); *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232560024 (Enf. Bur., Kansas City Office, released August 12, 2002).

¹¹ ABIP Programs are established pursuant to written agreements between FCC Field Offices and state broadcast associations. Under an ABIP agreement, a state broadcast association provides contract inspection services for a fee to its member stations. The inspector notifies the station of any actual or potential violations of the Commission's rules and the station is then given a brief period of time to correct any deficiencies. Upon confirmation that any deficiencies have been corrected, the association sends a certificate of compliance to the station and to the relevant Field Office. Upon receipt of a certificate of compliance, the Field Office agrees not to conduct routine random inspections of the station for the period covered by the certificate.

¹² State associations, including the WBA, recently signed new ABIP agreements with the Enforcement Bureau. The new agreements became effective on August 15, 2003, and similarly permit targeted tower safety inspections.

11. We have examined Cumulus's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Cumulus willfully violated Section 73.49 of the Rules, and we find no basis to rescind or reduce the \$7,000 forfeiture proposed for this violation.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503 of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹³ Cumulus Licensing Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willful violation of Section 73.49 of the Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁴ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232320007 and FRN 0002-8348-10. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁵

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class mail and certified mail return receipt requested to Cumulus Licensing Corporation, 3535 Piedmont Road, Building 14, 14th Floor, Atlanta, Georgia 30305, and to its counsel, Lewis J. Paper, Esq., Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street, N.W., Washington, D.C. 20037-1526.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹³ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁴ 47 U.S.C. § 504(a).

¹⁵ See 47 C.F.R. § 1.1914.