

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

In the Matter of)	
)	File No. EB-03-AT-077
Cumulus Licensing Corp.)	
Owner of Antenna Structures)	NAL/Acct. No. 200332480025
#1052722 and #1052724)	
near Savannah, Georgia)	FRN: 0005-2603-77

FORFEITURE ORDER

Adopted: December 22, 2004

Released: December 28, 2004

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Cumulus Licensing Corporation (“Cumulus”), the owner of antenna structure registration (“ASR”) numbers 1052722 and 1052724 in Savannah, Georgia, for willful and repeated violation of Section 17.50 of the Commission’s Rules (“Rules”).¹ The noted violation involves Cumulus’s failure to clean and repaint its antenna structures to maintain good visibility.

2. On May 27, 2003, the Commission’s Atlanta, Georgia District Office (“Atlanta Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to Cumulus for a forfeiture in the amount of ten thousand dollars (\$10,000).² Cumulus filed a response to the *NAL* on August 1, 2003.

II. BACKGROUND

3. On August 22, 2001, an agent from the Atlanta Office inspected antenna structures associated with AM radio station WBMQ, Savannah, Georgia. The agent found that the paint on the antenna structures was badly faded and peeling, greatly reducing the structures’ visibility. The Atlanta Office issued a *Notice of Violation* (“*NOV*”) to Cumulus on September 19, 2001, noting *inter alia* the violation of Section 17.50 of the Rules. Cumulus responded on October 15, 2001, that it was acquiring bids to repaint the structures and anticipated the repainting would be completed by December 31, 2001.

4. The Atlanta Office issued a *Continuation of Notice of Violation* (“*CNOV*”) on October 18, 2001, requesting a status report of the antenna structure repainting. On January 9, 2002, Cumulus’s counsel replied that Cumulus would make a determination no later than January 31, 2002, whether to repaint or replace the towers. On February 4, 2002, Cumulus’s counsel submitted an additional reply stating that Cumulus planned to replace the structures and that completion of construction would be June or July of 2002. On July 31, 2002, Cumulus’s counsel provided another written reply stating that after

¹ 47 C.F.R. § 17.50.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480025 (Enf. Bur., Atlanta Office, released May 27, 2003).

further evaluation, Cumulus had decided to relocate the operations for WBMQ to another existing structure in Savannah, Georgia, after which it would dismantle the current structures.

5. On March 18 and 19, 2003, an agent of the Atlanta Office again inspected ASR numbers 1052722 and 1052724. The structures remained unpainted and the orange and white aviation bands were not distinguishable at a distance of one-half mile from the structures. On May 27, 2003, the Atlanta Office issued the subject *NAL* for apparent willful and repeated violation of Section 17.50 of the Rules. In its response, Cumulus does not contest that its two structures were in violation of Section 17.50,³ but seeks a reduction in the forfeiture amount based on the fact that its existing towers cannot be repainted because the towers lead paint if scraped could be harmful to the surrounding environment, and because its efforts to relocate to a new location have been hampered by environmental-related concerns as well.

III. DISCUSSION

6. The *NAL* assessed the proposed forfeiture amount in this case in accordance with Section 503(b) of the 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*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). In examining Cumulus's response to the *NAL*, 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.⁶

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. Cumulus concedes that its two antenna structures are in violation of Section 17.50, and the record reflects that Cumulus permitted the violation to continue from August 22, 2001, the date of the Atlanta Office's first inspection of the referenced WBMQ antenna structures until March 19, 2003, the date of the Atlanta Office's re-inspection of the antenna structures.⁷ We, therefore, find that Cumulus willfully⁸ and repeatedly⁹ violated Section 17.50 of the Rules.

8. Cumulus states that their antenna structures have existed at their present location since the early 1950s. The location is a salt water marsh, which has eroded the towers during the last 50 years. Each tower's paint, apparently never replaced in its 50 years of existence, is lead-based and applied over

³ Cumulus' Response at page 1.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ See *William L. Needham and Lucille Needham*, 18 FCC Rcd 5521, 5522 (Enf. Bur. 2003) (Violation determined to be willful where tower owner was aware of the condition of the paint but chose not to repaint the tower).

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

⁹ 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*.

a non-galvanized steel structure. Cumulus purchased the station and antenna structures on March 26, 1998. Cumulus states that it began to consider the condition of the towers and their paint only after the Atlanta Office agent notified them of the Section 17.50 violation.¹⁰

9. After contact by the Atlanta Office agent, Cumulus says it began a series of efforts to paint the towers at their original location. Cumulus was informed that the Army Corps of Engineers was concerned because the towers' lead paint, if scraped or sanded, would cause lead to fall into the wetlands, which it is responsible for protecting, resulting in potential environmental harm. Moreover, all the painting contractors contacted by Cumulus stated that the towers were unsafe to climb. One company nevertheless provided a cost estimate of \$38,350 for the project. Because overcoming these obstacles would have been prohibitively expensive, Cumulus then developed plans to build new towers in the wetlands marsh by applying to the Army Corps of Engineers, which has jurisdiction of the area. Cumulus discovered that it would be prohibitively expensive, if not impossible, to acquire approval to replace the towers because of environmental-related concerns regarding placement of guy anchors in the protected wetland area. Cumulus subsequently applied to the Commission to relocate the Station WBMQ facility to an existing tower. However, when it began construction of a ground station near the existing tower, Cumulus soon learned from the Army Corps of Engineers that its chosen location is a *potential* wetland.

10. Cumulus persevered with its proposal to build the ground station and utilize the existing antenna structure at the site through the Army Corps of Engineers' permit process, and received final permission to begin building on July 3, 2003. We note that the last communication from Cumulus prior to the *NAL* was dated July 31, 2002, and indicated that it intended to relocate the station to an existing tower but made no mention of building a new ground station on potentially protected wetlands.¹¹

11. Cumulus argues that these events show that it has "acted promptly at all times to do whatever it could to solve the problem resulting from the poor paint visibility."¹² Cumulus states that if its contractors and consultants had informed it that the new site for relocation of the antenna structures was also a wetland and required Army Corps of Engineers approval, it "would have begun the permitting process earlier."¹³

12. Cumulus states that it is acting as quickly as it can to complete the building and commence operations at its new site. Once it is operating at the new site, it will close its existing site and take down the towers.

13. Cumulus states that it believed that the Commission understood the towers could not be repainted because it kept the Atlanta Field Office apprised of its progress after the agent's inspection. Cumulus argues that it had no notice that the time delay was unacceptable, and that correction of the problem has been its goal. It argues that the forfeiture will not provide additional motivation to enable Cumulus to take down the tower. Cumulus argues that the Commission is in effect telling it that it should have shut down the station and taken down the towers, but that this would have caused it to lose its license for being silent for more than a year.

14. We find that Cumulus should have known of, and acted on, the lack of paint on the towers prior to or immediately upon their purchase of the station and associated towers. Even if

¹⁰ Cumulus Response ¶ 2.

¹¹ Letter from John Griffith Johnson, Jr., of Paul, Hastings, Janofsky & Walker LLP, to Mr. Fred L. Broce, Atlanta District Director, Enforcement Bureau, dated July 31, 2002.

¹² Cumulus Response at ¶ 9.

¹³ *Id.*

Cumulus was unaware of its responsibility as the antenna structures' owner under the Rules regarding painting of the structure, it is well established that mistake or inadvertence resulting in a rule violation is considered a willful violation of the Commission's rules.¹⁴ Moreover, the Commission holds the owner of the antenna structure primarily responsible for awareness of and compliance with its Rules.¹⁵ Accordingly, we conclude that it was Cumulus's responsibility to determine that the structures were inadequately painted and to act on that determination.¹⁶

15. Cumulus's argument that it acted immediately to correct the violation after the violation was brought to its attention by the Atlanta Office agent does not support a reduction of the proposed forfeiture inasmuch as these actions were remedial and taken in response to being informed of the violation by the Atlanta Office. The Commission has consistently found that "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."¹⁷

16. We also disagree with Cumulus's argument that it has a good history of compliance. A search of our records shows numerous violations by Cumulus in connection with operation and maintenance of its stations. Accordingly, no reduction in the proposed forfeiture is warranted.

17. A search of the Commission's records does not indicate whether Cumulus has completed transferring its station operations or whether the former towers have been dismantled. Accordingly, we will require, pursuant to Section 308(b) of the Act,¹⁸ that Cumulus submit a report to the Enforcement Bureau within 30 days of the release date of this *Order* demonstrating that it is in compliance with our antenna registration Rules as required by Section 17.4(a). Cumulus's report must be submitted in the form of an affidavit or declaration, under penalty of perjury, and signed by an officer or director of the licensee. Cumulus should note that its continued noncompliance could result in additional enforcement action.

18. We have examined Cumulus' 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 Cumulus willfully and repeatedly violated Section 17.50 of the Rules, and we find no basis for rescinding or reducing the \$10,000 forfeiture for this violation.

IV. ORDERING CLAUSES

19. 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,¹⁹ Cumulus Licensing Corporation, owner of antenna structures #1052722 and #1052724 near Savannah, Georgia, **IS LIABLE FOR A MONETARY FORFEITURE**

¹⁴ *Southern California Broadcasting Company, supra* (citing *Vernon Broadcasting, Inc.*, 60 RR2d 1275, 1277 (1986); *Fay Neel Eggleston*, 19 FCC2d 829 (1969)). See also *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986); *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242 (1984).

¹⁵ See, e.g. *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 ¶¶ 6-7 (2002).

¹⁶ Moreover, we find unpersuasive Cumulus's argument that it only discovered the towers were standing in a protected wetland, and were so eroded as to prohibit repainting, years after it purchased the station, and then only after the Commission inspection. The standard business practice of due diligence would have revealed this information prior to Cumulus's purchase of the stations.

¹⁷ *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994).

¹⁸ 47 U.S.C. § 308(b).

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

in the amount of ten thousand dollars (\$10,000) for its violation of Section 17.50 of the Rules.

20. **IT IS FURTHER ORDERED** that, pursuant to Section 308(b) of the Act, Cumulus Licensing Corporation must submit the report described in paragraph seventeen (17) above no later than thirty (30) days from the release date of this *Order* to: Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division, 445 12th Street, S.W., Washington, D.C. 20554, Attention: Susan Magnotti, Esquire.

21. 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.²⁰ 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. 20554.²¹

22. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Cumulus Licensing Corporation, 3535 Piedmont Road, Building 14, 14th Floor, Atlanta, Georgia 30305, and to its counsel, Mark N. Lipp, Vinson & Elkins, LLP, The Willard Office Building, 1455 Pennsylvania Avenue NW, Washington, DC 20004-1008.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau

²⁰ 47 U.S.C. § 504(a).

²¹ See 47 C.F.R. § 1.1914.