

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

In the Matter of	)	
	)	
M.J. Phillips Communications, Inc.,	)	File No. EB-02-BF-344
Licensee of Station WJLL(AM)	)	NAL/Acct. No. 200332280006
Niagara Falls, New York	)	FRN 0004-9421-24

**FORFEITURE ORDER**

**Adopted:** June 21, 2004

**Released:** June 23, 2004

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to M.J. Phillips Communications, Inc. (“M.J. Phillips”), licensee of AM Station WJLL, Niagara Falls, New York, for its willful and repeated violations of the power restriction, Emergency Alert System (“EAS”) and antenna structure requirements of Sections 73.1560(a)(1), 11.35(a), 11.52(d) and 17.4(a) of the Commission’s Rules (“Rules”).<sup>1</sup>

**II. BACKGROUND**

2. On September 17 and 18, 2002, the Commission’s Buffalo, New York Office (“Buffalo Office”) conducted on-site inspections of Station WJLL. The inspections revealed that the station had been exceeding its authorized power limits by more than 105 percent,<sup>2</sup> that its Emergency Alert System (“EAS”) equipment had not been fully operational,<sup>3</sup> and had not been monitored, tested and logged on a regular basis,<sup>4</sup> and that its antenna structure had not been registered.<sup>5</sup> As a result of the inspections, the

<sup>1</sup>47 C.F.R. §§ 73.1560(a)(1), 11.35(a), 11.52(d) and 17.4(a).

<sup>2</sup>AM stations are required to maintain antenna input power levels “as near as is practicable” to, and not less than 90 percent or more than 105 percent of, their authorized power level. *See* 47 C.F.R. §§ 73.1560(a)(1). Station WJLL’s antenna input power levels exceeded its authorized power limit of 1000 watts by more than 250 percent and its authorized nighttime power limit of 55 watts by more than 900 percent, and thus greatly exceeded the 105 percent limit.

<sup>3</sup>Broadcast stations are required to maintain fully operational equipment EAS equipment, capable of monitoring “two EAS sources.” *See* 47 C.F.R. §§ 11.35(a), 11.52(d). Station WJLL’s equipment was only capable of monitoring one EAS source.

<sup>4</sup>Broadcast stations are required to monitor, test, and log such tests of, EAS equipment at regular intervals, and repair and/or replace defective equipment within 60 days (and to notify the appropriate Field Office if such equipment cannot be repaired or replaced within the 60-day period). *See* 47 C.F.R. §§ 11.35(a)-(c), 73.1820(a)(1)(iii). Station WJLL’s logs did not reflect the testing of EAS equipment since July 23, 2002, and did not reflect any failure of such equipment.

Buffalo Office issued M.J. Phillips a *Notice of Violation* on September 23, 2002, and a *Notice of Apparent Liability for Forfeiture* (“NAL”) on January 28, 2003.<sup>6</sup> The NAL found that M.J. Phillips apparently willfully and repeatedly violated the subject Rules, and proposed base forfeiture amounts totaling \$10,000 (\$4,000 for apparent failure to operate within authorized power limits, \$3,000 for apparent failure to register its tower, \$2,000 for apparent failure to conduct required measurements and testing, and \$1,000 for apparent failure to make required log entries).

3. M.J. Phillips sought cancellation or a substantial reduction in the proposed forfeiture in its response to the NAL. Specifically, M.J. Phillips disputed the NAL’s antenna registration findings, and claimed no forfeiture should be imposed in that regard. M.J. Phillips did not dispute the NAL’s findings regarding power excesses and EAS deficiencies, but claimed that they were due to unusual circumstances and further claimed that it was unable to pay the proposed forfeiture amounts.

### III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>7</sup> Section 1.80 of the Rules,<sup>8</sup> and the *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>9</sup> In examining M.J. Phillips’ response, Section 503(b) of the Act requires us to take into account the violations’ nature, circumstances, extent and gravity, and the violator’s degree of culpability, history of prior offenses, ability to pay, and other such matters as justice may require.<sup>10</sup> We will respond to each of M.J. Phillips’ claims separately below.

5. With respect to the antenna structure registration violation, M.J. Phillips claimed, without any proof, that it registered the structure in March 2000.<sup>11</sup> However, a search of Commission records reflects that as of the adoption date of this *Order*, M.J. Phillips’ structure still has not been registered as claimed. Therefore, we find that cancellation of the proposed forfeiture of \$3,000 is not warranted. Moreover, given that the Section 17.4(a) violation has continued, we will require M.J. Phillips to submit an affidavit, signed by an officer or director of the licensee, to the Enforcement Bureau within 30 days of the release of this *Order*, stating whether it has complied with Section 17.4(a), and if so, providing the registration number. We note that failure to submit the affidavit, or failure to comply with Section 17.4(a), may subject M.J. Phillips to further appropriate enforcement action.

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<sup>5</sup>Section 17.4(a) of the Rules requires that Station WJL’s antenna structure be registered with the Commission, because it exceeds 200 feet and is thus subject to Federal Aviation Administration (“FAA”) notification. However, according to Commission records, Station WJL’s antenna structure was not registered.

<sup>6</sup>*M.J. Phillips Communications, Inc.*, NAL/Acct. No. 200332280006 (Enf. Bur., Buffalo Office, released January 28, 2003).

<sup>7</sup>47 U.S.C. § 503(b).

<sup>8</sup>47 C.F.R. § 1.80.

<sup>9</sup>12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>10</sup>47 U.S.C. § 503(b)(2)(D).

<sup>11</sup>M.J. Phillips also claimed, and the Commission’s records reflect, that the coordinates for the antenna structure are: 43 04’ 52” North Latitude and 79 00’ 58” -- not 70 00’ 58” -- West Longitude, as stated in the NAL at ¶ 2.

6. With respect to the power and EAS “operating deficiencies,” M.J. Phillips did not dispute the *NAL*’s findings, but claimed that, at the time of the inspection, the station was short-staffed, was operating with limited management oversight, and thus was unable to monitor the station’s operations.<sup>12</sup> Additionally, M.J. Phillips claimed that, a week prior to the inspection, its transmitter equipment apparently was struck by lightning and rendered inoperable.<sup>13</sup> M.J. Phillips, as licensee, is responsible for monitoring its station’s operations and ensuring compliance with Commission requirements. M.J. Phillips conceded that it was not monitoring its station’s operations, and thus that it was not aware of the EAS and power violations prior to the Buffalo Office’s inspections and actions. We do not find that the circumstances, or M.J. Phillip’s lack of oversight, mitigates or excuses its violations, and thus do not find that cancellation or reduction of the proposed forfeiture amounts is warranted.<sup>14</sup>

7. Finally, M.J. Phillips claimed economic hardship, noting that the station has been operating at a loss and that it has filed for bankruptcy protection in February 2003. As the *NAL* correctly noted, we will consider canceling or reducing a forfeiture on the basis of economic hardship, if supported by financial documentation (*i.e.*, “federal tax returns for the most recent three-year period, financial statements prepared according to generally accepted accounting practices, or some other reliable and objective documentation that accurately reflects the petitioner’s current financial status”).<sup>15</sup> M.J. Phillips did not provide any supporting financial documentation, and thus we have no basis upon which to assess its claim. We note that, in limited circumstances where a licensee or regulatee relinquished control over assets, the Commission has cancelled or reduced forfeitures based on bankruptcy filings.<sup>16</sup> However, because it appears that M.J. Phillips has not relinquished control over the station, its bankruptcy filing,

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<sup>12</sup>M.J. Phillips explained that one of its two owners, both of whom were involved full-time in the station’s day-to-day operations, had surgery three months prior to and was medically incapacitated at the time of the inspection. M.J. Phillips did not explain why the other owner was not monitoring and correcting the station’s violations during that time period.

<sup>13</sup>In support, M.J. Phillips had attached a September 29, 2002, invoice for repairs from Western Antenna & Tower Service, which indicated that the damage to the transmitter site might have been caused by a lightning strike. In this connection, we note that M.J. Phillips undertook corrective measures *after* the Buffalo Office’s inspection. The Commission expects violations that are observed during inspection, and/or are the subject of an enforcement action, to be corrected, but does not believe that such corrective measures mitigate past violations. *See AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21875 ¶ 26 (finding that all Commission licensees and regulatees are “expected to promptly take corrective action when violations are brought to their attention,” and that such corrective action does not warrant reduction or cancellation of a forfeiture for past violations); *see also Seawest Yacht Brokers*, 9 FCC Rcd at 6099, 6099 ¶ 7 (1994); *TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992); *Sonderling Broadcasting Corp.*, 69 FCC 2d 289, 291 (1978); *South Central Communications Corp.*, 18 FCC Rcd 700, 702-03 ¶ 9 (Enf. Bur. 2003).

<sup>14</sup>*See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387 ¶ 3 (1991) (stating that “inadvertence . . . is at best ignorance of the law,” and thus is not mitigating circumstance that warrants reduction or cancellation of a forfeiture); *see also Suburban Cellular, L.L.C.*, 14 FCC Rcd 13099, 13100 ¶ 5 (WTB 1999).

<sup>15</sup>*NAL* at ¶ 13.

<sup>16</sup>*See Dennis Elam, Trustee for Bakcor Broadcasting, Inc., Debtor*, 11 FCC Rcd 1137, 1137 ¶ 5 (1996); *Interstate Savings, Inc. d/b/a/ ISI Communications*, 12 FCC Rcd 2934, 2936 ¶ 5 (CCB 1997)

alone, does not preclude the imposition of forfeitures,<sup>17</sup> and does not warrant reduction or cancellation of the proposed forfeiture.<sup>18</sup>

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Sections 503(a) and (b) of the Act,<sup>19</sup> and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>20</sup> M.J. Phillips Communications, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for its willful and repeated violations<sup>21</sup> of Sections 73.1560(a)(1), 73.11.35(a), 11.52(d) and 17.4(a) of the Rules. For collection, the Commission will file a proof of claim at the appropriate time in M.J. Phillip's bankruptcy action.<sup>22</sup>

9. **IT IS FURTHER ORDERED** that, pursuant to Section 308(b) of the Act,<sup>23</sup> M.J. Phillips Communications, Inc., must submit the affidavit described in paragraph 5 above, within 30 days from the releases of this *Order*, to: Federal Communications Commission, Enforcement Division, 445 12<sup>th</sup> Street, S.W., Room 7-C802, Washington, D.C. 20554, Attention: Ava Holly Berland.

10. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to M.J. Phillips Communications, Inc., 1224 Main Street, Niagra Falls, New York, and its attorney, James R. Cooke, Harris Beach, L.L.P., 1776 K Street, N.W., Suite 300, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>17</sup>See 11 U.S.C. § 362(b); see also *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 522-26 (8<sup>th</sup> 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).

<sup>18</sup>See *Pinnacle Towers, Inc.*, 18 FCC Rcd 16365, 16366-67 ¶ 7 (Enf. Bur. 2003); *Adelphi Communications*, 18 FCC Rcd 7652, 7654 ¶ 8 (Enf. Bur. 2003); *Friendship Cable of Texas, Inc.*, 17 FCC Rcd 8571, 8572-73 ¶ 9 (Enf. Bur. 2002).

<sup>19</sup>47 U.S.C. §§ 503(a) and (b).

<sup>20</sup>47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>21</sup>See 47 U.S.C. § 312(f)(1),(2); see also *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991).

<sup>22</sup>See *Commonwealth*, 913 F.2d at 523 note 15 *Coleman Enterprises, Inc.*, 15 FCC Rcd at 24390; see also note 19, *supra*.

<sup>23</sup>47 U.S.C. § 308(b).