

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

In the Matter of )
Commonwealth License Subsidiary, LLC ) File Number: EB-01-DV-138
Licensee of Station KLMR(AM) ) NAL/Acct. No. 200232800004
Lamar, Colorado ) FRN 0003-7484-98
Facility ID #174 )

FORFEITURE ORDER

Adopted: October 9, 2003

Released: October 14, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order, ("Order"), we issue a monetary forfeiture in the amount of five thousand five hundred dollars (\$5,500) to Commonwealth License Subsidiary, LLC ("Commonwealth"), licensee of Station KLMR(AM), Lamar, Colorado, for willful violation of Section 73.49 of the Commission's Rules ("Rules").

2. On May 30, 2002, the Commission's Denver, Colorado Field Office ("Denver Office") issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of seven thousand dollars (\$7,000) to Commonwealth for the noted violation.

II. BACKGROUND

3. On April 25, 2001, in response to a complaint, an agent from the Denver Office inspected KLMR(AM)'s two antenna structures, NE#1 tower antenna structure registration ("ASR") number 1023201 and SW#2 tower ASR number 1023200.

4. On December 7, 2001, the Denver Office issued a Notice of Violation ("NOV") to Commonwealth for the violations discovered during the April 25, 2001 inspection.

1 47 C.F.R. § 73.49.

2 Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200232800004 (Enf. Bur., Denver Office, released May 30, 2002).

3 The inspection was the result of the Denver Office's receipt of information on April 25, 2001 that one of KLMR(AM)'s radio towers had a light outage.

submitted a reply to the *NOV* on December 27, 2001. Commonwealth indicated that the gate lock to NE#1 tower was secured on April 25, 2001 after the agent's inspection, and that the missing wooden pickets from the fences enclosing the NE#1 and SW#2 towers were replaced on April 26, 2001. On May 30, 2002, the Denver Office issued an *NAL* in the amount of \$7,000 to Commonwealth for failure to provide effective locked fences enclosing the station's antenna structures. Specifically, the *NAL* noted that at the time of the inspection, the NE#1 tower's gate at the base fence was not locked, several wooden pickets were missing, and the overall fence height did not represent an effective enclosure of the tower. The *NAL* also indicated that the SW#2 tower's base fence had large openings with missing wooden pickets and that the overall fence height did not represent an effective enclosure of the tower.

5. In its response to the *NAL*, Commonwealth argues that the proposed forfeiture should be cancelled because for the past 30 years, the fences surrounding each of its two towers have been of sufficient height to protect anyone near the base of the towers. Commonwealth also suggests that in light of the distance between the towers and the nearest road, the towers are not easily accessible. With respect to the open gate and the broken pickets, Commonwealth contends that it corrected the problem immediately as to each tower. In addition, Commonwealth speculates that the problem was not due to "chronic neglect," but may have been caused by "severe weather" that occurred in the area on April 11, 2001. Commonwealth adds that since the inspection, it has had the fence surrounding the NE#1 tower replaced. Moreover, Commonwealth claims the fence surrounding the SW#2 tower was missing only two pickets, that the existing pickets were of adequate height, and that there was no damage to the gate. Commonwealth also indicates that the SW#2 tower generates a low amount of radiation. Further, Commonwealth argues that according to the Office of Engineering and Technology's ("OET") Bulletin 65 Supplement A,<sup>4</sup> the NE#1 tower required a fence "of no more than two meters less than eight feet from tower base in all directions" to be compliant with the licensee's power and frequency, and that the Commission's regulations are not specific as to the height of tower fences. Moreover, Commonwealth contends that KLMR(AM) subscribed to the FCC Alternative Broadcast Inspection Program through the Colorado Broadcasters Association, and had an FCC Regulatory Compliance Certification. Finally, Commonwealth asserts that the proposed forfeiture amount issued to its "small market station" will play a determining factor in its future financial existence.

### III. DISCUSSION

6. The forfeiture amount in this case was proposed in accordance with Section 503(b) of the Communications Act of 1934, as amended, ("Act")<sup>5</sup> Section 1.80 of the Rules,<sup>6</sup> 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). In examining Commonwealth'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.<sup>7</sup>

7. Section 73.49 of the Rules provides that all AM antenna towers having radio frequency ("RF") potential at the base must be enclosed within an effective locked fence or other enclosure. Section 73.49 of the Rules does not require individual fences around towers if the individual towers are contained within a protective property fence. The agent's inspection found, *inter alia*, the NE#1 tower did not represent an effective locked enclosure because the northwest entry gate was standing open and was not

---

<sup>4</sup> FCC OST/OET Bulletin Number 65, "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radio Frequency Radiation (Supplement A)."

