

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

In the Matter of	)	
	)	
4M of Richmond, Inc., Licensee of WLEE	)	File No. EB-02-NF-124
4M Communications, Inc., Owner of Antenna	)	
Structure #1231421	)	NAL/Acct. No. 200332640001
Richmond, Virginia	)	
	)	FRN3782182

**FORFEITURE ORDER**

**Adopted: August 11, 2004**

**Released: August 13, 2004**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture of six thousand six hundred dollars (\$6,600) to 4M of Richmond, Inc. (“4M of Richmond”) for willful violation of Section 73.49 of the Commission's Rules (“*Rules*”) and for willful and repeated violation of Section 73.1745(a) of the Rules.<sup>1</sup> Additionally, we issue a monetary forfeiture of eight thousand dollars (\$8,000) against 4M Communications, Inc. (“4M Communications”) for willful violation of Section 17.50 of the Rules, for a total forfeiture amount of fourteen thousand six hundred dollars (\$14,600). The noted violations involve 4M of Richmond’s failure to enclose its tower with an effective locked fence (§ 73.49) and exceeding its nighttime power limit (§ 73.1745), and 4M Communications’ failure to comply with the prescribed antenna structure marking (§ 17.50).

2. On November 4, 2002, the Commission’s Norfolk, Virginia, Resident Agent Office (“*Norfolk Office*”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to 4M of Richmond and 4M Communications (“*the 4M companies*”) for a forfeiture in the amount of twenty-one thousand dollars (\$21,000).<sup>2</sup> The 4M companies jointly responded to the *NAL* on December 3, 2002.

**II. BACKGROUND**

3. 4M of Richmond is the licensee of AM station WLEE, Richmond, Virginia. WLEE is licensed to transmit with a daytime power of 1,000 watts and a nighttime power of 13 watts. 4M Communications owns that station’s antenna structure (#1231421), which is located at 2516 Inman Avenue, Richmond, Virginia. The Commission’s Antenna Structure Registration (“*ASR*”) database lists the structure’s height as 75.6 meters above ground level and prescribes lighting and painting requirements. The same principals control both 4M of Richmond and 4M Communications.

<sup>1</sup> 47 C.F.R. §§ 73.49, 73.1745(a) and 17.50.

<sup>2</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332640001 (Enf. Bur., Norfolk Office, released November 4, 2002).

4. On August 19, 2002, an agent from the Norfolk Office inspected WLEE's transmitter site. At about 1:30 p.m., the agent observed that the fencing around the base of WLEE's tower had no lock. He also observed that the antenna structure's paint was so chipped and faded that the contrasting color bands were difficult to distinguish from less than one-quarter of a mile away, resulting in poor visibility of the antenna structure.

5. After sunset on August 19, 2002, the agent observed WLEE's antenna base current meter, which measured the current supplied to WLEE's antenna tower, and calculated that WLEE's power exceeded the station's authorized nighttime power of 13 watts. On August 20, 2002, the agent inspected a portion of WLEE's logs for August 17, 18 and 19, 2002. Those logs noted that the use of power between sunset and sunrise on August 17, 18 and 19, 2002, exceeded WLEE's authorized nighttime power of 13 watts on each of those evenings with, respectively, readings of 37 watts, 945 watts and 37 watts.

6. Based on the agent's observations, on November 4, 2002, the Norfolk Office issued a *NAL* to 4M of Richmond and 4M Communications for a total forfeiture in the amount of \$21,000 for willful violation of Sections 73.49 (\$7,000) and 17.50 (\$10,000) of the Rules and for willful and repeated violation of Section 73.1745(a) (\$4,000) of the Rules. In the joint response, filed December 3, 2002, the 4M companies seek reduction or cancellation of the proposed forfeiture. As to Section 73.49, the 4M companies admit that the fence around the base of WLEE's tower was not locked but argue that this was a minor violation because it existed for only four days before it was corrected. With regard to Section 17.50, the 4M companies argue that its observations and those of the contractor who repainted WLEE's tower on October 13, 2002, indicate that the tower did not need repainting and that the Commission has not provided photographic evidence of the need for repainting WLEE's tower.

