

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

In the Matter of)	
)	
M.J. Phillips Communications, Inc.,)	File No. EB-02-BF-344
Licensee of Station WJLL(AM))	NAL/Acct. No. 200332280006
Niagara Falls, New York)	FRN 0004-9421-24

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2006

Released: January 23, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we grant in part and deny in part the petition for reconsideration filed by M.J. Phillips Communications, Inc. (“M.J. Phillips”), licensee of AM Station WJLL, Niagara Falls, New York. M.J. Phillips seeks reconsideration of a *Forfeiture Order*¹ issued on June 23, 2004, in the amount of ten thousand dollars (\$10,000) for willful and repeated violations of Sections 73.1560(a)(1), 11.35(a), 11.52(d) and 17.4(a) of the Commission’s Rules (“Rules”).² The noted violations involve M.J. Phillips’ use of excessive power; its failure to have fully operational Emergency Alert System (“EAS”) equipment; its failure to monitor, test and log the tests of its EAS equipment on a regular basis; and its failure to register its antenna structure. For the reasons discussed below, we reduce the forfeiture amount to seven thousand dollars (\$7,000) based on inability to pay. This reduction is consistent with the requirement of Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ that we take into account “ability to pay and other such matters as justice may require.”⁴

II. BACKGROUND

2. On September 17 and 18, 2002, the Commission’s Buffalo, New York Office (“Buffalo Office”) conducted on-site inspections of Station WJLL. The inspections revealed that the station had been exceeding its authorized power limits by more than 105 percent;⁵ that its EAS equipment had not

¹ *M.J. Phillips Communications, Inc.*, 19 FCC Rcd 11051 (Enf. Bur. 2004).

² 47 C.F.R. §§ 73.1560(a)(1), 11.35(a), 11.52(d) and 17.4(a).

³ 47 U.S.C. § 503(b).

⁴ 47 U.S.C. § 503(b)(2)(D). See also note to Section 1.80(b)(4), Section II, *Adjustment Criteria for Section 503 Forfeitures*, Downward Adjustment Criteria.

⁵ AM stations are required to maintain antenna input power levels “as near as is practicable” to, and not less than 90 percent or more than 105 percent of, their authorized power level. See 47 C.F.R. §§ 73.1560(a)(1). Station WJLL’s antenna input power levels exceeded its authorized power limit of 1000 watts by more than 250 percent (continued....)

been fully operational;⁶ that it had not monitored, tested and logged the tests of its EAS equipment on a regular basis;⁷ and that its antenna structure had not been registered.⁸

3. As a result of the inspections, the Buffalo Office issued M.J. Phillips a *Notice of Violation* on September 23, 2002, and a *Notice of Apparent Liability for Forfeiture* (“NAL”) on January 28, 2003.⁹ The NAL proposed a total forfeiture amount of \$10,000 for the noted willful and repeated violations of the Rules. In its response to the NAL, M.J. Phillips sought cancellation or substantial reduction of the proposed forfeiture. Specifically, M.J. Phillips argued that we should not impose a forfeiture amount for failure to register the WJLL antenna structure because the antenna structure was registered; that the portions of the forfeiture imposed for the excessive power and EAS violations should be mitigated because of unusual circumstances; and that it was unable to pay the proposed forfeiture amount, noting that it filed for bankruptcy protection in February 2003.¹⁰ In the *Forfeiture Order*, we rejected these arguments and imposed a forfeiture of \$10,000. In particular, we rejected M.J. Phillips’ inability to pay argument because it failed to include the necessary documentation to establish its inability to pay. In its petition for reconsideration, M.J. Phillips does not dispute the violations but again seeks reduction of the forfeiture on the basis of financial hardship, but this time provides copies of its 2000, 2001, 2002 and 2003 federal income tax returns as supporting documentation.

4. Section 503(b) of the Act requires that, in assessing a forfeiture, the Commission consider, *inter alia*, ability to pay. Under the *Forfeiture Guidelines*,¹¹ inability to pay can be a mitigating factor in assessing a forfeiture. In analyzing an inability to pay claim, the Commission generally considers gross

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and its authorized nighttime power limit of 55 watts by more than 900 percent, and thus greatly exceeded the 105 percent limit.

⁶Broadcast stations are required to maintain fully operational EAS equipment, capable of monitoring “two EAS sources.” See 47 C.F.R. §§ 11.35(a), 11.52(d). Station WJLL’s equipment was only capable of monitoring one EAS source.

⁷Broadcast stations are required to monitor, test, and log such tests of EAS equipment at regular intervals, and repair and/or replace defective equipment within 60 days (and to notify the appropriate Field Office if such equipment cannot be repaired or replaced within the 60-day period). See 47 C.F.R. §§ 11.35(a)-(c), 73.1820(a)(1)(iii). Station WJLL’s logs did not reflect the testing of EAS equipment since July 23, 2002, and did not reflect any failure of such equipment.

⁸Section 17.4(a) of the Rules requires that Station WJLL’s antenna structure be registered with the Commission, because it exceeds 200 feet and is thus subject to Federal Aviation Administration (“FAA”) notification. However, according to Commission records, Station WJLL’s antenna structure was not registered.

⁹*M.J. Phillips Communications, Inc.*, NAL/Acct. No. 200332280006 (Enf. Bur., Buffalo Office, released January 28, 2003).

¹⁰ The bankruptcy proceeding (03-10705B) is still pending in the United States Bankruptcy Court for the Western District of New York.

¹¹See *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, (“*Forfeiture Policy Statement*”), 12 FCC Rcd 17087, 17106-07 ¶ 43 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) and *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089, ¶ 8 (1992).

revenues from the three most recent tax years to be a reasonable and appropriate yardstick in determining whether a licensee is able to pay the assessed forfeiture.¹²

III. DISCUSSION

5. M.J. Phillips seeks reduction of the monetary forfeiture solely on the basis of economic hardship and has submitted copies of its federal income tax returns for 2000, 2001, 2002 and 2003 to support this claim. After reviewing M.J. Phillips' claim and the supporting documentation, we believe that payment of the \$10,000 forfeiture would pose a financial hardship and conclude that a reduction of the proposed forfeiture amount to \$7,000 is appropriate,¹³ as it would represent an amount more consistent with Commission precedent.

6. We have considered the forfeiture amount and we have examined M.J. Phillips' petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Communications Act of 1934, as amended ("Act"),¹⁴ and in conjunction with the *Forfeiture Policy Statement* as well. While we find that M.J. Phillips willfully and repeatedly violated Sections 73.1560(a)(1), 11.35(a), 11.52(d) and 17.4(a) of the Rules, as a result of our review of the petition for reconsideration, we conclude that a reduction of the monetary forfeiture to \$7,000 is appropriate.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of Act¹⁵ and Section 1.106 of the Rules,¹⁶ the petition for reconsideration filed by M.J. Phillips Communications, Inc., on July 23, 2004, **IS GRANTED ONLY TO THE EXTENT INDICATED ABOVE AND IS DENIED IN ALL OTHER RESPECTS.** For collection, the Commission will file a proof of claim at the appropriate time in M.J. Phillip's bankruptcy action.¹⁷

¹² *Id.*

¹³ See *PJB Communications of Virginia, Inc., supra*, at 2089, ¶ 8 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, 16 FCC Rcd 10023, 10025 (2001) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

¹⁴ 47 U.S.C. § 503(b)(2)(D).

¹⁵ 47 U.S.C. § 405.

¹⁶ 47 C.F.R. § 1.106.

¹⁷ See *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 523 (8th Cir. 1990) and *Coleman Enterprises, Inc.*, 15 FCC Rcd 2485, 24390 (2000), *recon. denied*, 16 FCC Rcd 10016 (2001); see also Section 503(b) of the Act.

8. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to M.J. Phillips Communications, Inc., 1224 Main Street, Niagara Falls, New York, and its attorney, James R. Cooke, Harris Beach, L.L.P., 1776 K Street, N.W., Suite 300, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau