

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

In the Matter of)	File No. EB-02-PA-284
)	
James Chladek)	NAL/Acct. No. 200332400008
WXMC(AM))	
New York, New York)	FRN No. 0006-1444-14

FORFEITURE ORDER

Adopted: July 20, 2004

Released: July 22, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of six thousand three hundred dollars (\$6,300) to James Chladek, (“Chladek”), the licensee of WXMC(AM), Parsippany-Troy Hill, New Jersey, for willful violation of Section 73.49 of the Commission’s Rules (“*Rules*”).¹ The noted violation involves failure to enclose each of two of WXMC’s antenna structures within effective locked fences.

2. On December 4, 2002, the Commission’s Philadelphia District Office (“Philadelphia Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Chladek for a forfeiture in the amount of seven thousand dollars (\$7,000).² Chladek filed a response to the *NAL* on March 7, 2003.

II. BACKGROUND

3. On July 11, 2002, agents from the Commission’s New York, New York District Office (“New York Office”) and the Philadelphia Office inspected four antenna structures used by Station WXMC for its directional antenna system. During the inspection, the agents observed that the gates to the fences surrounding antenna structures No. 1224382 (Southeast Tower) and No. 1224378 (Northwest Tower) were unlocked and the gate enclosing the entire WXMC directional antenna system was also unlocked. The New York Office and Philadelphia Office agents informed the station’s Chief Engineer that the station should take immediate action to lock the gates and preclude access.

4. On July 12, 2002, the agents returned to WXMC’s directional antenna system and observed that the gate enclosing the array was still unlocked and the gates surrounding the Southeast Tower and the Northwest Tower remained unlocked as well. The District Director of the Philadelphia Office issued an Official Notice of Violation (“*NOV*”) on August 12, 2002, to which Chladek’s Chief

¹ 47 C.F.R. § 73.49.

² *Notice of Apparent Liability for Forfeiture*, File No. EB-02-PA-284, NAL/Acct. No. 200332400008 (released February 3, 2003). The *NAL* at paragraph 7 contained an administrative error, stating that “Chladek willfully and repeatedly violated Section 1.903(a) of the Rules [emphasis added, footnotes omitted].” As is clear from paragraph 1 of the *NAL* and the discussion and analysis throughout the document, the *NAL* found that Chladek willfully and repeatedly violated Section 73.49 of the Rules.

Engineer responded on behalf of Mr. Chladek on August 19, 2002. The *NOV* stated, *inter alia*, that Chladek was in violation of Section 73.49 of the Rules on July 11 and July 12, 2002. In its response, Chladek did not deny the violation and stated that the gates had now been secured.

5. On February 3, 2003, the Philadelphia Office issued an *NAL* to Chladek for seven thousand dollars (\$7,000) for willful and repeated violation of Section 73.49 of the Rules on July 11 and 12, 2002.³ Chladek responded to the *NAL* conceding that two of the four towers were without functioning locks. Chladek points out, however, that the inspectors returned the next day before a full 24 hours had passed, and while they again found the gates unsecured, Mr. Altobelli had already purchased new locks and placed them on the gates only an hour or two after the agents' second visit. Chladek argues that the agents' return less than 24 hours after their initial visit was an "apparent overzealous exercise of governmental enforcement action for the purpose of proving the 'repeated' nature of the Section 73.49 violation."⁴ Chladek argues that it should not be cited for a repeated violation of Section 73.49 because it replaced the locks within 24 hours of the agents' visit.

6. Chladek further argues that the case should have been closed without further action because, as the Chief Engineer stated in response to the *NOV*, the gates' locks had already been secured. Further action in the form of an *NAL* is, Chladek argues, arbitrary, capricious and inconsistent with previous actions. Finally, Chladek argues that it has never been cited for an infraction of the Rules and this factor should have been taken into account with the issuance of the *NAL*.

III. DISCUSSION

7. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended, ("Act"),⁵ Section 1.80 of the Rules,⁶ 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) ("*Policy Statement*"). In examining Chladek'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.⁷

8. Section 73.49 of the Rules requires antenna towers having radiofrequency potential at the base to be enclosed with effective locked fences or other enclosures. The Philadelphia Office and New York Office agents' observations were that AM Station WXMC has radio frequency potential at the bases of its antenna towers, thereby requiring each to have an effective locked fence or other enclosure. At the time of the inspections on July 11 and 12, 2002, two of the WXMC antenna structures were not enclosed within effective locked fences or other enclosures as required by Section 73.49. Chladek admits that it had two antenna towers without effective locked enclosures around the bases. Accordingly, we conclude that Chladek willfully⁸ violated Section 73.49 of the Rules.

³ *NAL* at ¶¶ 1, 7.

⁴ Chladek Response at page 3.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ 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

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9. Our finding of “willfulness” alone is sufficient to uphold the proposed forfeiture here.⁹ Accordingly, we need not reach the issue of whether it would be inequitable in these circumstances to treat the violation as “repeated.”¹⁰

10. Chladek also claims that the *NAL* should not have been issued because the violation was corrected in response to the *NOV* and similar situations must be treated in a similar manner. Chladek does not provide an identifiable reference in support of its argument.¹¹ There is nothing in the Act or the Commission’s Rules that precludes an *NAL* where an *NOV* has previously been issued. Indeed, the Commission has indicated issuance of an *NAL* after an *NOV* is an appropriate enforcement option.¹² Accordingly, we find Chladek’s argument to be without merit. We thoroughly explain our reasoning for assessing a forfeiture herein.¹³

11. Chladek argues that the *NAL* did not take into account that Station WMXC has not been cited for a previous violation of the Commission’s Rules. Our records show that Chladek’s Station WMXC has never been the subject of enforcement action for violation of the Rules. Accordingly, we find that a reduction of \$700 is warranted for Chladek’s history of compliance.

12. We have examined Chladek’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 Chladek willfully violated Section 73.49 of the Rules, but we find that the forfeiture should be reduced to six thousand three hundred dollars (\$6,300).

IV. ORDERING CLAUSES

13. 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,¹⁴ James Chladek, licensee of Station WMXC(AM), Parsippany-Troy, New Jersey, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand three hundred dollars (\$6,300) for his willful violation of Section 73.49 of the Rules.

14. 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.¹⁵ Payment may be made by mailing a check or similar instrument, payable to the order of the

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regulation of the Commission authorized by this Act” *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁹ The statutory standard for assessing a forfeiture is that the action or omission in question is willful *or* repeated. 47 U.S.C. § 503(b)(1)(B).

¹⁰ As provided by 47 U.S.C. § 312(f)(2), “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, 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). *Southern California Broadcasting Co.*, *supra*.

¹¹ Chladek’s counsel states “we compare Chladek’s circumstances here with those of another broadcast licensee of this law firm...the licensee responded to the NOV...and the field office closed the case without further enforcement action.” Chladek Response at page 3.

¹² See, e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866 (2002).

¹³ *Melody Music, Inc., v. FCC*, 345 F.2d 730 (1965).

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

¹⁵ 47 U.S.C. § 504(a).

Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332400008 and FRN 0006-1444-14. 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. 20554.¹⁶

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to James Chladek, 20 Waterside Plaza, Suite 26, New York, New York, and to its counsel, Howard J. Braun, Esq., and Shelley Sadowsky, Esq., Katten Muchin Zavis Rosenman, 1025 Thomas Jefferson Street, N.W., East Lobby, Suite 700, Washington, D.C. 20007-5201.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁶ See 47 C.F.R. § 1.1914.