

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

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| In the Matter of |) | |
| |) | |
| Mortenson Broadcasting Co. |) | File No. EB-02-CF-338 |
| |) | NAL/Acct. No. 200232340002 |
| Owner of Antenna Structure |) | FRN 0004-1688-29 |
| Registration No. 1020434 |) | |
| South Charleston, West Virginia |) | |

FORFEITURE ORDER

Adopted: May 9, 2003

Released: May 13, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) to Mortenson Broadcasting Co. (“Mortenson”), owner of an antenna structure with Antenna Structure Registration (“ASR”) number 1020434 in South Charleston, West Virginia, for willful and repeated violation of Section 17.51(a) of the Commission’s Rules (“Rules”).¹ The noted violation involves Mortenson’s failure to exhibit red obstruction lighting on its antenna structure between sunset and sunrise.

2. On July 9, 2002, the Commission’s Columbia, Maryland Field Office (“Columbia Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Mortenson for a forfeiture in the amount of ten thousand dollars (\$10,000).² Mortenson filed a response to the *NAL* on August 7, 2002.

II. BACKGROUND

3. On May 15, 2002, at approximately 9:20 p.m., agents from the Columbia Office observed that the obstruction lighting on an antenna structure with ASR number 1020434 in South Charleston, West Virginia, was extinguished. Mortenson is the registered owner of this antenna structure and uses it in conjunction with the operation of its licensed station, WSCW(AM), South Charleston, West Virginia.

4. On May 16, 2002, at approximately 9:30 a.m., one of the agents visited the WSCW studio and determined that station personnel were unaware that the tower had been unlit the previous night. Chris Colagrosso, WSCW’s program director and designated chief operator, initially told the agent that he had observed the tower lights at approximately 6:00 a.m. that morning and that the lights were functioning properly at that time. Subsequently, however, Mr. Colagrosso stated that perhaps he had

¹ 47 C.F.R. § 17.51(a).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232340002 (Enf. Bur., Columbia Office, released July 9, 2002).

observed the lights on an adjacent antenna structure. The agent advised Mr. Colagrosso and WSCW's station manager that Mortenson was required to notify the FAA of the unlit tower immediately if the outage was not corrected within 30 minutes.

5. On May 23, 2002, the agent contacted the Federal Aviation Administration ("FAA") Flight Service Center in Elkins, West Virginia. FAA personnel told the agent that Mortenson notified the FAA of the light outage at 8:14 a.m. on May 17, 2002.

6. On July 9, 2002, the Columbia Office issued an *NAL* for a \$10,000 forfeiture to Mortenson for failing to exhibit obstruction lighting on its antenna structure between sunset and sunrise in willful and repeated violation of Section 17.51(a) of the Rules. In its response to the *NAL*, Mortenson argues that no forfeiture is warranted for this violation because the violation was neither willful nor repeated. Mortenson asserts that the violation was not willful because the lighting failure was the result of an equipment malfunction that was beyond its control, the tower lighting is monitored visually each day by station personnel and through use of an automatic alarm system, and its engineer attempted to correct the problem as quickly as possible. Mortenson asserts that the violation was not repeated because the tower was unlit for only one day. In support of these assertions, Mortenson provides written statements from Mr. Colagrosso and Lester Lovejoy, WSCW's chief engineer. Mr. Colagrosso states that he believes that the FCC agent who visited WSCW was mistaken in reporting that the tower lights were out on the evening of May 15, 2002. In this regard, Mr. Colagrosso asserts that he observed the tower lights on the morning of May 16, 2002 and was "almost positive" that the beacon was flashing, and that the automatic alarm monitor did not indicate any problem with the lights. Mr. Colagrosso further states that after speaking with the FCC agent, he asked Mr. Lovejoy to check the lights, and that he assumed Mr. Lovejoy would notify the FAA if there was a problem with the lights. Mr. Lovejoy states that on the evening of May 16, 2002, he checked the tower lights and confirmed that the lights were out, but he was unable to correct the outage at that time. Mr. Lovejoy asserts that he thought there would be no harm in waiting until the next morning to notify the FAA of the light outage because there was another lit tower about 250 feet away from the WSCW tower.³ Further, Mr. Lovejoy reports that the outage was corrected the following morning, that he has checked the alarm system to ensure that it is working properly, and that he has scheduled regular routine checks and maintenance on the tower lighting and reporting equipment. Finally, Mortenson argues that no harm resulted from the lights being out for one day and that its overall history of compliance with the Commission's rules supports cancellation of the forfeiture.

III. DISCUSSION

7. 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 Mortenson'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

³ Mr. Colagrosso states that when he learned on the morning of May 17, 2002 that Mr. Lovejoy had not notified the FAA of the light outage, he immediately did so.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶

8. Section 17.51(a) of the Rules requires that red obstruction lighting on an antenna structure be exhibited from sunset to sunrise. On the morning of May 16, 2002, an FCC agent informed Mortenson employees that the tower lighting was not operating. Mortenson admits in its response to the *NAL* that it did not correct the light outage or report the outage to the FAA until the morning of May 17, 2002. Accordingly, we conclude that Mortenson violated Section 17.51(a) of the Rules.

9. Mortenson argues that the violation of Section 17.51(a) was not “willful.” We disagree. 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.⁷ 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.⁸ We think that it is irrelevant that Mr. Colagrossa may have believed that the tower light was functioning when he observed the tower at 6:00 a.m. on the morning of May 16, 2003, or that the light outage may have been the result of an equipment malfunction. At approximately 9:30 that morning, an FCC agent informed Mr. Colagrossa of the light outage and advised Mr. Colagrossa to notify the FAA immediately if the outage could not be corrected within 30 minutes. Thus, regardless of whether Mr. Colagrossa believed that he had seen the lights operating that morning or whether he had received an alert from the tower’s automatic alarm system, the FCC agent put him on specific notice that there was a light outage or potential light outage. Mr. Colagrossa made a conscious and deliberate decision not to investigate the outage report immediately or to notify the FAA immediately, as advised by the FCC agent. In this regard, we are not persuaded by Mortenson’s claim that its engineer attempted to correct the problem as quickly as possible. According to Mr. Colagrossa, Mr. Lovejoy said that he could not check the lighting until evening as the lights would be off until then. Although it is true that the tower lighting was not scheduled to come on until sunset, we see no reason, and Mortenson offers no explanation, why Mortenson could not have inspected the tower lighting during the day to determine whether it was functioning properly. Tower owners routinely inspect and perform maintenance on lighting systems, including nighttime lighting systems, during daytime hours.

10. Furthermore, when Mortenson’s engineer did confirm the light outage that evening, he failed to notify the FAA of the outage immediately. That Mr. Lovejoy believed that there would be no harm in waiting until the next morning to notify the FAA of the lighting outage because there was a lit tower nearby does not excuse his failure to notify the FAA of the lighting outage immediately, as required by Section 17.48(a) of the Rules. Moreover, the Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees.⁹ Thus, Mortenson

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... 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” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) (“*Southern California*”).

⁸ *Id.*

⁹ See *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972).

is responsible for Mr. Lovejoy's failure to notify the FAA. Accordingly, based on the record before us, we conclude that Mortenson willfully violated Section 17.51(a) of the Rules.

11. We find that Mortenson's violation of Section 17.51(a) was also repeated.¹⁰ A violation is "repeated" within the meaning of Section 503(b) of the Act if it occurs more than once or it continues for more than one day.¹¹ Mortenson's violation of Section 17.51(a) was repeated because it continued from at least the evening of May 16, 2002, when Mortenson observed the light outage, until the morning of May 17, 2002, when Mortenson finally contacted the FAA. Thus, we conclude that the record supports a finding that Mortenson's violation of Section 17.51(a) was repeated.

12. Mortenson further argues that no harm resulted from the tower lights being out for one day. We think it is irrelevant that there is no indication that air safety was actually compromised by the lighting outage. The potential hazard to air navigation presented by the unlit tower raises serious safety of life concerns justifying a forfeiture.¹² However, after considering Mortenson's overall history of compliance with the Commission's rules, we conclude that reduction of the proposed forfeiture from \$10,000 to \$8,000 is warranted.

13. We have examined Mortenson'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 Mortenson willfully and repeatedly violated Section 17.51(a) of the Rules, but we reduce the forfeiture proposed for this violation from \$10,000 to \$8,000.

IV. ORDERING CLAUSES

14. 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 Mortenson Broadcasting Co. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willful and repeated violation of Section 17.51(a) of the Rules.

15. 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

¹⁰ Section 503(b)(1) of the Act provides that a forfeiture penalty may be imposed if the violation is either willful or repeated. 47 U.S.C. § 503(b)(1).

¹¹ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). See *Southern California*, 6 FCC Rcd at 4388.

¹² Cf. *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002) (finding it irrelevant that there was no indication that air safety was actually compromised by unpainted coaxial cable on a tower because the potential hazard to air navigation presented by the unpainted cable raised serious safety of life concerns justifying a \$10,000 forfeiture).

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

¹⁴ 47 U.S.C. § 504(a).

Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232340002 and FRN 0004-1688-29. 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

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class mail and certified mail return receipt requested to Mortenson Broadcasting Co., 3270 Blazer Parkway, Suite 101, Lexington, Kentucky 40509, and to its counsel, Jerrold Miller, Esq., Miller & Miller, P.C., 1990 M Street, N.W., Suite 760, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁵ See 47 C.F.R. § 1.1914.