

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

In the Matter of	)	
	)	
Lotus Communications Corporation	)	File Number: EB-04-LA-085
	)	
Registrant of Antenna Structure	)	NAL/Acct. No.: 200432900008
ASR # 1015922	)	FRN: 0001529171
Los Angeles, California	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 25, 2006**

**Released: August 29, 2006**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“*Order*”), we dismiss as untimely the Petition for Reconsideration (“*Petition*”) filed on August 30, 2005, by Lotus Communications Corporation (“Lotus”) registrant of antenna structure # 1015922, in Los Angeles, California.<sup>1</sup> Lotus seeks reconsideration of the *Forfeiture Order*<sup>2</sup> in which Lotus was found liable for a monetary forfeiture in the amount of \$10,000 for repeated violations of Section 303(q) of the Communications Act of 1934, as amended, (“the Act”),<sup>3</sup> and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Commission's Rules (“Rules”).<sup>4</sup> As discussed below, we dismiss Lotus’ *Petition* because it does not comply with the Act and the Rules, and is therefore procedurally defective. We also find that even if Lotus had timely filed its *Petition*, the *Petition* would fail on the merits.

**II. BACKGROUND**

2. On March 22, 2004, the Los Angeles Police Department (“LAPD”) notified its flight crews of tower light outages on towers near the intersection of Martin Luther King Boulevard and Coliseum Street in Los Angeles, California. On March 23, 2004, the LAPD sent a complaint to the FCC concerning the tower light outages and, later on March 23, 2004, a field agent from the Los Angeles Office inspected antenna structure # 1015922, located at 4557 Martin Luther King Boulevard, Los Angeles, California.<sup>5</sup> Lotus is the registered owner of the antenna structure. Lotus is also the licensee of KWKW(AM) which broadcasts from the antenna structure array. The antenna structure is required to have “Obstruction Marking and Lighting” in accordance with the applicable paragraphs of FCC Form

<sup>1</sup> Lotus initially filed a Petition for Extension of Time to file an Application for Review on July 28, 2005. Lotus later filed a Petition for Acceptance of Petition for Reconsideration along with the *Petition* on August 30, 2005.

<sup>2</sup> *Lotus Communications Corporation*, 20 FCC Rcd 11549 (EB 2005).

<sup>3</sup> 47 U.S.C. § 303(q).

<sup>4</sup> 47 C.F.R. §§ 17.21(a), 17.47, 17.48 and 17.49.

<sup>5</sup> This antenna structure is designated as tower two (2TA2) of a two-tower transmitting array. The other tower of this array is ASR # 1015921, also registered to Lotus.

715/715A.<sup>6</sup> Specifically, the structure is required to have a flashing red beacon mounted on the top of the antenna structure.<sup>7</sup> On levels at approximately two-thirds and one-third of the overall height of the structure, there is a requirement of at least two red obstruction lights.<sup>8</sup> The lights on the structure are required to burn continuously or be controlled by a light sensitive device.<sup>9</sup> During the inspection on March 23, 2004, the field agent observed that the antenna structure's top beacon and three of the four intermediate level side lights were not functioning. The field agent then contacted the Federal Aviation Administration ("FAA") and the FAA representative indicated that they had not previously been notified of the tower light outage for antenna structure # 1015922.<sup>10</sup>

3. On March 24, 2004, a field agent from the Los Angeles Office notified the Senior Vice President of Lotus that not all of the lights on antenna structure # 1015922 were functioning. The Lotus executive acknowledged that while station personnel are required to check the remote light indicator every night for Lotus, they sometimes failed to do the required checks. The executive also indicated that the remote automatic alarm system was no longer functioning because of a number of false alarms. On March 25, 2004, the Lotus executive contacted the field agent, thanked him for "notifying us of a problem," and stated that Lotus was "trying to develop ways [to] electronically back up the monitoring system," noting that the "biggest problem is operator error . . ." The Lotus executive told the field agent that the light outages would be repaired by March 31, 2004. An inspection by the field agent on April 2, 2004, revealed that the extinguished lights on the tower were still not functioning. A subsequent inspection on April 9, 2004, showed that the lights had been repaired. In its response to the *NAL*, Lotus acknowledged omissions by station personnel "derailed the system" and explained the difficulties it encountered contracting for a crew to repair the lights, after it had been notified of the light outage by the Los Angeles agent.

4. On April 6, 2004, an agent from the Los Angeles Office conducted an inspection of the station logs with the station engineer for KWKW(AM). The agent observed that the station logs for March 22, 2004, and March 23, 2004, did not note any outages concerning the antenna structure lights. Although Lotus, the licensee of KWKW(AM), was notified by the field agent on March 24, 2004, that the lights on the antenna structure were not functioning properly, the station logs from March 24, 2004, through April 2, 2004, continued to show no light outages on antenna structure # 1015922.

5. On September 29, 2004, the Los Angeles Office issued a *NAL* in the amount of \$10,000 to Lotus.<sup>11</sup> After being granted an extension, Lotus filed a response to the *NAL* on November 23, 2004 ("Response"). Lotus responded to the *NAL*, arguing that its violation was not willful, that the duration of the light outage was a small percentage of the time that Lotus had owned the antenna structure, and that it had a history of "unblemished compliance" with the Rules and that the issuance of a forfeiture against a licensee with such a history was against public policy. In the *Forfeiture Order*, the Western Region, Enforcement Bureau, found that the Los Angeles Office had determined that Lotus' violation was repeated, but not willful. The Western Region also found that the duration of the outage measured against

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<sup>6</sup> FCC Forms 715/715A Paragraphs 1, 3, 12, 21.

<sup>7</sup> FCC Forms 715/715A, Paragraph 3.

<sup>8</sup> FCC Forms 715/715A, Paragraph 12.

<sup>9</sup> The light sensitive device shall be "adjusted so that the lights will be turned on at a north sky light intensity level of about 35 foot candles and turned off at a north sky intensity of about 58 foot candles." FCC Forms 715/715A Paragraph 21.

<sup>10</sup> After a subsequent conversation with the field agent on March 23, 2004, the FAA issued a Notice to Airmen ("NOTAM") advising pilots of the light outage on the antenna structure.

<sup>11</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432900008 (Enf. Bur., Western Region, Los Angeles Office, released September 29, 2004).

the length of time Lotus owned the structure was immaterial, and that Lotus did not deny that the outage lasted for more than one day and was, therefore, repeated, pursuant to Section 312(f)(2) of the Act.<sup>12</sup> Finally, the Western Region found that Lotus in fact did not have a history of overall compliance with the Rules because Lotus had previously been the subject of multiple Notices of Violation (“NOV’s”) including one concerning the antenna structure array which was the subject of the *NAL*. Consequently, the Western Region issued the subject *Forfeiture Order* on June 30, 2005, imposing a \$10,000 forfeiture for Lotus’ violation of Section 303(q) of the Act<sup>13</sup> and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Rules.<sup>14</sup> On August 30, 2005, Lotus filed its *Petition* along with a Petition for Acceptance of Petition for Reconsideration. Lotus argues that its *Petition* should be accepted because of the “protracted, incapacitating illness” of Lotus’ counsel, who was the only lawyer available in the law firm representing Lotus with a sufficient background to prepare the *Petition*. Lotus argues that if the Commission does not grant its request to accept the late-filed petition, it should accept the *Petition* as an Application for Review of the *Forfeiture Order*. In the *Petition*, Lotus acknowledges the light outage that was the basis of the *Forfeiture Order*, but argues that the *Forfeiture Order* should be set aside because Lotus did not repeatedly violate the Rules, and that Lotus has an overall record of compliance with the Rules.

