

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

In the Matter of
Fun Media Group, Inc.
Owner of Antenna Structure #1043249 in
Scant City, Alabama
Arab, Alabama
File Number EB-02-AT-379
NAL/Acct. No. 200332480012
FRN: 0007-3298-65

FORFEITURE ORDER

Adopted: June 4, 2004

Released: June 8, 2004

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 Fun Media Group, Inc. ("Fun Media Group"), owner of antenna structure # 1043249 in Scant City, Alabama, for willful violation of Section 17.50 of the Commission's Rules ("Rules").

2. On December 6, 2002, the District Director of the Commission's Atlanta, Georgia Field Office ("Atlanta Office") issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of ten thousand dollars (\$10,000) to Fun Media Group for willful and repeated violation of Section 17.50. Fun Media Group filed a response to the NAL on January 13, 2003, which it supplemented on January 21, 2003 and April 23, 2003.

II. BACKGROUND

3. Fun Media Group is the registered owner of a 500-foot tall antenna structure located in Scant City, Alabama. This structure is assigned antenna structure registration ("ASR") # 1043249. The structure is assigned obstruction lighting and marking requirements that include alternate painted bands of aviation orange and white.

4. On October 29, 2002, the Atlanta Office received a complaint from the pilot of a private airplane that the instant tower was severely rusted causing it to blend in with the area terrain. On October

1 47 C.F.R. § 17.50.

2 Notice of Apparent Liability Forfeiture, NAL /Acct. No. 200332480012 (Enf. Bur. Atlanta Office, released December 6, 2002).

30, 2002, an agent from the Atlanta Office inspected antenna structure registration # 1043249 from distances of 100 feet to one-quarter mile and observed that the severely chipped and faded paint of the structure precluded good visibility of the antenna structure in violation of Section 17.50 of the Commission's Rules.

5. On December 6, 2002, the District Director of the Atlanta Office issued a *NAL* for a \$10,000 forfeiture to Fun Media Group for failure to maintain good antenna visibility in willful and repeated violation of Section 17.50 of the Rules. Fun Media Group filed a response to the *NAL* on January 13, 2003. In its response Fun Media Group disagreed that the tower structure was either chipped or rusted and asserted that prior to the *NAL* receipt, it reviewed the structure multiple times during 2002, and saw no chipping or rust. It further stated it had considered painting the tower structure that summer, but chose not to do so. The response further alleged that the agent observed the tower from a distance, making observation of any chipped paint or rust difficult.

6. Fun Media Group submitted a letter of intent³ from a painting company to demonstrate that it had committed to have the tower painted prior to receipt of the *NAL*. Fun Media also claimed that the FCC agent erred in failing to offer it the opportunity to correct the alleged violation before issuing the *NAL*. Additionally, the licensee submitted statements from two parties commenting on the good visibility and condition of the tower.

7. Further, Fun Media Group claimed it has no prior record of violation with the Commission. Finally, the licensee claimed it is a small station and submitted tax returns for the years 1999-2002, in support of its inability to pay claim.

III. DISCUSSION

8. The proposed 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). In examining Fun Media Group'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 such other matters as justice may require.⁶

9. Section 17.50 of the Rules provides that antenna structures requiring painting under the rules shall be cleaned or repainted as often as necessary to maintain good visibility. Antenna structure # 1043249, owned by Fun Media Group, has specified lighting and painting requirements that include painting the structure with alternating bands of aviation orange and white. An agent from the Atlanta Office observed the antenna structure from distances of 100 feet to one-quarter of a mile and noted that the antenna structure had chipped and faded orange and white paint, causing the structure to have an overall dark appearance. Fun Media Group asserted that it periodically checked the tower paint and concluded that repainting was not required. It therefore chose not to repaint the tower prior to inspection. Based on the agent's conclusions and the licensee's failure to meet the requirements of Section 17.50, we conclude that Fun Media Group willfully⁷ violated this section of the Rules. See *William Needham and*

³ Dated November 26, 2002, promising painting of the tower within three weeks.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ Section 312(f)(2) 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

Lucille Needham Owners of Antenna Structure No. 1064409, 18 FCC Rcd 5521, 5522 (Enf. Bur. 2003), *recon. granted on other grounds*, DA 04-1272 (Enf. Bur. Released May 7, 2004).

10. In its response to the *NAL*, Fun Media Group presented multiple arguments in support of its position that the forfeiture should be cancelled. First, Fun Media Group asserted that the agent observed the tower from a distance, thus, making observation of whether the tower's paint was chipped or faded difficult. The agent observed the tower at distances from 100 feet to one-quarter mile, consistent with established procedure and determined based on his observations and experience the tower structure paint was clearly and obviously chipped and the paint faded. The statements by third parties regarding the lack of rust or good visibility of the tower do not supercede the agent's determination.

11. Further, Fun Media Group asserts that it arranged to have the tower painted following the inspection. It is well established that remedial efforts to correct the violation, after the violation was discovered by the Commission are not a mitigating factor. See *Seawest Yacht Brokers*, 9 FCC Rcd 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." See also, *Station KGVV, Inc.*, 42 FCC 2d 258, 259 (1973).

12. Fun Media Group complained that it was not provided information regarding the violation and a chance to rectify the violation prior to the issuance of an *NAL*, and thus, claims the forfeiture should be cancelled. There is no requirement that the Commission issue a *Notice of Violation (NOV)* or provide a violator an opportunity to cure a violation prior to issuance of a *Notice of Apparent Liability (NAL)*. See 47 C.F.R. § 1.89; *A.T. & T. Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 n.20; and *WOYK, Inc.* 18 FCC Rcd 15181, 15182, fn.8 (Enf. Bur. 2003). Moreover, precedent holds that a failure to clean or repaint its antenna structure as often as necessary to maintain good visibility is a serious violation warranting a forfeiture assessment. See *In the Matter of Midwest Tower Partners, LLC*, 18 FCC Rcd 12921 (Enf. Bur. 2003); *In the Matter of Gold Coast Broadcasting Company Santa Monica, California*, 18 FCC Rcd. 8576 (Enf. Bur. 2003); and *In the Matter of Pinnacle Towers, Inc.*, 18 FCC Rcd 6419 (Enf. Bur. 2003).

13. Finally, we have reviewed the financial information provided by the Fun Media Group to support its claim of inability to pay and we find that this information does not provide a basis for cancellation of the forfeiture as the forfeiture amount is a small percentage of Fun Media Group's gross revenues. It is well established that a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.⁸ We find that Fun Media Group's gross revenues are well within Commission precedent for a forfeiture of \$10,000.⁹

14. We have examined Fun Media Group'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 Fun Media Group, Inc. failed to maintain good visibility of the required antenna structure obstruction marking in willful violation of Section 17.50 of the Rules. Since we have found the violation

(...continued from previous page)

Commission authorized by this Act..." 47 U.S.C. § 312(f)(1). This definition also applies to Section 503(b). See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

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

⁹ *Id.* at 2089 (1991) (Forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues). See also, *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (Forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corp.*, 7 FCC Rcd 6741, 6742 (Comm. Carrier Bur. 1992) (Forfeiture not deemed excessive where it represented approximately 3.9 percent of violator's gross revenues).

to be willful, we need not address whether it is repeated as found in the *NAL*.¹⁰ We have reviewed the Commission's database regarding prior violations and find that Fun Media Group has no record with the Commission of a prior violation. Considering the prior good behavior of Fun Media Group, we agree that the forfeiture amount should be reduced. Accordingly, we reduce the \$10,000 forfeiture proposed by the Notice of Violation to \$8,000 on the basis of a history of overall compliance with Commission Rules.

IV. ORDERING CLAUSES

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,¹¹ Fun Media Group, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for failure to clean and repaint its antenna structure to maintain good visibility, in willful violation of Section 17.50 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.¹² Payment may 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 reference NAL/Acct. No. 200332480012 and FRN 0007-3298-65. 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. 20554.¹³

17. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Fun Media Group, Inc. 981 North Brindlee Mountain Parkway, Arab, Alabama 35016 and its counsel, M. Scott Johnson, Gardner, Canton & Douglas 1301 K Street, N.W. Suite 900, East Tower, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁰ 47 U.S.C. § 312 (a)(4) provides administrative sanctions “for willful *or* repeated violation of, or willful *or* repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.” (Emphasis added).

¹¹ 47 C.F.R. §§ 0.111, 0.311, 0.180(f)(4).

¹² 47 U.S.C. § 504(a).

¹³ See 47 C.F.R. § 1.1914.