

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

In the Matter of)	File No. EB-02-SJ-050
)	
Radio X Broadcasting Corporation)	NAL/Acct. No. 200232680008
Bayamon, Puerto Rico)	FRN No. 0003762150

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 2004

Released: September 28, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“MO&O”) we grant in part and deny in part a Petition for Reconsideration (“Petition”) filed on December 10, 2003, by Radio X Broadcasting Corporation (“Radio X”), licensee of Station WXLX(FM), Lajas, Puerto Rico, and owner of antenna structure number 1043256, Cabo Rojo, Puerto Rico. Radio X seeks reconsideration of a November 10, 2003 *Forfeiture Order* (“Order”),¹ in which the Enforcement Bureau issued a monetary forfeiture in the amount of twenty thousand dollars (\$20,000) for willful violation of Sections 17.50 and 73.3526(b) of the Commission’s Rules (“Rules”).² The noted violations involve Radio X’s failure to clean and repaint its antenna structure to maintain good visibility and its failure to maintain the Station WXLX(FM)’s public inspection file at the main studio. For the reasons discussed below, we reduce the monetary forfeiture to sixteen thousand dollars (\$16,000).

II. BACKGROUND

2. On August 21, 2002, Commission agents (“agents”) from the San Juan, Puerto Rico Field Office (“Field Office”) inspected the referenced antenna structure (or “tower”) owned by Radio X. The Commission’s antenna structure registration database indicates that the structure is required to be painted. At the time of the inspection, the agents observed that the tower’s aviation orange and white paint was extremely faded and chipped, reducing the visibility of the structure. Also on August 21, 2002, agents conducted an inspection of WXLX(FM)’s main studio. The agents found that the public inspection file was not available for inspection. The operator on duty during the inspection stated that the subject file was kept at the station owner’s office in Bayamon, Puerto Rico, which is over 100 miles from the city of license.

3. On September 5, 2002, the San Juan Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) for the antenna structure and public inspection file violations. On September 19, 2002, Radio X submitted a response to the NAL (“Response”). In its Response, Radio X accepted the findings of the San Juan Office regarding both the condition of the antenna structure and the location of

¹ *Radio X Broadcasting Corporation*, 18 FCC Rcd 23201 (Enf. Bur. 2003).

² 47 C.F.R. §§ 17.50 and 73.3526(b).

the public inspection file, and requested a substantial reduction or cancellation of the forfeiture based on the immediate measures it took to correct the violations noted in the *NAL*. In denying Radio X's request, the *Order* noted that the Commission has repeatedly stated that remedial actions taken to correct a violation are not mitigating factors warranting reduction of a forfeiture.³

4. Radio X also sought a substantial reduction or cancellation of the forfeiture based on an inability to pay the forfeiture amount. In addition to the financial statements which were submitted in its response to show an inability to pay the proposed forfeiture, Radio X also supplied a statement indicating that no cash transactions were effectuated by Radio X during 2001 and 2000 and that its parent company made "all payments" for it in those years. In looking to the totality of the circumstances surrounding Radio X's ability to pay the forfeiture, the *Order* noted that the parent company's ability to pay was relevant in evaluating the subsidiary company's ability to pay the forfeiture.⁴ Because Radio X had not provided sufficient information from which it could evaluate the financial condition of its parent company, Radio X's inability to pay claim was denied. The *Order* concluded that Radio X willfully violated Sections 17.50 and 73.3526(b) of the Rules and that neither cancellation nor reduction of the proposed monetary forfeiture was warranted.

III. DISCUSSION

5. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934,⁵ as amended ("Act"), Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁷ In examining Radio X's Petition, 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 such other matters as justice may require.⁸

A. Mitigating Factors

6. In its Petition, Radio X first asserts that the Enforcement Bureau failed to provide an analysis of the mitigating factors proffered by Radio X. We disagree. As an initial matter, we reiterate that in its Response, Radio X accepted the findings of the agents concerning the violations of Sections 17.50 and 73.3526(b) of the Rules. The sole purpose of the Response was an attempt to mitigate those violations. Radio X proffered two such mitigation factors for the purpose of reducing the forfeiture amount.⁹ As to the alleged "immediate measures" Radio X took to correct the violations, the analysis is summed up in one sentence, as stated in the *Order*: "[R]emedial actions taken to correct a violation are not mitigating factors warranting reduction of a forfeiture."¹⁰ As to Radio X's alleged inability to pay the

³ See, e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGV L, Inc.*, 42 FCC 2d 258, 259 (1973).

⁴ See *Order* at 23203; see, e.g., *Forfeiture Policy Statement* at 17158 ¶ 113.

⁵ 47 U.S.C. § 503.

⁶ 47 C.F.R. § 1.80.

⁷ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁸ 47 U.S.C. § 503(b)(2)(D).

⁹ See *supra* at ¶¶ 3-4 (immediate action corrected the violations; unable to pay the forfeiture).

¹⁰ See *Order* at 23203; see also *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002) (*AT&T Wireless*); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGV L, Inc.*, 42 FCC 2d 258, 259 (1973). Nowhere in its Response or Petition did Radio X provide objective evidence that the tower painting process was underway *prior* to

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proposed forfeiture, the Commission has consistently held that the parent company's ability to pay is relevant in evaluating the subsidiary company's ability to pay the forfeiture.¹¹ Radio X did not provide this key information, so its inability to pay claim was rejected.

B. Tower Painting

7. Section 17.50 of the Rules states that antenna structures requiring painting must be cleaned or repainted as often as necessary to maintain good visibility. Again, although in its Response Radio X accepted the findings of the agents, it now challenges the determination, asserting that the frequency a tower requires repainting is "purely subjective" with no "bright line test" and is "unconstitutionally vague and unenforceable on its face and as applied." Radio X points out that in the past it was the practice of the Field Office to provide notice to tower owners that their tower required repainting and to provide a reasonable opportunity for painting "prior to, and in lieu of, assessing a forfeiture." We note, however, that neither the Commission nor its agents are obligated to notify a licensee when an inspection occurs or to provide an opportunity to cure a violation prior to issuing an *NAL*.¹² Despite Radio X's claim that it was painting the tower in order to protect its structure and not "*in order to maintain good visibility* [emphasis theirs]," and its assertion that a licensee has some discretion as to the timing of the repainting, the field agent noted that the tower paint was severely faded and provided poor visibility, and therefore in violation of Section 17.50 of the Rules. We find nothing in Radio X's Petition to warrant overturning the agent's determination.¹³

8. Radio X asserts that the instant case is "akin to *Access.I*"¹⁴ in which a forfeiture was reduced due to good faith and a history of overall compliance. Part of this argument is misplaced.¹⁵ In *Access.I*, staff determined that because the licensee identified the need for, scheduled and repainted the tower *prior to any notice* of the inspection or issuance of the *NAL*, it merited a reduction of the proposed forfeiture based on its good faith efforts to comply with Section 17.50.¹⁶ In the instant case, Radio X operators were present for the inspection and *one day later* took steps to cure the violation. Radio X does not merit a reduction based on a good faith effort to comply with the Rules. We discuss the history of overall compliance issue in paragraph 12.

9. Radio X also seeks a reduction in the forfeiture amount claiming the violation did not reflect egregious misconduct, was not willful or intentional and resulted in no substantial harm. First, in the *NAL*, we did not find that Radio X's violations rose to the level of egregious misconduct and as such, the forfeiture amount does not reflect an upward adjustment of the base forfeiture amount. To the extent

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inspection (e.g., a written estimate from a tower painting company dated prior to August 21, 2002), except to say that it was "in the process of obtaining bids" for the project.

¹¹ See, e.g., *Forfeiture Policy Statement* at 17158 ¶ 113.

¹² See *AT&T Wireless*, 17 FCC Rcd at 21871 n. 20 (enforcing a forfeiture issued without a *Notice of Violation*). See also *Missouri RSA*, 18 FCC Rcd 12653, 12654 (Enf. Bur. 2003) (Nothing in the Communications Act or Rules entitles a licensee to an opportunity to correct a violation prior to the issuance of an *NAL*. Licensees cannot expect simply to sit back and await Commission findings of violations before taking appropriate steps to ensure compliance with Commission rules.).

¹³ See *William L. Needham and Lucille Needham*, 18 FCC Rcd 5521 (Enf. Bur. 2002) (upholding the field agent's determination that the tower's painted bands were not clearly visible, despite tower owner's assertion that it had no difficulty discerning the painted bands and maintained a painting schedule for the tower).

¹⁴ *Access.I Communications Corp.-NY*, 18 FCC Rcd. 22289 (Enf. Bur. 2003).

¹⁵ Radio X's claim of a history of overall compliance is addressed in para. 12.

¹⁶ See *Radio One Licenses, Inc.*, 18 FCC Rcd 15964 (2003).

that Radio X seeks a reduction of the forfeiture under the notion that the paint violation is minor, we disagree. A minor violation, such as lacking posting, might justify a reduction from the base forfeiture amount. However, a tower paint violation is not minor. The Commission has consistently stressed that it expects full compliance with the antenna structure rules because of the potential danger to air navigation.¹⁷ Second, Radio X 's reliance on its definition of "willfulness" – which excludes an accidental act or omission – is misplaced. The term "willful," as used in Section 503(b) of the Act, does not require a finding that the rule violation was intentional or that the violator was aware that it was committing a rule violation.¹⁸ Rather, the term "willful" simply requires that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.¹⁹ Finally, the fact that no harm resulted is not a basis for lowering the forfeiture here,²⁰ although had harm resulted the forfeiture might have been increased.²¹ In light of our determination that Radio X violated Section 17.50 of the Rules we do not further reduce the forfeiture amount based on Radio's arguments.

C. Maintain public inspection file at main studio 73.3526(b).

10. Section 73.3526(b) of the Rules requires that the public inspection file must be maintained at the main studio of the station. Although there is a discrepancy in the timing of when the public file was moved from the main studio to the licensee's office in Bayamon, Puerto Rico (over 100 miles from the station's transmitter site and city of license),²² the Rule is clear. In light of Radio X's conscious decision to maintain the public inspection file at its business office in Bayamon, Puerto Rico (again, over 100 miles from the station's transmitter site and city of license) which it argues is "more accessible and convenient for viewing by the public," we affirm the finding in the *Order*, that Radio X's violation of Section 73.3526(b) of the Rules was willful.

11. Radio X seeks a decrease in the forfeiture amount because no substantial harm was done,²³ the violation was minor and made in good faith. Again, the fact that no harm resulted is not a basis for lowering the forfeiture here,²⁴ although had harm resulted the forfeiture might have been increased.²⁵ The Commission has found that reasonable access to the public inspection file serves the important purpose of facilitating citizen monitoring of a station's operations and public interest performance and fostering community involvement with local stations, thus helping to ensure that stations are responsive to the needs and interests of their local communities.²⁶ Radio X moved the subject file from its main studio to a location other than the main studio in 1998 and that file was not returned until 2002, after agents informed it of the violation. The public file violation was clearly not minor and no reduction in the forfeiture amount is warranted.

¹⁷ See *SpectraSite Communications Inc.*, 17 FCC Rcd. 7884 (2002).

¹⁸ 47 U.S.C. § 312(f)(1).

¹⁹ *Id.*

²⁰ See *AGM-Nevada, LLC*, 18 FCC Rcd 1476, 1478-79 (Enf. Bur. 2003) ("*AGM-Nevada*") (finding that absence of a showing of harm to the public interest did not entitle a licensee to a reduction of the proposed forfeiture).

²¹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-17101.

²² Radio X explains that it moved the public file – out of concern for its safety – to its studios in Bayamon, Puerto Rico at the time of Hurricane Georges.

²³ See 47 U.S.C. 503(b)(2)(D).

²⁴ See *AGM-Nevada*, 18 FCC Rcd at 1478-79.

²⁵ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-17101.

²⁶ *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd. 15691, 15700 (1998).

D. Overall Compliance and Inability to Pay

12. Radio X seeks a reduction in the forfeiture amount because it has not previously been found to have violated the Rules. We have confirmed that Radio X has a history of compliance, and find that a reduction of the forfeiture to sixteen thousand dollars (\$16,000) is appropriate. In its Petition, Radio X again raises the issue of inability to pay, but adds nothing that would permit us to approve its request. Instead of providing the pivotal documents that we seek, Radio X rejects the request by arguing that because its parent company was not required to, but merely chose to make “certain cash payments” on behalf of Radio X,” that the requested balance sheets are not relevant as evidence of inability to pay. We disagree. Those “cash payments” amounted to *all* “cash transactions effectuated during the year 2001 and 2002.” We reject Radio X’s claim of inability to pay.

E. Conclusion

13. We have examined Radio X’s Petition pursuant to the statutory factors above and in conjunction with the *Policy Statement* as well. As a result of our review, we affirm the *Order’s* conclusion that Radio X willfully violated Sections 17.50 and 73.3526(b) of the Rules.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 405²⁷ of the Act and Section 1.106 of the Rules,²⁸ Radio X’s December 10, 2003 Petition for Reconsideration of the Enforcement Bureau’s Forfeiture Order issued on November 10, 2003 **IS GRANTED IN PART AND DENIED IN PART**.

15. **IT IS ALSO ORDERED THAT**, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²⁹ Radio X Broadcasting Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of sixteen thousand dollars (\$16,000) for willfully violating Sections 17.50 and 73.3526(b) of the Rules.

16. 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.³⁰ Payment of the 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. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. 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. 20554.³¹

²⁷ 47 U.S.C. § 405.

²⁸ 47 C.F.R. § 1.106.

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

³⁰ 47 U.S.C. § 504(a).

³¹ See 47 C.F.R. § 1.1914.

17. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Radio X Broadcasting Corporation, HC 67 Box 15390, Bayamon, Puerto Rico 00956-9535 and to its counsel, Christopher D. Imlay, Booth, Freret, Imlay & Tepper, P.C., 14356 Cape May Road, Silver Spring, Maryland 20904-6011.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau