

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

In the Matter of)	
)	
M.B. Communications, Inc.)	File No. EB-04-BF-018
WYLF)	NAL/Acct. No. 200432280003
Penn Yan, New York)	FRN: 0000012005
)	

FORFEITURE ORDER

Adopted: June 1, 2005

Released: June 3, 2005

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eleven thousand dollars (\$11,000)¹ to M.B. Communications, Inc. (“M.B. Communications”), licensee of AM station WYLF, Penn Yan, New York, for willful and repeated violations of Sections 73.49, 73.1560(a)(1), and 73.1745(a) of the Commission’s rules (the “Rules”).² The noted violations concern the operation of station WYLF with power in excess of the station’s authorization during daytime, post sunset, and nighttime hours and failure to enclose the station’s tower within an effective locked fence or other enclosure.

II. BACKGROUND

2. Station WYLF is authorized to operate at certain power levels during daytime, post sunset, and nighttime hours. On February 4, 2004, in response to an anonymous phone call stating that station WYLF was operating with excessive power at nighttime, an agent with the Commission’s Buffalo Office took field strength measurements for daytime and post sunset operation. Based on these measurements, the agent determined that WYLF was operating in excess of authorized levels for both daytime and post sunset operation. On February 9, 2004, the agent conducted field strength measurements and determined that the station was operating in excess of its authorized nighttime levels as well. On February 24, 2004, the agent conducted field strength measurements and determined that WYLF was again operating in excess of its daytime authorized power level.

3. The Commission agent also inspected the WYLF antenna and tower enclosure. The agent found that the gate to the enclosure was secured by a long-cabled lock, but the amount of slack in the cable resulted in an inadequately secured lock that allowed unimpeded access to the tower. The agent also observed a space of at least eighteen (18) inches between the bottom of the fence and the ground that allowed unimpeded access to the tower.

¹M.B. Communications made a “good faith” payment of \$2,000 on August 31, 2004, and thus the total amount due is \$9,000.

² 47 C.F.R. §§ 73.49, 73.1560(a)(1), and 73.1745(a).

4. On August 25, 2004, the Commission's Buffalo Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to M.B. Communications for a forfeiture in the amount of eleven thousand dollars (\$11,000) for willful and repeated violation of Sections 73.49, 73.1560(a)(1), and 73.1745(a) of the Rules. M.B. Communications filed a response to the NAL on August 31, 2004.

III. DISCUSSION

5. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ Section 1.80 of the Rules,⁴ and the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁵ In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we 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 As discussed below, we have considered M.B. Communications' response to the NAL in light of these statutory factors and have found that reduction or cancellation of the proposed forfeiture amount is not warranted.

6. Section 73.1560(a)(1) of the Rules provides that AM stations must be maintained as near as practicable to the authorized antenna input power. Section 73.1745(a) of the Rules requires that no broadcast station operate at times, or with modes or power, other than those specified and made part of the license. A Commission agent determined that station WYLF exceeded its authorized daytime power limit on February 4, 2004 and February 24, 2004; its post sunset power limit on February 4, 2004; and its nighttime power limit on February 9, 2004. The violation of Section 73.1745(a) therefore is repeated.⁷

7. In its response to the NAL, M.B. Communications does not deny that it operated at power levels above those authorized for daytime, post sunset, and daytime operations. M.B. Communications claims, however, that the excessive power levels were the result of an equipment malfunction, which prevented the transmitter from automatically changing power levels at the required times. It is irrelevant what caused the station to operate in excess of its authorized power levels. M.B. Communications, as the licensee for station WYLF, is responsible for ensuring that the station operates at all times consistent with its authorized daytime, post sunset, and nighttime power levels. To the extent M.B. Communications is attempting to demonstrate that its actions were not willful, we note that Section 503(b) of the Act gives the Commission the authority to assess a forfeiture penalty against any person if the Commission determines that the person has "willfully or repeatedly" failed to comply with the provisions of the Act or with any rule, regulation or order issued by the Commission. In light of our determination that M.B. Communications' violations of Sections 73.1560(a)(1) and 73.1745(a) were repeated, it is not necessary

³47 U.S.C. § 503(b).

⁴47 C.F.R. § 1.80.

⁵12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁶47 U.S.C. § 503(b)(2)(D).

⁷Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[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."

to determine whether they also were willful.⁸

8. Section 73.49 of the Rules requires AM antenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) to be enclosed within an effective locked fence or other enclosure.⁹ At the time of the inspection in February 2004, the Commission agent determined that the fence at the base of the WYLF antenna tower did not effectively enclose the antenna because of an ineffective lock on the fence's gate and a gap of at least eighteen (18) inches beneath the fence, both of which the agent concluded allowed unimpeded access to the tower. Based on this evidence, the Buffalo Office concluded in the *NAL* that M.B. Communications apparently willfully and repeatedly violated Section 73.49 of the Rules. With regard to the lock on the gate, M.B. Communications does not challenge the agent's description or the finding in the *NAL* that its actions were willful and repeated. Rather, M.B. Communications disagrees with the agent's conclusion that it was not an effective lock. The agent's contemporaneous observations, however, show that the lock on the gate was not effective because the amount of slack in the locked cable resulted in an inadequately secured gate. As a result, access to the tower was unimpeded. We stand by the Buffalo Office's conclusions and find that the ineffective lock on the gate constitutes a willful and repeated violation of Section 73.49 of the Rules.¹⁰

9. As to the gap beneath the fence, M.B. Communications explains that a "section of the enclosure lifted out of the ground during the winter" and that it "was an excessively snowy winter which covered up the open area below the fence."¹¹ For purposes of determining whether there has been a violation of our rules, it is irrelevant what caused the gap in the fence. The tower owner is responsible for ensuring that the tower is enclosed within an effective locked fence. Moreover, we do not accept M.B. Communications' apparent claim that it could not see the gap because of the snow. At the time of the inspection in February, the agent's documented evidence shows that there was snow on the ground and the agent was able to see the gap beneath the fence. There is no reason to believe that M.B. Communications could not have seen the gap beneath the fence as well. In any event, because we find that the existence of the gap throughout the winter constitutes a repeated violation of Section 73.49 of the Rules, we do not need to make a finding with regard to willfulness.¹²

10. M.B. Communications states in its response to the *NAL* that it immediately took steps to correct the overpowered operation and to fix the tower gate.¹³ M.B. also submits that it changed its

⁸See *Entravision Communications Corporation*, 19 FCC Rcd 15333 (2004), citing *KOKE, Inc.*, 23 FCC 2d 191 (1970).

⁹The WYLF tower is series fed.

¹⁰Section 312(f)(1) of the Act, 47 U.S.C. 312(f)(1), which applies to Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹¹M.B. Communications' statement that "anyone who would willingly crawl under the fence in the mud and snow in February . . . would have malicious intent" is not relevant to our determination as to whether there was a repeated or willful violation by M.B. Communications of Section 73.49 of the Rules.

¹²See *supra* para. 8.

¹³M.B. Communications states in its response to the *NAL* that it could not fix the gap beneath the fence until the ice and snow melted.

monitoring procedures to ensure that WYLF remains at authorized power levels. These remedial efforts by M.B. Communications do not warrant a reduction or cancellation in the forfeiture. As the Commission has stated, “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.”¹⁴

11. We have examined M.B. Communications’ response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that M.B. Communications repeatedly violated Sections 73.1560(a)(1) and 73.1745(a) of the Rules and willfully and repeatedly violated Section 73.49 of the Rules. We also conclude that neither cancellation nor reduction of the proposed \$11,000 monetary forfeiture is warranted.

12. We have received information that leads us to believe that M.B. Communications continues to operate station WYLF in excess of the station’s authorized power. Accordingly, we direct M.B. Communications to report to Regional Counsel for the Northeast Region within thirty (30) days, whether station WYLF is operating consistent with the station’s authorization.

IV. ORDERING CLAUSES

13. 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 Rules¹⁵, M.B. Communications, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for repeated violations of 73.1560(a)(1), 73.1745(a), and 73.49 of the Rules. M.B. Communications made a “good faith” payment on August 31, 2004, and thus the balance due is nine thousand dollars (\$9,000).

14. **IT IS FURTHER ORDERED** that, pursuant to Section 308(b) of the Act, M.B. Communications, Inc., **SHALL REPORT** to Regional Counsel within thirty (30) days whether station WYLF is operating consistent with the station’s authorization. Such information shall be reported to Regional Counsel, Northeast Region, Federal Communications Commission, One Oxford Valley Office Building, Room 404, 2300 East Lincoln Highway, Langhorne, PA 19047-1859.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (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.¹⁶ 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 Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

¹⁴See *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994). We note that, in its response, M.B. Communications provides information regarding other matters, including, for example, its purchase of certain EAS equipment. This additional information is not relevant to the violations at issue here.

¹⁵47 C.F.R. §§ 0.111, 0.311, 1.80(f).

¹⁶47 U.S.C. § 504(a).

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to M.B. Communications, Inc.'s address of record.

FEDERAL COMMUNICATIONS COMMISSION

Russell Monie, Jr.
Regional Director, Northeast Region
Enforcement Bureau