

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

In the matter of)	
)	
Billy R. Autry)	File No.: EB-02-OR-386
Licensee of WKRA (AM))	NAL/Acct. No. 200332620012
)	FRN 0004-9301-45
Holly Springs, Mississippi)	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 2004

Released: November 10, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we grant in part a September 10, 2003 petition for reconsideration (petition) filed by Billy R. Autry, who seeks reconsideration of an August 11, 2003 *Forfeiture Order*,¹ in which the Enforcement Bureau imposed a monetary forfeiture in the amount of eleven thousand dollars (\$11,000) for willful and repeated violation of Sections 73.49 and 73.1745 of the Commission's Rules ("Rules").² The noted violations involve Mr. Autry's operation of an AM radio station without proper enclosure of its antenna tower, operating with excessive power during post-sunset hours, and failing to discontinue operation at night. As explained below, we will reduce the forfeiture to \$8,800 based on Mr. Autry's history of overall compliance with the Rules.

II. BACKGROUND

2. On November 18 and 19, 2002, an agent from the Commission's New Orleans, Louisiana Field Office ("New Orleans Office") observed WKRA(AM)'s radio signal from before sunset, through sundown, until 10:00 p.m. During this time period, the agent conducted field strength measurements of the station's signal and determined that WKRA(AM) failed to reduce power or to cease operation in accordance with its station authorization. The next day the agent inspected WKRA(AM)'s antenna tower which has radio frequency energy at its base. The fence enclosing the antenna tower had an unlocked gate which was open and broken. Also, there was no perimeter fence or other enclosure to prevent anyone from gaining access to the tower.

3. On March 17, 2003, the New Orleans Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL"), in the amount of eleven thousand dollars (\$11,000) to Mr. Autry for the apparent willful and repeated violation of Sections 73.49 and 73.1745 of the Rules.³ The Bureau did not receive a response to the *NAL*, and in its subsequent *Forfeiture Order* found Mr. Autry liable for an \$11,000

¹ *Billy R. Autry*, 18 FCC Rcd 16350 (Enf. Bur. 2003) ("*Forfeiture Order*").

² 47 C.F.R. § 73.49 and 47 C.F.R. §1745.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332620012 (Enf. Bur., New Orleans Office, released March 17, 2003).

forfeiture for willful violation of Section 73.49 of the Rules, and for willful and repeated violation of Section 73.1745 of the Rules.⁴

4. Mr. Autry's petition is accompanied by a copy of a purported response to the *NAL* that he claims he filed with the Commission.⁵ In his petition, Mr. Autry admits the violations, and claims that the station has taken corrective actions and has committed no other violations of Commission Rules. He seeks cancellation or a drastic reduction of the forfeiture amount. In support of his claim of inability to pay the forfeiture amount, he submits certain financial information for the years 2000 – 2002.

III. DISCUSSION

5. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁶ Section 1.80 of the Rules,⁷ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* (“*Forfeiture Policy Statement*”).⁸ Section 503(b) of the Act requires that the Commission, in examining Mr. Autry's petition, 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.⁹

6. Section 73.49 of the Rules requires that antenna towers having radio frequency potential at the base be enclosed within effective locked fences or other enclosures. Mr. Autry has admitted that the gate to the fence was unlocked. Section 73.1745 of the Rules requires that broadcast stations operate only at times and power levels as specified in their license. Mr. Autry has admitted that WKRA(AM) failed to reduce its power and its nighttime operations at the time in question. Based on Mr. Autry's admissions with respect to the condition of the fence and gate surrounding the antenna tower, and the operation of WKRA (AM) at unspecified times with nonreduced power, we conclude that Mr. Autry willfully violated Sections 73.49 and 73.1745 of the Rules, and repeatedly violated Section 73.1745 of the Rules.

7. In seeking reconsideration of the *Forfeiture Order*, Mr. Autry states that he has remedied the defects identified in the Commission inspection and seeks mitigation. However, no mitigation is warranted on the basis of Mr. Autry's correction of the violations. As the Commission stated in *Seawest Yacht Brokers*, “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

⁴ *Forfeiture Order* at 16350, *supra*.

⁵ In that *NAL* response, Mr. Autry admits the violations, states that he has made remedial efforts to correct the violations, that the station has not been in violation of Commission rules previously, and that a fine of \$11,000 would be very difficult for him to pay.

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

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

⁹ 47 U.S.C. § 503(b)(2)(D).

¹⁰ 9 FCC Rcd 6099, 6099 (1994). *See also Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966); and *AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875-76 ¶¶ 26-28 (2002).

8. Mr. Autry points out, and a search of Commission records confirms, that he has a history of compliance with the Commission's Rules. After considering Mr. Autry's past history of compliance, we conclude that a reduction of the forfeiture amount to \$8,800 is appropriate.¹¹

9. Mr. Autry prefaces his inability to pay claim by pointing out that his small business is in a small community and is "without substantial corporate assets." The Commission has stated that such entities' reliance upon their small business status, alone, will not suffice to demonstrate an inability to pay;¹² they still must substantiate their inability to pay claim with financial documentation.¹³

10. In support of Mr. Autry's claim that to pay the penalty assessed would be a financial hardship, he submits three years of profit and loss statements for both WKRA AM and FM, prepared by the stations' accountant, and a statement of the AM station's sales proceeds total for three years with trade amounts subtracted. As stated in the *NAL*, the Commission will not consider reducing or canceling a forfeiture on the basis of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. The Commission typically has relied upon gross revenues (or receipts) as the best indicator of a violator's ability to pay a forfeiture.¹⁴

11. Mr. Autry's submissions are not adequate to demonstrate an inability to pay the forfeiture. Here, Mr. Autry, as an individual (not a corporation, partnership, or any other legal entity) is the licensee of station WKRA(AM), and thus the profit and loss statements for stations WKRA AM and FM are insufficient to demonstrate his inability to pay the forfeiture. Because Mr. Autry did not submit sufficient documentation regarding his personal finances, we are unable to evaluate his inability to pay claim, such that we can award a reduction based on inability to pay.¹⁵ The Commission has stated that "[i]n cases involving individuals, financial documentation other than financial statements is often submitted such as copies of filed tax forms or other objective information."¹⁶

¹¹ See *Max Media of Montana, L.L.C.*, 18Fcc Rcd 21375, 21379 ¶ 14 (Enf. Bur. 2003) (making a similar reduction due to licensee's history of overall compliance).

¹² *Forfeiture Policy Statement, supra* at 17109 ¶¶ 51-52 (finding that the Commission's forfeiture policies and precedent is 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).

¹³ 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) .

¹⁴ See *Forfeiture Policy Statement, supra*, 17106 ¶ 43; *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 ¶ 8 (1992) (finding that gross receipts are a "very useful yardstick" in analyzing a company's financial condition for forfeiture purposes).

¹⁵ We did review Stations WKRA AM and FM's profit and loss statements for 2000, 2001 and 2002, and note that while the income decreased in amount over the three year period, the statements nonetheless reflect income sufficiently large to negate a claim of inability to pay, as explained in *PJB Communications of Virginia, Inc., supra*. Indeed, the Commission has stated that if "companies' gross revenues are sufficiently large, the fact that net losses are reported, alone, does not necessarily signify inability to pay." See *Alpha Ambulance, Inc.*, 19 FCC Rcd 2547, 2548 ¶ 6 (2004). Thus, had we considered Mr. Autry's submissions, we would have found that the \$8,800 forfeiture is not excessive under Commission precedent, according to *PJB Communications of Virginia*, and *Alpha Ambulance, Inc.*

¹⁶ *Barry A. Stevenson Edmonds, Washington*, 12 FCC Rcd 1976, 1977 (CIB 1997). See also *James Lee Gaskey*, 15 FCC Rcd 25309 (Enf. Bur. 1999).

12. We have examined Mr. Autry's petition pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we find that a cancellation of the forfeiture is not warranted but a reduction of the forfeiture amount to \$8,800 is appropriate.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act¹⁷ and Section 1.106 of the Rules,¹⁸ Mr. Autry's petition for reconsideration of the March 17, 2003 *Forfeiture Order* in this proceeding **IS** hereby **GRANTED** to the extent indicated herein.

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.¹⁹ 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. 20554.²⁰

15. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Mr. Billy R. Autry, in care of Koerner & Olender, P.C., 5809 Nicholson Lane, Suite 124, North Bethesda, Maryland 20852-5706.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁷ 47 U.S.C. § 405.

¹⁸ 47 C.F.R. § 1.106.

¹⁹ 47 U.S.C. § 504(a).

²⁰ See 47 C.F.R. § 1.1914.