

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

In the Matter of)	
)	
Capital Media Corporation)	
WHAZ)	File No. EB-03-NY-082
WBAR-FM)	File No. EB-03-NY-083
WMYY)	File No. EB-03-NY-084
WMNV)	File No. EB-03-NY-085
Cohoes, NY)	
)	NAL/Acct. No. 200432380008
)	FRN: 0003 7934 60

FORFEITURE ORDER

Adopted: October 13, 2004

Released: October 15, 2004

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of four thousand dollars (\$4,000) to Capital Media Corporation (“*Capital Media*”), licensee of radio stations WHAZ, WBAR-FM, WMYY and WMNV, for willful and repeated violation of Sections 11.35(a) and 11.61(b) of the Commission’s Rules (“*Rules*”)¹ by failing to maintain station records of required monthly and weekly Emergency Alert System (“*EAS*”) test messages.

2. On March 1, 2004, the Commission's New York Field Office (“*New York Office*”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”), to Capital Media for a proposed forfeiture in the amount of four thousand dollars (\$4,000).² Capital Media filed a response to the *NAL* on March 29, 2004.

II. BACKGROUND

3. On June 5, 2003, an agent from the Commission’s New York Office conducted an EAS inspection of stations: WHAZ, Troy, New York; WBAR-FM, Lake Luzerne, New York; WMYY, Schoharie, New York; and WMNV, Rupert, Vermont. The four stations are owned by Capital Media, are co-located at Cohoes, New York, and use the same EAS system. The agent did not find station records for EAS testing for the months of December 2002, January 2003, March 2003 and April 2003, the test for January 5-11, 2003, or find reasons given why EAS tests were not received.

¹ 47 C.F.R. § 11.35 and 47 C.F.R. § 11.61(b).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432380008 (Enf. Bur., New York Office, released March 1, 2004).

4. On March 1, 2004, the New York Office issued the *NAL* for violation of Sections 11.35(a) and 11.61(b) of the Rules, and fined Capital Media \$1,000 for each of the four stations (\$4,000). On March 29, 2004, Capital Media submitted a response to the *NAL*. In that response, Capital Media admits that its EAS receiver did not receive the tests in question, but urges the Commission to rescind or reduce the forfeiture amount.³

III. DISCUSSION

5. 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* (“*Forfeiture Policy Statement*”).⁶ In examining Capital Media’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

6. Section 11.61(b) of the Rules requires broadcast stations to make entries in station records of monthly and weekly EAS tests received, and Section 11.35(a) requires broadcast stations to make entries in station records of any failure to receive monthly and weekly EAS tests, and to give reasons why the entries were not made.

7. Capital Media does not dispute that it did not receive the EAS tests or that it failed to make contemporaneous entries at the time as to why it failed to receive the tests. Nevertheless, Capital Media seeks a rescission or reduction of the proposed forfeiture. In support, Capital Media claims that it kept very careful records of its EAS tests received, as evidenced by EAS test records it has before and after the missing ones in 2003. It also states it does not know definitively why it did not receive the tests that are missing. In documentation submitted with its response, Capital Media notes that power outages and inclement conditions may have caused its EAS receiver to not be working. It also states that it has corrected communications within its EAS system, and continues to improve its EAS recordkeeping

8. The reasons Capital Media gives for having neither the test records nor the explanation for their absence are not exculpatory. Capital Media, as a Commission licensee, is obligated to maintain its stations in full compliance with the Act and the Rules during all periods, and will not be excused for violations absent clear mitigating circumstances.⁸ In the instant case, Capital Media does not have entries with respect to EAS tests received nor any contemporaneous explanation as to why there were no entries made. Since it cannot satisfactorily explain why it could not receive the tests, Capital Media also

³ To the extent that Capital Media also alleges that during the inspection, the Commission agent assured Capital Media that he would not impose a sanction, the dispositive facts are that Capital Media violated Sections 11.35(a) and 11.61(b) of the Rules, and thus a sanction is appropriate.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ See *Roser Communications Network, Inc.*, 18 FCC Rcd 11766 (Enf. Bur. 2003).

cannot comply with the requirement to give reasons why the entries were not made. By failing to make the appropriate entries at the relevant time, Capital Media violated Sections 11.61(a) and 11.35 of the Commission's Rules. The three exhibits Capital Media includes with its response to the *NAL* which appear to attribute non-compliance, in part, to weather difficulties, were made in 2004 and are nothing more than *post hoc* rationalization of the violations.

9. Based on the findings of the *NAL* and Capital Media's response thereto, we find that Capital Media's violation of Sections 11.35(a) and 11.61(b) was willful⁹ and repeated.¹⁰ While the licensee has taken corrective actions to prevent recurrence of the violations, such actions are not mitigating factors warranting a forfeiture reduction.¹¹ Therefore, we deny Capital Media's request to reduce or rescind the *NAL*.

IV. ORDERING CLAUSES

10. 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,¹² Capital Media, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for willfully and repeatedly violating Sections 11.35(a) and 11.61(b) of the Rules.

11. 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.¹³ Payment shall 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 must include the FCC Registration Number (FRN) and the *NAL*/Acct. No. referenced in the caption. 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 Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁴

⁹ 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).

¹⁰ 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. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company, supra*, at 4388 and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

¹¹ See, e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

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

¹³ 47 U.S.C. § 504(a).

¹⁴ See 47 C.F.R. § 1.1914.

12. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Mr. Paul F. Lotters, President and General Manager, Capital Media Corporation, 30 Park Avenue, Cohoes, New York, 12047-3330.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau