

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

In the Matter of)	
)	
Max Media of Montana, LLC,)	
900 Laskin Road)	File No. EB-02-ST-234
Virginia Beach, VA 23451)	NAL/Acct. No. 200232980002
)	FRN 0004-9891-33
Antenna Structure Registration # 1051225)	
Great Falls, MT)	

FORFEITURE ORDER

Adopted: October 17, 2003

Released: October 21, 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 eight hundred dollars (\$8,800.00) to Max Media of Montana, LLC (“Max Media”), licensee of television Station KTGF, Great Falls, Montana, for willful and repeated violations of the antenna structure lighting and registration requirements of Section 303(q) of the Communications Act of 1934, as amended (the “Act”),¹ and Sections 17.21, 17.47(a)(2) and 17.57 of the Commission’s Rules (“Rules”).²

2. On September 27, 2002, the Director of the Commission’s Seattle, Washington District Office (“Seattle Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Max Media for a forfeiture in the amount of thirteen thousand dollars (\$13,000.00).³ Max Media filed its response to the NAL on November 8, 2002, and supplemented its response on December 9, 2002, and June 3, 2003.

II. BACKGROUND

3. Max Media owns an antenna structure, antenna structure registration (“ASR”) # 1051225, located approximately seven and a half (7.5) miles north of Great Falls, Montana.⁴ The ASR reflects

¹ 47 U.S.C. § 303(q). Section 303(q) authorizes the Commission to require that owners of antenna towers, which constitute or potentially constitute “a menace to air navigation . . . maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this Section.”

² 47 C.F.R. §§ 17.21, 17.47(a)(2), 17.57.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232980002 (Enf. Bur., Seattle, Washington District Office, September 27, 2002).

⁴ It should also be noted that the antenna structure is located within eight (8) miles from the Great Falls Airport and within eleven (11) miles from the Malmstrom Air Force Base.

that the antenna structure is 244.0 feet above ground and that high intensity lighting is required.⁵

4. On May 3, 2002, at approximately 5:30 p.m., a Seattle Office agent inspected the antenna structure and observed that the top high intensity light was extinguished. The agent searched the ASR database, discovered that the listed antenna structure owner was Continental Television Network, Inc. d/b/a/ KTGF (“Continental”), and attempted -- but was unable -- to contact Continental.

5. On both May 4 and 5, 2002, the agent returned to the antenna structure, observed that the top high intensity light was still out, and continued efforts to contact Continental. On May 5, 2002, the agent contacted the Federal Aviation Administration (“FAA”) Flight Service Station in Great Falls, Montana, learned that the lighting outage had not been reported to the FAA, and made a report to the FAA, which, in turn, issued a Notice to Airman (“NOTAM”).

6. On May 6, 2002, at approximately 1:00 p.m., the agent returned to the antenna structure and observed that the top high intensity light was operational. The agent proceeded to the main studio of Station KTGF, and interviewed its station manager. The station manager informed the agent that the antenna structure was owned by Max Media (not Continental), that the automatic alarm system for that structure was monitored from Station KTMF-TV (which is owned by Max Media and located in Missoula, Montana), and that Station KTGF had not been notified of any lighting outage. Station personnel provided the agent with a copy of the Application for ASR and Submission Results for Application, dating from June 1998 and listing Continental as the antenna structure owner. According to the Commission’s licensing records, an assignment application, transferring the license for Station KTGF from Continental to Max Media, was granted on February 5, 2001.⁶ However, as stated above, the Commission’s ASR database still listed Continental as the antenna structure owner. The Commission’s ASR database was not updated to reflect the change in ownership until September 9, 2002, approximately four months after the Seattle Office contacted Max Media.⁷

7. On September 27, 2002, the Seattle Office issued the *NAL* proposing a forfeiture in the amount of thirteen thousand dollars (\$13,000) to Max Media. Specifically, the *NAL* proposed a \$10,000 forfeiture for Max Media’s apparent willful and repeated violations of Section 17.21 (failure to exhibit the lighting specified for antenna structure # 1051225, which exceeds 200 feet above ground) and Section 17.47(a)(2) (failure to maintain an automatic alarm system designed to detect lighting failures). Additionally, the *NAL* proposed a \$3,000 forfeiture for Max Media’s apparent willful and repeated violations of Section 17.57 (failure to “immediately” notify the Commission of the change in ownership of antenna structure # 1051225).

8. In its response to the *NAL*,⁸ Max Media did not dispute the findings of the *NAL*.

⁵ The Rules mandate the registration of all antenna structures that are over 200 feet above ground and/or are in close proximity to airports, for which notice to the Federal Aviation Administration is required. *See* 47 C.F.R. § 17.4, *see also* 47 C.F.R. § 17.7.

⁶ It should be noted that on March 27, 2001, the Commission staff granted the *pro forma* assignment application, transferring Station KTGF from Max Media to MMM Licenses, LLC. *See* File No. BALCT-20010227AAS. MMM Licenses, LLC is a wholly owned subsidiary of Max Media, which, in turn, is a wholly owned subsidiary of the Max Broadcast Group. *Id.* at Exhibit 3.

⁷ As a follow-up to the agent’s on-site inspection, the agent contacted a Max Media officer on May 6 and 26, 2002. During the May 6 telephone conversation, the agent referred to the Commission’s requirement that the agency be notified of changes in ownership of antenna structures. During the May 26 telephone conversation, the Max Media officer represented to the agent that the Commission notification of change of ownership of antenna structure # 1051225 had been filed, and that an independent contractor had been retained to repair the structure’s lighting and alarm monitoring system.

⁸ Max Media’s Response to Notice of Apparent Liability (November 8, 2002) (“November 8 Response”).

Additionally, Max Media conceded that its failure to comply with notification requirements regarding the change in ownership of the antenna structure “frustrated” the “[e]fforts by the Seattle Agent to contact the tower owner . . . because the tower was still registered to the previous owner.”⁹ Max Media nevertheless sought rescission or substantial reduction of the forfeiture based upon the fact that it took corrective actions, that it had an unblemished record of compliance, and that it provided responsive local broadcast service. Specifically, Max Media stated that it updated the Commission’s ASR database,¹⁰ replaced the extinguished top high intensity light, completed repairs on the automatic alarm system,¹¹ and otherwise maintained the antenna structure. Additionally, Max Media cited to its principals’ history of operating over 40 broadcast stations over the past 25 years without any infractions. Max Media further cited to its expenditure of approximately one million dollars (\$1,000,000) on a master control room and related equipment to ensure future timely notification of lighting outages, and its annual expenditures of over several hundred thousands of dollars to bring the community of Great Falls, Montana additional local news programming “at a time when many small market television stations have canceled local news due to financial constraints.” Finally, “[b]y way of mitigation,” Max Media explained that the delay in replacing the top high intensity light was due to a malfunctioning automatic alarm system, which Continental had warranted to be in compliance with FCC requirements.¹²

III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹³ Section 1.80 of the Rules,¹⁴ 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 Max Media’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.¹⁵

10. Part 17 of the Rules is designed to promote air safety, by prescribing regulations for antenna structures that constitute or that potentially constitute “a menace to air navigation.”¹⁶ Antenna structures that exceed 200 feet above ground level (“tall antenna structures”) are deemed to constitute or potentially constitute such a menace.¹⁷ Thus, Part 17 requires owners of tall antenna structures, who

⁹ *Id.* at 1-2.

¹⁰ Max Media also represented that it posted a sign outside the antenna structure, which identifies Max Media as the antenna structure owner and lists emergency contacts. *See* November 8 Response at 2.

¹¹ *See* Letter from Arthur V. Belendiuk, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (June 3, 2003) (providing a declaration of an independent contractor that the automatic alarm system had been repaired and was fully operational). Max Media had previously represented that it would visually inspect the structure’s lighting, while the system was being repaired. *See* November 8 Response at 3.

¹² Max Media stated that it learned after it became the licensee of Station KTGF and owner of antenna structure # 1051225, on March 1, 2001, that Continental’s representations in the sales contract regarding the tower and related equipment “proved not to be true.” November 8 Response at 3. By way of example, Max Media referred to “a major failure of the transmission line at KTGF-TV, which was attributable to deferred maintenance on the tower” and which occurred in August 2001. *Id.*

¹³ 47 U.S.C. § 503(b).

¹⁴ 47 C.F.R. § 1.80.

¹⁵ 47 U.S.C. § 503(b)(2)(D).

¹⁶ 47 C.F.R. § 17.1(a).

¹⁷ *See* 47 C.F.R. §§ 17.7(a), 17.21(a).

are subject to FAA notification requirements,¹⁸ to comply with certain Commission painting and lighting,¹⁹ inspection,²⁰ registration,²¹ and reporting requirements.²²

11. Specifically, under Section 17.21 of the Rules, owners of tall antenna structures are required to paint and illuminate their structures in accordance with standards that are mandated by the Commission's Rules and are established by FAA guidelines.²³ Here, it is undisputed that Max Media violated Section 17.21 by failing to maintain the lighting of antenna structure # 1051225 for three consecutive days. As stated above, from May 3 through 5, 2002, the agent observed that the structure's top high intensity light was out, and thus not in compliance with Section 17.21. Under the circumstances, we find that Max Media "willfully" and "repeatedly" violated Section 17.21, by failing to maintain a fully illuminated antenna structure.²⁴ However, on May 6, 2002, prior to the agent's contacts with Max Media, the agent observed that the structure's top high intensity light had been restored. Because Max Media took corrective action and restored the structure's lighting prior to Commission notification or action we conclude that a reduction of the \$10,000 forfeiture by \$2,000 (to \$8,000) is warranted.²⁵

12. Under Section 17.47(a)(2) of the Rules, owners of tall antenna structures are required to "provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner."²⁶ It is undisputed that Max Media violated Section 17.47(a)(2), by failing to maintain a functional automatic alarm system, which would indicate and provide notification of a lighting failure. Although Max Media took remedial action and repaired the system, its actions followed the Commission's inspection and notification of the violation. Under the circumstances, we find that Max Media willfully and repeatedly violated Section 17.47(a)(2). Because Max Media instituted repairs after -- not before -- the Commission's inspection and notification, we do not find that Max Media's remedial action is a mitigating factor that would warrant further reduction of the forfeiture.²⁷ We also do not find that Max Media's alleged expenditure of approximately \$1,000,000 to install a new master control room and employ related equipment mitigates its prior failings.²⁸ Finally, we find that, Max Media's reliance upon alleged contractual warranties in a

¹⁸ See 47 C.F.R. § 17.7(a).

¹⁹ See 47 C.F.R. § 17.21(a).

²⁰ See 47 C.F.R. § 17.47.

²¹ See 47 C.F.R. § 17.4.

²² See 47 C.F.R. §17.57.

²³ See 47 C.F.R. §§ 17.22-23.

²⁴ For purposes of Section 503(b) of the Act, the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's Rules, and "repeatedly" means more than once. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

²⁵ See, e.g., *East Tennessee Radio Group, L.P.*, DA 03-868, 2003 WL 1526638, ¶ 7 (Enf. Bur. March 26, 2003) (finding that an antenna structure owner's corrective actions to replace the ASR posting took place prior to receiving Commission notification of violation, and as such was a mitigating factor).

²⁶ *Id.* As an alternative to the provision of a properly maintained automatic alarm system, Section 17.47(a)(1) requires that antenna structure owners visually inspect the lighting at least once every 24 hours "to insure that all such lights are functioning properly." 47 C.F.R. § 17.47(a)(1).

²⁷ See, e.g., *South Central Communications Corp.*, 18 FCC Rcd 700, 702-03 ¶ 9 (Enf. Bur. 2003) (finding that an antenna structure owner's remedial action in repairing lighting outages took place after receiving Commission notification of a violation, and as such was not a mitigating factor).

²⁸ Max Media neither substantiated its claim of \$1,000,000.00 in expenditures, nor claimed an inability to pay the forfeiture as a result of such alleged expenditures.

Commission enforcement action to be misplaced; such matters more appropriately should be raised and resolved in a local forum.²⁹

13. Under Section 17.57 of the Rules, owners of tall antenna structures, who are subject to the antenna registration requirements,³⁰ must “*immediately* notify the Commission using FCC Form 854 upon any change in structure height or *change in ownership information*.”³¹ The imposition of an immediate notification requirement ensures that the Commission’s ASR database is up-to-date and accurately reflects the current antenna structure owner, thereby enabling “the FAA and the Commission [to] rapidly . . . identify a single responsible entity during lighting outages.”³² It is undisputed that at the time of inspection, the Commission’s ASR identified Continental as the owner of antenna structure # 1051225. Max Media did not file its change of ownership information, and consequently the Commission’s ASR was not updated, until September 9, 2002 -- approximately 17 months after Max Media became the licensee of Station KTGF and assumed ownership of antenna structure # 1051225,³³ and approximately four months after the Seattle office notified Max Media of its failure to submit the updated ownership information. Under the circumstances, we find that Max Media willfully and repeatedly violated Section 17.57. We find further that Max Media’s dilatory corrective action does not mitigate its failure to comply with the “immediate” reporting requirements of Section 17.57, and thus does not warrant cancellation or reduction of the \$3,000 forfeiture.

14. Finally, Max Media asserted, and a search of agency decisions confirmed, that Max Media and its principals have an unblemished history of serving its broadcast communities in compliance with the Commission’s regulations. After considering Max Media’s past history, we conclude that a reduction of the remaining forfeiture amount (\$11,000 as reduced) to \$8,800 is appropriate.³⁴

15. 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,³⁵ Max Media of Montana, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand eight hundred dollars (\$8,800.00) for failure to maintain its antenna structure lighting, for failure to maintain a functional automatic alarm system, and for failure to immediately notify the Commission of the change in ownership of antenna structure # 1051225, in willful and repeated violations of Sections 17.21, 17.47(a)(2) and 17.57 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.³⁶ Payment may be made by mailing a check or similar instrument, payable to the

²⁹ In this connection, Max Media acknowledged that it was on notice that warranties regarding its facility and related equipment proved untrue, ten months before the May 2002 inspections. *See* n. 12, *supra*.

³⁰ *See* 47 C.F.R. § 17.4.

³¹ 47 C.F.R. § 17.57 (emphasis added).

³² *Streamlining the Commission’s Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission’s Rules Concerning Construction, Marking, and Lighting Requirements, Order*, 11 FCC Rcd 4272, 4278 ¶12 (1995).

³³ *See* n. 12, *supra*.

³⁴ *See South Central Communications Corp.*, 18 FCC Rcd 700, 701, 703 ¶¶ 6, 9 (Enf. Bur. 2003) (finding that a licensee’s history of compliance with Commission regulations, spanning 50 years operating over 30 broadcast stations, warranted a reduction of the proposed forfeiture).

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

³⁶ 47 U.S.C. § 504(a).

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. 200232980002 and FRN 0004-9891-33. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.³⁷

17. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Arthur V. Belendiuk, Esq., counsel for Max Media, at Smithwick & Belendiuk, 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

³⁷ See 47 C.F.R. § 1.1914.