

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

In the Matter of)	
)	
Small Town Radio, Inc.)	File No.: EB-02-AT-291
)	NAL/Acct. No. 200332480007
Licensee of Station WDGR(AM))	FRN 0005-0483-35
Dahlonega, Georgia)	

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2004

Released: April 27, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* ("Order") we deny the Petition for Reconsideration filed by Small Town Radio, Inc. ("Small Town"), licensee of Station WDGR(AM), Dahlonega, Georgia. Small Town seeks reconsideration of the *Forfeiture Order*¹ in which the Chief, Enforcement Bureau ("Bureau"), found it liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000), for willful and repeated violation of Sections 11.35(a) and 73.49 of the Commission's Rules ("Rules").² The noted violations involve Small Town's failure to maintain operational emergency alert system ("EAS") equipment and failure to enclose the station's antenna tower within an effective locked fence.

II. BACKGROUND

2. On October 21, 2002, an agent from the Commission's Atlanta, Georgia Field Office ("Atlanta Office") inspected radio station WDGR. The agent observed that the gate to the fence surrounding WDGR's transmission tower was open and several boards were missing from the fence, allowing unrestricted access to the area within the fence. During a telephone conversation, Don Boyd, President of Small Town, told the agent that he was aware of the fencing problem and intended to repair the fence.

3. On the same day the agent also observed that WDGR's EAS apparatus was not connected to any receiver and, therefore, could not monitor the required EAS sources. There were no EAS logs available at the station. The operator on duty at WDGR was unfamiliar with the operation of the EAS equipment and stated that he had never sent an EAS test.

4. On November 13, 2002, the Atlanta Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$15,000 to Small Town.³ Small Town did not file a response to the NAL. On February 4, 2003, the Bureau issued the *Forfeiture Order*, which imposed a monetary forfeiture

¹ *Small Town Radio, Inc.*, 18 FCC Rcd 1492 (Enf. Bur. 2003).

² 47 C.F.R. §§ 11.35(a) and 73.49.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480007 (Enf. Bur., Atlanta Office, released November 13, 2002).

in the amount of \$15,000. Small Town subsequently filed a petition for reconsideration of the *Forfeiture Order*.

III. DISCUSSION

5. Section 11.35(a) of the Rules requires that broadcast stations have fully operational EAS equipment. The FCC agent's investigation establishes that Small Town did not have fully operational EAS equipment at its station and failed to document any efforts to ensure its operability. Small Town admits that this violation already existed when it acquired WDGR. Based on the facts before us, we find that Small Town willfully⁴ and repeatedly⁵ violated Section 11.35(a) of the Rules.

6. Section 73.49 of the Rules requires the owner of an antenna structure to enclose it within an effective locked fence. The FCC agent's observations establish that Small Town's tower was not surrounded by an effective locked fence on October 21, 2002. Small Town admits that this violation already existed when it acquired WDGR. Based on the facts before us, we find that Small Town willfully and repeatedly violated Section 11.35(a) of the Rules.

7. No mitigation is warranted on the basis of Small Town's correction of the violations. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations."⁶

8. Finally, Small Town contends that it is unable to pay the monetary forfeiture and seeks cancellation or reduction of the forfeiture. As support for its position, Small Town cites *Pinnacle Communications, Inc.*, 11 FCC Rcd 15496 (1996) ("*Pinnacle*"), *Benito Rish*, 10 FCC Rcd 2861 (1995), and *Cornbelt Broadcasting Co.*, 18 FCC Rcd 6336 (Enf. Bur. 2003) ("*Cornbelt*"). As discussed below, we find that the cited cases do not support cancellation or reduction of the forfeiture.

9. Small Town contends that its liabilities greatly exceed its assets and it simply does not have the funds to pay the forfeiture. It cites *Pinnacle* as precedent for rescinding the *NAL* where the licensee's liabilities exceed its assets. First, the *Pinnacle* case does not require rescission of a *NAL* whenever the licensee's liabilities exceed its assets. Second, the result in *Pinnacle* depended on that case's particular facts. In *Pinnacle*, the licensee was selling its station to a buyer who would assume certain liabilities but would not provide any cash to the licensee. In this case, on the other hand, the petition for reconsideration indicates that Small Town contracted to sell its station for a substantial amount.⁷ We find that the *Pinnacle* case does not support cancellation or reduction of the forfeiture

⁴ 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).

⁵ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991).

⁶ See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

⁷ According to our records, Small Town's application for assignment of the license for WDGR to USK Broadcasting, Inc. was granted on May 29, 2003 (File No. BAL-20030415AAK). The assignment was consummated on November 25, 2003.

10. Small Town contends that this case is similar to *Benito Rish*, in which the Commission reduced a \$10,000 forfeiture to \$2,500, because both cases involve an unprofitable AM station in a small market, which is the licensee's only station. The cases are not, in fact, similar. In *Benito Rish*, the Commission found that the circumstances (a 5,000 watt daytime only station in a community of 425) suggest an inherently low station value. In this case, on the other hand, Small Town contracted to sell its station for a substantial amount. We find that *Benito Rish* does not support cancellation or reduction of the forfeiture.

11. Small Town also argues that this case is similar to *Cornbelt*, in which the Enforcement Bureau reduced a monetary forfeiture from \$17,000 to \$1,000. In *Cornbelt*, the licensee provided the necessary financial information, including the licensee's gross revenues, to warrant reducing the forfeiture to \$1,000. In this case, however, Small Town submits insufficient financial information, which does not include Small Town's gross revenues.

12. The Commission has determined that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.⁸ The Enforcement Bureau advised Small Town that, in order for the Bureau to evaluate Small Town's financial hardship claim, it is necessary for Small Town to provide documentation of its gross revenues for the most recent three year period for which this information is available. Small Town has not provided that information. We find that no reduction is warranted on the basis of financial hardship.⁹

13. We have determined that Small Town's *Motion* should be granted and that its petition for reconsideration should be considered. We have examined Small Town's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,¹⁰ and in conjunction with the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,¹¹ as well. As a result of our review, we conclude that Small Town willfully and repeatedly violated Sections 11.35(a) and 73.49 of the Rules and find that neither cancellation nor reduction of the monetary forfeiture is appropriate.

IV. ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 405 of the Act and Section 1.106 of the Rules, Small Town's petition for reconsideration of the February 4, 2003, *Forfeiture Order*

⁸ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

⁹ The FCC has received notice that Small Town has filed for Chapter 11 bankruptcy. However, the filing for bankruptcy does not necessarily preclude the imposition of a forfeiture. See 11 U.S.C. § 362(b); see also *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 522-26 (8th Cir. 1990) (excepting from bankruptcy imposed stays, suits by government to obtain monetary judgment for past violations of the law); *Coleman Enterprises, Inc.*, 15 FCC Rcd 24385, 24389 notes 27-28 (2000), *recon. denied*, 16 FCC Rcd 10016 (2001) (noting that a bankruptcy filing does not preclude the Commission from assessing forfeitures for violations of the Act and Rules). Moreover, the filing for bankruptcy does not necessarily justify an adjustment or cancellation of the forfeiture amount for a violation of the Rules. See *Adelphi Communications*, 18 FCC Rcd 7652, 7654 ¶ 8 (Enf. Bur. 2003) (finding that a Chapter 11 bankruptcy filing -- alone, without financial documentation -- does not support an inability to pay claim and thus does not provide a basis to adjust or cancel an assessed forfeiture); see also *North American Broadcasting Co., Inc.*, 19 FCC Rcd 2754 ¶ 6 (Enf. Bur. 2004); *Pinnacle Towers, Inc.*, 18 FCC Rcd 16365, 16366-67 ¶ 7 (Enf. Bur. 2003); *Friendship Cable of Texas, Inc.*, 17 FCC Rcd 8571, 8572-73 ¶ 9 (Enf. Bur. 2002).

¹⁰ 47 U.S.C. § 503(b)(2)(D).

¹¹ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

IS DENIED. For collection, the Commission will file a proof of claim at the appropriate time in Small Town's bankruptcy action.¹²

15. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Small Town Radio, Inc., 3500 Lenox Road, N.E. Atlanta, Georgia 300326.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹² See *Coleman Enterprises, Inc.*, *supra* at 24390. See also *Commonwealth*, *supra* at 523 note 9.