

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

In the Matter of	)	
	)	File No. EB-02-CG-522
Mercury Broadcasting Company, Inc.	)	
	)	NAL/Acct. No. 200332320004
Station WKBF (AM)	)	
Moline, Illinois	)	FRN: 0001 6778 06

**FORFEITURE ORDER**

**Adopted: September 28, 2004**

**Released: September 30, 2004**

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture of eight thousand eight hundred dollars (\$8,800) to Mercury Broadcasting Company, Inc. (“Mercury”) for willful and repeated violations of Sections 17.50 and 17.57 of the Commission's Rules (“Rules”). The noted violations involve Mercury’s failure to comply with the prescribed antenna structure painting requirements and failure to register a change in tower ownership.

2. In January 24, 2003, the Commission’s Chicago, Illinois Field Office (“Chicago Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Mercury for a proposed forfeiture in the amount of thirteen thousand dollars (\$13,000).<sup>1</sup> Mercury responded to the *NAL* on February 24, 2003.

**II. BACKGROUND**

3. Mercury is the licensee of AM radio station WKBF, Rock Island, Illinois. Mercury owns that station’s two antenna structures (#s 1009199 and 1009200), which are located at 53<sup>rd</sup> Street and Old Colona Road, Moline, Illinois. The Commission’s Antenna Structure Registration (“ASR”) database lists each structure’s height as 108.2 meters above ground level (355 feet). The registration requires appropriate marking and lighting.

4. On July 31, 2002, an agent from the Chicago Office inspected WKBF’s antenna structure site.<sup>2</sup> The agent observed that both antenna structures’ paint was badly faded, and sections of the towers had paint missing, exposing the bare metal. On August 5, 2002, the agent discovered that the Commission ASR data base listed another company as the licensee for WKBF. Based on this inspection and

<sup>1</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332320004 (Enf. Bur., Chicago Office, released January 24, 2003).

<sup>2</sup> The *NAL*, at paragraph 2, identifies the day of inspection as July 3, 2002. The *Notice of Violation* and the investigative record, however, correctly identify the inspection date as July 31, 2002.

information, on August 7, 2002, the Chicago Office issued a *Notice of Violation* (“*NOV*”) to Mercury for violations of Section 17.50 of the Rules, for failure to comply with the prescribed antenna structure marking, and Section 17.57, failure to register a change in tower ownership. On August 16, 2002, Mercury responded to the *NOV*. It did not dispute the noted violations, but instead submitted information documenting that it was in the process of having the towers painted, and that it had updated its tower registration with the Commission.<sup>3</sup>

5. On January 24, 2003, the Chicago Office issued an *NAL* for a forfeiture in the amount of \$13,000 for apparent willful and repeated violations of Sections 17.50 (\$10,000) and 17.57 (\$3,000) of the Commission’s Rules. Mercury responded to the *NAL* on February 24, 2003. In its response, Mercury did not dispute the findings of the *NAL*; rather, Mercury sought a reduction or cancellation of the proposed forfeiture based on its good faith and prompt remedial efforts, the nature and circumstances of the violations, and its record of compliance with the Commission’s Rules.

### III. DISCUSSION

6. 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>4</sup> Section 1.80 of the Rules,<sup>5</sup> 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*”). Section 503(b) of the Act requires that the Commission, in examining Mercury’s 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 such other matters as justice may require.<sup>6</sup> As discussed below, we have considered Mercury’s response to the *NAL* in light of these statutory factors and have found that reduction of the proposed forfeiture is warranted.

7. 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. Mercury admitted that its antenna structures needed repainting. Section 17.57 of the Rules requires the owner of an antenna structure for which an ASR number has been obtained to notify the Commission of any change in the ownership information. Mercury concedes that it did not do so following an ownership change. Section 312(f)(1) of the Communications Act<sup>7</sup> 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 . . . .”<sup>8</sup> Similarly, Section 312 (f)(2) of the Act

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<sup>3</sup> The documentation included a list of companies to which tower painting quotes were sent out on April 30, 2002, and a bid acceptance dated July 24, 2002 and signed July 29, 2002.

<sup>4</sup> 47 U.S.C. § 503(b).