<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</sup> 47 U.S.C. § 503(b)(2)(D).

locked.<sup>8</sup> With regard to Commonwealth's second tower, the SW#2 tower did not represent an effective locked enclosure because the fence had four gaps. Specifically, the fence had one opening approximately 24 inches wide, another approximately 30 inches wide, and two openings each approximately 18 inches wide. Thus, we find that the condition of the fences constituted a safety hazard because they did not provide suitable protection to the public from possible contact with the radiating structure.<sup>9</sup> Commonwealth's argument that the fences have been in existence for at least 30 years and are of sufficient height to protect anyone near the towers is not persuasive because the gate to NE#1 was not locked and was open when the agent inspected the station. Further, Commonwealth's argument that access to the towers is not easy is unpersuasive, because the NE#1 tower, which was unlocked, is only 350 feet from the station and nearest road. Commonwealth states that it corrected the open gate on NE#1 and broken pickets on the same day that the agent discovered the violation. However, Commonwealth's remedial efforts to correct the violation are not a mitigating factor.<sup>10</sup> In addition, Commonwealth asserts that the damage may have been caused by severe weather. However, based on Commonwealth's response, after a 1998 report that its fence complied with the rule, Commonwealth never inspected its fence to ensure that it remained in compliance with the Commission's rule. Therefore, in light of its conscious decision not to check the fence during a nearly three-year period, we do not believe that Commonwealth's argument regarding the severe weather event warrants reduction of the forfeiture amount.

8. Further, we are not persuaded by Commonwealth's argument that the NE#1 tower required a fence of no more than two meters less than 8 feet from the tower base in all directions to be compliant with its power and frequency. OET Bulletin 65 does not contain any reference to fence height. It does, however, specify minimum distances from radiating elements. Section 1.1310 of the Rules establishes the criteria to be used to evaluate the environmental impact of human exposure to RF radiation based on the station's power. OET Bulletin 65 permits the use of a fence to restrict access as one method to limit human exposure to excessive RF radiation levels.<sup>11</sup> Although OET Bulletin 65 does not specify the type or condition of such fencing, it clearly states that restricting access to the area surrounding an AM tower is one method of complying with Section 1.1310 of the Rules. The fence used to limit human exposure to excessive RF radiation levels under Section 1.1310 of the Rules can also be used to meet the AM fencing requirements under Section 73.49 of the Rules. However, it can only do so if the fence is considered an "effective locked fence or other enclosure." Here, as indicated above, the fence surrounding NE#1 was standing open and was not locked.

9. Regarding Commonwealth's argument that it had been inspected under the FCC's voluntary FCC inspection program, had passed the inspection and concluded that its fences complied with FCC requirements, we do not disagree with Commonwealth that the fences complied when the station was inspected on August 25, 1998 as part of the FCC's Alternative Broadcast Inspection Program ("ABIP"). In fact, we assume that stations inspected under the ABIP comply and we do not routinely inspect such stations. We inspected Commonwealth, however, because we received a complaint that one

---

<sup>8</sup> We need not reach Commonwealth's arguments regarding the height of the fences since the entry gate to the NE #1 tower was not locked.

<sup>9</sup> *Family Broadcasting Inc.*, 17 FCC Rcd 6180 (2002) (sustaining a Summary Decision for violation of Section 73.49, but remanding on other grounds) (finding based on a fence that had an opening that permitted access to the antenna); *MAPA Broadcasting, L.L.C.*, 16 FCC Rcd 22403 (2001) (forfeiture assessed where fence surrounding the tower was unlocked); *Culpeper Broadcasting Corporation*, 15 FCC Rcd 12594 (2000) (forfeiture assessed for failure to maintain effective locked fence where several boards were missing and gap in fencing large enough to permit a person to climb through).

<sup>10</sup> See e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

<sup>11</sup> The minimum distance depends on frequency and power.

of its tower lights was inoperative and had been off for a month. The agent noted the poor condition of the tower fences while investigating whether the light was functioning properly.<sup>12</sup> The ABIP agreement for the Colorado Broadcasters Association in effect during the relevant period states, in pertinent part, that the FCC is permitted to inspect a station during the pendency of an ABIP certification on the basis of a complaint. This agreement does not prohibit the FCC from inspecting a station for compliance with other public safety requirements during an inspection conducted as a result of a complaint.<sup>13</sup>

10. Although Commonwealth suggests that the proposed forfeiture will affect its future financial existence, it does not submit any financial documentation from which we can assess its ability to pay. Therefore, we decline to reduce the forfeiture amount on this basis. We do, however, agree with Commonwealth that their station appears to have an overall history of compliance. For this reason we reduce the forfeiture amount to \$5,500.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>14</sup> Commonwealth License Subsidiary, LLC IS LIABLE FOR A MONETARY FORFEITURE in the amount of five thousand five hundred dollars (\$5,500) for failure to enclose its AM transmission system for Station KLMR(AM) within effective locked fences or other enclosures in willful violation of Section 73.49 of the Rules.

12. 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.<sup>15</sup> Payment shall 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 note NAL/Acct. No. 200232800004 and FRN 0003-7484-98. 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.<sup>16</sup>

13. IT IS FURTHER ORDERED that, a copy of this *Order* shall be sent by Certified Mail, Return Receipt Requested, to Commonwealth License Subsidiary, LLC, 2550 Fifth Avenue, Suite 723, San Diego, CA 92103.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

---

<sup>12</sup> The agent determined that the station had arranged for repair of the light prior to his inspection and the FCC took no further enforcement action.

<sup>13</sup> State associations, including the Colorado Broadcasters Association, recently signed new ABIP agreements with the Enforcement Bureau. The new agreements, effective on August 15, 2003, likewise provide that the FCC may inspect ABIP-certified stations if there has been a complaint concerning non-compliance.

<sup>14</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>15</sup> 47 U.S.C. § 504(a).

<sup>16</sup> See 47 C.F.R. § 1.1914.