7. With respect to Section 73.1745(a), the 4M companies assert that WLEE's antenna base current meter had been removed for repairs and recalibration and was reinstalled just before the FCC agent read it. The 4M companies argue that if there was a violation of Section 73.1745(a), it was minor and unintentional, that there were no field strength measurements taken, that there were no complaints of interference from WLEE's operation and that the determination that WLEE's power exceeded the authorized level by 26 watts was "within the margin of error." Additionally, the 4M companies argue that the power measurements reported in WLEE's station logs are not reliable because "with a transmitter designed to operate at 1,000 watts, it is technically difficult to obtain accurate readings at low output levels in the range of 13 watts."

8. The 4M companies also argue that they have a history of overall compliance and that, by cooperating with the FCC agent, they acted in good faith. The 4M companies argue further that any violations were "minor, inadvertent, unintentional and promptly corrected." In addition, the 4M companies assert that they are "a small, independent broadcaster" and that the Commission "should not discourage companies like 4M whose successful efforts to save troubled AM stations and bring new programming choices to listeners have served the public interest."

### III. DISCUSSION

9. 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>3</sup> Section 1.80 of the Rules,<sup>4</sup> and *The*

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<sup>3</sup> 47 U.S.C. § 503(b).

*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*”). Section 503(b) of the Act requires that the Commission, in examining the 4M companies’ response, 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.<sup>5</sup>

10. Section 73.49 of the Rules provides that antenna structures that have radio frequency potential (voltage) at the base of the tower must be enclosed within an effective locked fence to protect the public. The 4M companies admit that the gate to the fence around the antenna structure was not locked as a result of the intentional act of a 4M agent to cut the lock, but argue that this violation was minor because it lasted for only four days. We do not agree that its duration of “only” four days makes the fencing violation “minor” when the public’s safety and possibility of contact with the radiating antenna structure is involved.<sup>6</sup> We find that 4M of Richmond willfully<sup>7</sup> violated Section 73.49.

11. Section 17.50 of the Rules provides that antenna structures requiring painting shall be cleaned or repainted as often as necessary to maintain good visibility. To determine compliance with Section 17.50, we rely primarily on the investigating agent’s observations and judgment rather than on photographic evidence. The 4M companies contend that their observations and those of the contractor who repainted WLEE’s tower indicate that prior to the contractor’s painting of the tower, the tower did not need repainting. The FCC agent’s observations and judgment at the time of his inspection indicate that the tower’s paint was so chipped and faded that the contrasting color bands were difficult to distinguish from less than one-quarter of a mile away. We find, based on the agent’s observations, that 4M Communications violated Section 17.50 of the Rules,<sup>8</sup> and that the one sentence statement to the

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<sup>4</sup> 47 C.F.R. § 1.80.

<sup>5</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>6</sup> *See, e.g., FBS Wireless Corporation*, 18 FCC Rcd 21018 (Enf. Bur. 2003); *Truth Broadcasting Corporation*, 17 FCC Rcd 24376 (Enf. Bur. 2002).

<sup>7</sup> 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).

<sup>8</sup> *See Access.1 Communications Corp.-NY*, 18 FCC Rcd 22289, 22291 at fn 8 (Enf. Bur. 2003). The 4M companies argue that there is an insufficient evidentiary record to find a violation of Section 17.50 of the Rules, citing *Beacon Broadcasting, Inc.*, 17 FCC Rcd 22839 (Enf. Bur. 2002). We can find nothing in that case which supports the view that there is an insufficient evidentiary record to establish a violation of Section 17.50. In *Beacon*, the tower owner did not challenge the FCC’s evidentiary findings but sought cancellation or reduction of a proposed \$15,000 forfeiture for several violations, including Section 17.50, on the basis of its recent acquisition of the tower, its remedial efforts and its inability to pay the forfeiture; we determined that neither cancellation nor reduction of the proposed forfeiture was warranted. If the 4M companies are implying that the evidence for a violation of Section 17.50 in this proceeding is deficient because it differs from the evidence supporting the violation of that section in *Beacon*, we point out that each case should be examined on its own merits. *See James R. Weeks*, 48 FCC 2d 273 (ALJ 1974).

contrary by 4M Communications' contractor does not override this conclusion. Further, the condition of the antenna structure's paint was plainly visible. After reviewing the facts of this case, we find that 4M Communications' violation of Section 17.50 was willful.

12. Section 73.1745(a) of the Rules prohibits broadcast licensees from operating with power other than that specified by their licenses. WLEE is licensed to operate with a power of 1,000 watts during the day and a power of 13 watts between sunset and sunrise. After sunset on August 19, 2002, the FCC agent -- using a current meter which WLEE's contract engineer had just reinstalled -- measured the current supplied to WLEE's antenna and calculated that WLEE was operating with a power of 39 watts. The 4M companies make several arguments. First, 4M Companies claim that the FCC agent measured the current to WLEE's antenna "without allowing [WLEE's contract engineer] to readjust the transmitter to reflect the recalibration [of the current meter]." We agree that the agent measured the current meter before the contract engineer could readjust the transmitter power; this was necessary in order to accurately determine the station's power prior to 4M of Richmond's readjusting the transmitter power. The point here is not that 4M of Richmond could have adjusted the power to its licensed parameters, if given the chance, but rather that 4M of Richmond was operating in excess of those parameters. Next, the 4M companies claim that the power violation was "minor" and "within the margin of error" because WLEE's power was only 26 watts above the authorized level, and that the power measurements reported in WLEE's station logs were not reliable because "with a transmitter designed to operate at 1,000 watts, it is technically difficult to obtain accurate readings at low output levels in the range of 13 watts." However, when the FCC agent inspected the logs, he found that WLEE was in operation with as much as 945 watts after sunset on August 18, 2002, and as much as 940 watts before sunrise on August 19, 2002. Due to WLEE's operation at near daytime power, levels significantly above the FCC authorized nighttime level of 13 watts on the evening of August 18 and the morning of August 19, as well as the operation of WLEE at 39 watts on the evening of August 19 (300% of the authorized power), this is not a minor violation.<sup>9</sup> Further, the claim that the power measurements reported in WLEE's station logs are not reliable at readings near 37 watts because its full scale range is 1000 watts is contradicted by readings of 945 and 940 watts obtained, respectively, on the evening of August 18, 2002, and the morning of August 19, 2002.<sup>10</sup> Further, WLEE was responsible for assuring that the power meter readings were accurate.<sup>11</sup> The 4M companies' third contention, that there were no field strength measurements, is incorrect; the FCC agent did take field strength measurements which confirm that WLEE was operating after sunset on August 19, 2002, with power exceeding 13 watts. Finally, because 4M of Richmond's operation exceeded the authorized power, the violation is not mitigated by any lack of complaints about the effects of 4M of Richmond's overpower operation.<sup>12</sup> We find that 4M

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<sup>9</sup> AM stations must not operate with over 105% of authorized power no matter the mode of operation. *See* 47 C.F.R. § 73.1560.

<sup>10</sup> This argument does apply to the readings (37 watts) recorded for the evenings of August 17 and 19, 2002. However, we need not address it for those dates because a Commission measurement (39 watts) establishes overpower operation on the evening of August 19, 2002, and it is unnecessary to establish an overpower violation on August 17, 2002.

<sup>11</sup> AM stations are allowed to operate without a current meter for up to 60 days provided the station can determine operating power. *See* 47 C.F.R. §§ 73.51 and 73.58.

<sup>12</sup> In *PJB Communications of Virginia, Inc.* (7 FCC Rcd 2088, 2088 (1992)), the Commission did not downwardly adjust a forfeiture based on wireless carrier's claims that its rule violation [failure to file required notifications to maintain authorized operation of one-way paging facilities] did not adversely affect the public. The Commission

of Richmond willfully and repeatedly<sup>13</sup> violated Section 73.1745(a) of the Rules,<sup>14</sup> with an excess of power at night on August 18, and 19, 2002.

13. We do not agree with 4M companies' assertion that any violations were "inadvertent" or "unintentional." As indicated above, an agent of the 4M companies intentionally caused the violation of Section 73.49 of the Rules by cutting the lock on the gate to the enclosure around WLEE's antenna structure. The 4M companies' lack of intent to violate the rules does not excuse or mitigate its violations of the Rules. Section 503(b)(1)(B) of the Act provides that any person who "willfully or repeatedly" fails to comply with any provision of the Act or any rule, regulation or order issued by the Commission under the Act "shall be liable to the United States for a forfeiture penalty."<sup>15</sup> In this context, "willful" simply means the conscious and deliberate commission or omission of an act, *irrespective of any intent* to violate statutory or regulatory requirements.<sup>16</sup> Thus, we conclude that no reduction or cancellation of the proposed forfeiture is warranted on the basis of 4M companies' lack of intent or inadvertence.

14. No mitigation is warranted on the basis that the 4M companies are "a small, independent broadcaster."<sup>17</sup> The Commission takes the size of a business into account by considering its ability to pay a monetary forfeiture.<sup>18</sup> As explicitly stated in the *NAL*, we will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for

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explained that licensees have a duty to operate in accordance with Commission rules, and cannot absolve themselves of the failure to do by simply claiming that there was no harm done to the public. The Commission maintained that there is an independent public interest in licensees complying with the rules. *Id.*

<sup>13</sup> 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. 97<sup>th</sup> Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

<sup>14</sup> The 4M companies contend that the Enforcement Bureau has not met its burden of proving that 4M of Richmond willfully and repeatedly violated Section 73.1745(a) of the Rules, citing *Tarrant Radio Broadcasting, Inc.*, 17 FCC Rcd 16761 (Enf. Bur. 2002) and *Sycamore Valley Broadcasting, Inc.*, 17 FCC Rcd 15843 (Enf. Bur. 2002). While *Tarrant* and *Sycamore* involve facts similar to those of the instant case, we can find nothing in *Tarrant* and *Sycamore* which supports the view that the Enforcement Bureau has not met its burden of proof in this case. In *Tarrant*, we reduced the proposed \$4,000 forfeiture by \$1,000 due to a history of overall compliance, and in *Sycamore*, we determined there were no factors justifying a reduction of the proposed forfeiture amount.

<sup>15</sup> 47 U.S.C. § 503(b)(1)(B).

<sup>16</sup> *Supra*, note 7.

<sup>17</sup> See *Forfeiture Policy Statement*, at 17109 ¶¶ 51-52 (finding that the Commission's forfeiture policies and precedent are consistent with the requirements of Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996), because the agency considers, among other factors, inability to pay, good faith efforts, participation in alternative compliance programs, in assessing forfeitures).

<sup>18</sup> See, e.g., *Jerry Szoka*, 14 FCC Rcd 20147,20150 ¶¶ 9-10 (1999); *Bay Broadcasting Corp.*, 15 FCC Rcd 13613, 13615-16 ¶¶ 8-9 (Enf. Bur. 2000) *Merichem Sasol LLC*, 15 FCC Rcd 8450, 18452 ¶ 4 (WTB 1999) .

the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. The 4M companies have not provided any financial documentation to support a claim of inability to pay; therefore, we have no basis to reduce the forfeiture on grounds of inability to pay.<sup>19</sup>

15. Because we expect cooperation during an FCC investigation, no mitigation is warranted on the basis that the 4M companies acted in good faith by cooperating with the FCC agent or by 4M Communications having the tower painted after the FCC agent so advised 4M Communications. We do, however, find that 4M of Richmond acted in good faith by correcting the fencing violation before being notified of that violation and are reducing that portion of the proposed forfeiture for 4M of Richmond's violation of Section 73.49 of the Rules by \$1,400. We also find that 4M of Richmond acted in good faith when it was attempting to install the repaired and recalibrated antenna base current meter during the FCC agent's inspection, and are reducing that portion of the proposed forfeiture for 4M of Richmond's violation of Section 73.1745(a) of the Rules by \$800.

16. While the 4M companies' "successful efforts to save troubled AM stations" are commendable, we find that no mitigation is warranted on that basis. We do, however, find that the 4M companies have a history of overall compliance and, accordingly, we find that the forfeiture proposed against 4M of Richmond should be further reduced by \$2,200 and that the forfeiture proposed against 4M Communications should be reduced by \$2,000.

17. We have examined the 4M companies' response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well.<sup>20</sup> As a result of our review, we conclude that 4M of Richmond willfully violated Section 73.49 of the Rules and willfully and repeatedly violated violations of Section 73.1745(a) of the Rules; and that 4M Communications willfully violated Section 17.50 of the Rules. We find that the proposed forfeitures against 4M of Richmond and 4M Communications should be reduced to the amounts indicated above.

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<sup>19</sup> The Commission has determined that, in general, gross revenues are the best indicator of the ability to pay a forfeiture. See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

<sup>20</sup> The 4M companies cite *Radio One Licenses, Inc.*, as authority for reducing the proposed forfeiture on the basis of minor violation, good faith and history of overall compliance. See *Radio One Licenses, Inc.*, 16 FCC Rcd 15326 (Enf. Bur. 2001); *recon. den.*, 17 FCC Rcd 1724 (Enf. Bur. 2002); *recon. granted in part and denied in part*, 17 FCC Rcd 20408 (Enf. Bur. 2002); *application for review granted in part and denied in part*, 18 FCC Rcd 15964 (2003); *recon. den.*, 18 FCC Rcd 25481 (2003). In the instant case, we considered reducing the proposed forfeiture in paragraphs 13-17 above and found that a reduction is warranted on the basis of a history of overall compliance and good faith. We have examined the *Radio One* orders and find nothing which supports a different result. *Radio One* involved a monetary forfeiture originally imposed for willful violation of the following Rules: 11.35(a) (failure to have operational Emergency Alert System ("EAS") equipment); 73.1125(e) (failure to establish a local or toll-free telephone number in the community of license); 73.1350(c)(1) (failure to establish monitoring procedures to determine compliance with Section 73.1560 regarding operating power); 73.1800(a) (failure to maintain a station log); and 73.3526(a)(2) (failure to maintain a public inspection file). In a series of rulings, the Enforcement Bureau and the Commission reduced the originally proposed monetary forfeiture of \$22,000 to \$8,000 on the basis that *Radio One* did maintain a public inspection file and had a history of overall compliance.

**IV. ORDERING CLAUSES**

18. 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,<sup>21</sup> 4M of Richmond **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand six hundred dollars (\$6,600) for willful violation of Section 73.49 of the Rules and for willful and repeated violations of Section 73.1745(a) of the Rules.

19. **IT FURTHER IS ORDERED** that 4M Communications **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willful violation of Section 17.50 of the Rules. The total amount for these forfeitures is fourteen thousand six hundred dollars (\$14,600).

20. 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.<sup>22</sup> 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. 200332640001 and FRN 3782182. 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.<sup>23</sup>

21. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to 4M of Richmond, Inc., and 4M Communications, Inc., 308 Broad Street, Richmond, Virginia 23220.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

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<sup>21</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>22</sup> 47 U.S.C. § 504(a).

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