<sup>5</sup> 47 C.F.R. § 1.80.

<sup>6</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>7</sup> 47 U.S.C. § 312(f)(1).

<sup>8</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

provides that “the term ‘[r]epeated,’ . . . , means the commission or omission of such act more than once or, if continuous, for more than one day.”<sup>9</sup> We find that Mercury’s failures to keep its antenna structure painted to maintain good visibility, and to immediately notify the Commission of any change in ownership information were willful and repeated.

8. In support of its claim of good faith, Mercury submitted documentation that it had begun negotiations to have the towers repainted several months before an agent from the Chicago Office inspected the towers in the presence of Mercury’s Chief Engineer and Engineer. After reviewing this supporting documentation, we conclude that a reduction of \$2,000 of the proposed forfeiture amount is appropriate based on Mercury’s good faith efforts made to keep its towers in conformance with Section 17.50 before being notified of the violations by the Commission staff.<sup>10</sup>

9. Mercury also claims that the nature and circumstances of its violations reveal “no threat to public safety,” thus warranting reduction of the forfeiture amount. Specifically, Mercury notes that because the towers were registered [in another name], its inadvertent failure to register the ownership change was not a grave offense, nor was its failure to repaint the towers because Mercury repainted them so quickly upon Commission notice. After reviewing the facts of this case, we find that Mercury’s violations are not mitigated because there was no showing of harm to the public. The Commission has emphasized the importance of tower registration in order to be able to contact the tower owner in case a problem arises.<sup>11</sup> Moreover, it is well established that a licensee cannot absolve itself of the failure to operate in compliance with Commission Rules by simply claiming that there was no harm done to the public.<sup>12</sup> Similarly, Mercury’s claim of inadvertence for failure to notify the Commission of the ownership change does not excuse or mitigate its violation of the Rules. As the Commission has stated, “inadvertence . . . is at best ignorance of the law,” and is not considered a mitigating circumstance.<sup>13</sup> Additionally, Mercury’s remedial actions based on correcting both its Sections 17.50 and 17.57 violations after the violations were discovered by the Commission, are not a mitigating factor.<sup>14</sup>

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<sup>9</sup> 47 U.S.C. § 312(f)(2).

<sup>10</sup> See *Access.I Communications Corp. – NY*, 18 FCC Rcd 22289 (Enf. Bur. 2003) (reducing a forfeiture where a licensee was able to demonstrate that it had taken significant steps towards having its antenna structure repainted before the Commission inspected the tower).

<sup>11</sup> See *American Tower Corporation*, 16 FCC Rcd 1282 (2001).

<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 further 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.

<sup>13</sup> *Southern California Broadcasting Co.*, *supra*, note 8 at 4388.

<sup>14</sup> 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.”

10. Finally, Mercury points out, and a search of Commission records confirms, that Mercury has a history of compliance with the Commission's rules, and that in its 12 years as an FCC licensee, it has not been cited for any rule violations for its seven other broadcast stations.<sup>15</sup> After considering Mercury's past history of compliance, we conclude that a further reduction of two thousand, two hundred dollars (\$2,200) of the forfeiture amount is appropriate.

11. We have examined the Mercury'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 Mercury willfully and repeatedly violated Sections 17.50 and 17.57 of the Rules. We find that the proposed forfeitures against Mercury should be reduced to the amount as indicated above.

#### IV. ORDERING CLAUSES

12. 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>16</sup> Mercury Broadcasting Company, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand eight hundred dollars (\$8,800) for willful and repeated violation of Sections 17.50 and 17.57 of the Rules.

13. 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>17</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL/Acct. No.* and *FRN No.* referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>18</sup>

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<sup>15</sup> Mercury cites four different cases where the Commission reduced a forfeiture based on the licensee's history of overall compliance, and one case based on the Commission's discretion. Because these cases support the action we are taking in this case, no further discussion is necessary.

<sup>16</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>17</sup> 47 U.S.C. § 504(a).

<sup>18</sup> See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Mercury Broadcasting Company, Inc., 115 East Travis, San Antonio, Texas 78205.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon  
Assistant Chief, Enforcement Bureau