### III. DISCUSSION

6. Section 405(a) of the Act<sup>15</sup> and Section 1.106(f) of the Rules<sup>16</sup> provide that a petition for reconsideration be filed within thirty days from the date of public notice of the final action. In this case, public notice of the Forfeiture Order occurred on June 30, 2005, upon its release.<sup>17</sup> The thirtieth day after June 30, 2005, was July 30, 2005, a Saturday. When the computation of the filing date indicates that a document is due to be filed on a Saturday, the document is due on the next business day.<sup>18</sup> Thus to have been timely, any request for reconsideration was due to be filed with the Commission no later than August 1, 2005.<sup>19</sup> Lotus’ submission was filed August 30, 2005. While Lotus argues that the Commission, “from time to time, has found that exigent circumstances permit out-of-time filings,” it provides no caselaw to support its claim. Accordingly, we find that Lotus did not timely file its petition for reconsideration and that dismissal is warranted.<sup>20</sup>

7. We further find that even if Lotus had timely filed its petition, the *Petition* would fail on the merits. Lotus first contends that it did not commit repeated error, but that only a “single oversight occurred, which persisted for a number of days despite strenuous remedial efforts” by Lotus.<sup>21</sup> Section

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<sup>12</sup> 47 U.S.C. § 312(f).

<sup>13</sup> 47 U.S.C. § 303(q).

<sup>14</sup> 47 C.F.R. §§ 17.21(a), 17.47, 17.48 and 17.49.

<sup>15</sup> 47 U.S.C. § 405(a).

<sup>16</sup> 47 C.F.R. § 1.106(f).

<sup>17</sup> See 47 C.F.R. § 1.4(b).

<sup>18</sup> See 47 C.F.R. § 1.4(j).

<sup>19</sup> See 47 C.F.R. §§ 1.106(f), 1.4(j).

<sup>20</sup> See *Washington Broadcast Management Co., Inc.*, 15 FCC Rcd 6607 (2000); *Bay Broadcasting Corporation*, 15 FCC Rcd 23449 (EB 2000). We also decline to consider Lotus’ request that we treat its *Petition* as an Application for Review.

<sup>21</sup> We note that Lotus’ remedial actions only began after being notified of the light outage by a Los Angeles agent. The Commission has stated in the past that a downward adjustment in a forfeiture is not warranted when the corrections were made only after the Commission brought the violations to the violator’s attention. *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866 (2002).

312(f)(2) of the Act, which 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.”<sup>22</sup> In the *Forfeiture Order*, the Western Region correctly found that Lotus’ repeatedly failed to comply with Section 303(q) of the Act, and the relevant Part 17 Rules. Specifically, the lights on antenna structure # 1015922 were extinguished from at least March 22, 2004, through April 2, 2004, in violation of Section 17.21(a) of the Rules.<sup>23</sup>

8. The Commission’s Part 17 Rules are important public safety mandates which require diligence on the part of antenna structure owners to ensure that antenna structures do not become a “menace to air navigation.”<sup>24</sup> Despite Lotus’ insistence that it is being punished for a “single oversight,” the record shows that for at least three days, from March 22, 2004 to March 24, 2004, when Lotus was told of the outage by a Los Angeles agent, Lotus failed to even notice that its antenna structure’s top beacon and three intermediate level side lights were not functioning. In addition, the Los Angeles agent contacted the local FAA Flight Service Station (“FSS”), and found that Lotus had not notified the FAA FSS of the outage, in violation of Section 17.48 of the Rules.<sup>25</sup> A Lotus executive indicated to the Los Angeles agent that station personnel did not routinely perform the required observations, and also indicated that the remote automatic alarm system was no longer functioning, in violation of Section 17.47 of the Rules.<sup>26</sup> A review of the logs kept by KWKW(AM) concerning antenna structure # 1015922 revealed no records indicated any outages between March 22 and April 2, 2004, in violation of Section 17.49 of the Rules.<sup>27</sup> All of these events occurred for more than one day and, contrary to Lotus’ assertion, amount to more than a single oversight.

9. The other argument proffered by Lotus was already considered by the Western Region in the *Forfeiture Order*, namely, that Lotus has an overall history of compliance with the Commission’s Rules. As detailed in the *Forfeiture Order*, on July 19, 2000, the Los Angeles Office issued an NOV to Lotus concerning the antenna structure array that was the subject of the *NAL* and *Forfeiture Order* because of Lotus’ failure to post correct antenna structure registration numbers at the site.<sup>28</sup> Additionally, antenna structures and radio stations owned by Lotus or its associated companies have been the subject of other NOV’s concerning the Commission’s antenna structure and emergency alert system (“EAS”) Rules. We have consistently rejected history of overall compliance claims based on issuance of NOV’s in other cases.<sup>29</sup> Thus, we concur with the Western Region’s conclusion in the *Forfeiture Order* that Lotus’ overall history does not mitigate its liability in this case.

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<sup>22</sup> 47 U.S.C. § 312(f)(2).

<sup>23</sup> 47 C.F.R. § 17.21(a).

<sup>24</sup> 47 C.F.R. § 17.1(a).

<sup>25</sup> 47 C.F.R. § 17.48.

<sup>26</sup> 47 C.F.R. § 17.47.

<sup>27</sup> 47 C.F.R. § 17.49.

<sup>28</sup> See Section 17.4(g) of the Rules, 47 C.F.R. § 17.4(g). See Notice of Violation to Lotus Communications Corp. d/b/a KWKW, EB-00-LA-285, (Enf. Bur., Western Region, Los Angeles Office, issued July 19, 2000). See also, Notice of Violation to Lotus Broadcasting Corp., EB-01-LA-117, (Enf. Bur., Western Region, Los Angeles Office, issued April 24, 2001); Notice of Violation to Lotus Broadcasting Corp., EB-01-LA-220, (Enf. Bur., Western Region, Los Angeles Office, issued September 19, 2001); Notice of Violation to Radio Station KCMT(AM), Arizona Lotus Corp., EB-01-SD-223, (Enf. Bur., Western Region, San Diego Office, issued January 10, 2002); Notice of Violation to Radio Station KTKT(AM), Arizona Lotus Corp., EB-01-SD-224, (Enf. Bur., Western Region, San Diego Office, issued January 10, 2002).

<sup>29</sup> See, e.g., *Rio Grande Transmission, Inc.*, 16 FCC Rcd 17040 (EB 2001); *Hill Country Real Estate Development Corp.*, 18 FCC Rcd 21079 (EB 2003).

10. The record indicates that Lotus' argument concerning the repeated nature of its violations, and its claim of a history of compliance, are without merit. Therefore, Lotus' repeated violations of the Act and the Rules would not warrant cancellation or reduction of the monetary forfeiture, even if its *Petition* had been timely filed.

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), 405 of the Act<sup>30</sup> and Section 1.106 of the Rules,<sup>31</sup> that the Petition for Extension of Time to file an Application for Review and the Petition for Acceptance of Petition for Reconsideration, filed by Lotus Communications Corporation, **ARE DENIED**, and the Petition for Reconsideration filed by Lotus Communications Corporation **IS DISMISSED**.

12. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act,<sup>32</sup> and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's Rules,<sup>33</sup> Lotus Communications Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$10,000 for violating Section 303(q) of the Act,<sup>34</sup> and Sections 17.21(a), 17.47, 17.48 and 17.49 of the Rules.<sup>35</sup>

13. 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.<sup>36</sup> 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. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, Room 1A625, 445 12th Street, S.W., Washington, D.C. 20554.<sup>37</sup>

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<sup>30</sup> 47 U.S.C. §§ 154(i), 154(j), 405.

<sup>31</sup> 47 C.F.R. § 1.106.

<sup>32</sup> 47 U.S.C. § 503(b).

<sup>33</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>34</sup> 47 U.S.C. § 303(q).

<sup>35</sup> 47 C.F.R. §§ 17.21(a), 17.47, 17.48 and 17.49.

<sup>36</sup> 47 U.S.C. § 504(a).

<sup>37</sup> See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Lotus Communications Corporation, at its address of record, and its counsel of record, Jerome S. Boros, Esquire, Bryan Cave.

**FEDERAL COMMUNICATIONS COMMISSION**

Kris Anne Monteith  
Chief, Enforcement Bureau