

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

In the Matter of)	
)	
WSMN Broadcasting, LLC)	File Number EB-04-BS-003
)	
Licensee of Station WSMN)	NAL/Acct. NO. 200532260003
Nashua, New Hampshire)	
Facility ID # 102)	FRN 0011401320

FORFEITURE ORDER

Adopted: October 3, 2006

Released: October 6, 2006

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 seven thousand dollars (\$7,000) to WSMN Broadcasting, LLC, (“WSMN”), former licensee of AM station WSMN,¹ in Nashua, New Hampshire, for willfully and repeatedly violating Section 73.49 of the Commission's Rules (“*Rules*”)² by failing to enclose one of WSMN’s three antenna structures within an effective locked fence or other enclosure.

II. BACKGROUND

2. On May 12, 2004, an agent from the FCC Enforcement Bureau’s Boston Office inspected the three antenna structures used by AM station WSMN, Nashua, New Hampshire. The agent observed that the fence around the west tower had a large gap between two pickets and the fence on one side of the gap was falling down. The gap allowed access to the tower, which was series fed and had radio frequency potential at its base. The agent also observed that there was extensive vegetative growth around the base of the tower, including in the gap of the fence. The agent also found that the tower’s tuning unit had fallen and was upside down on the ground. The antenna structures were not protected by a property fence.

3. On September 28, 2005, the Boston Office issued a Notice of Apparent Liability for Forfeiture to WSMN for apparent willful and repeated violation of Section 73.49 of the Rules.³ In its response to the *NAL*, WSMN claims that the proposed forfeiture should be rescinded because WSMN is

¹ Commission records show that the application for assignment of station WSMN was granted on August 19, 2005, and the assignment of the license was consummated on November 10, 2005. WSMN Broadcasting, LLC was the licensee at the time the violations at issue occurred in 2004.

² 47 C.F.R. § 73.49.

³ *WSMN Broadcasting, LLC*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200532260003 (Enf. Bur., Boston Office, September 28, 2005) (“*NAL*”).

not the owner of the antenna structures at issue.⁴

III. DISCUSSION

4. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁵ Section 1.80 of the Rules,⁶ and the *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁷ 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.⁸

5. We decline to grant WSMN’s request to cancel the proposed forfeiture. WSMN claims that it is not responsible for complying with the AM fencing requirements because it does not own the antenna structures. The fencing requirements in Section 73.49 of the Rules, however, apply to AM licensees, not antenna structure owners. Section 73.49 is contained within Part 73 of the Commission’s rules, which applies to broadcast services and its licensees. More specifically, Section 73.49 of the Rules is set out in Subpart A of Part 73, the scope of which is described as containing “those rules which apply exclusively to the AM broadcast service”⁹ The cases WSMN cites in its response to the *NAL* support this conclusion. In each of those cases, the entity held responsible for violating Section 73.49 of the Rules was the licensee, albeit in each instance the licensee also was the antenna structure owner.¹⁰ The responsibility for complying with Section 73.49 of the Rules does not shift to the antenna structure owner in cases where the licensee and the antenna structure owner are different entities; that is, the licensee always remains the party responsible for complying with the AM fencing requirements.¹¹

⁴ WSMN also submitted a supplemental response in which it reports that the antenna structures were dismantled.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

⁸ 47 U.S.C. § 503(b)(2)(D).

⁹ 47 C.F.R. § 73.1. In contrast, Part 17 sets out the requirements for antenna structure owners. See 47 C.F.R. §§ 17.1 *et seq.* We note that, even with regard to the requirements that primarily apply to antenna structure owners, licensees still have a secondary responsibility. Section 17.6(a) provides that, if the licensee “has reason to question whether the antenna structure owner is carrying out its responsibility under this part, the licensee or permittee must take immediate steps to ensure that the antenna structure is brought into compliance and remains in compliance.” 47 C.F.R. § 17.6(a).

¹⁰ See *M.B. Communications, Inc.*, Forfeiture Order, 20 FCC Rcd 9356 (2005), *petition for recon. denied*, Memorandum Opinion and Order, 2006 WL 2336317 (2006)(licensee of WYLF(AM), Penn Yan, NY); *Small Town Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7187 (2004)(licensee of WDGR(AM), Dahlonga, GA); *Westshore Broadcasting, Inc.*, Forfeiture Order, 19 FCC Rcd 6169 (2004)(licensee of WOCA(AM), Ocala, FA); *FBS Wireless Corporation*, 19 FCC Rcd 19477 (2004)(licensee of WFBS(AM), Berwick, PA). Although we recognize that these decisions use language suggesting that the tower owner is responsible for complying with Section 73.49 of the Rules, such language is not dispositive and does not supercede the relevant provisions in our rules.

¹¹ Indeed, compliance with the AM fencing requirements is significant enough to have been one of the issues designated for consideration in a case to determine whether an individual was qualified to be an AM station licensee. In *Family Broadcasting Inc.*, the Commission remanded to the presiding judge, *inter alia*, the issue of whether the
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6. We have examined the *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 WSMN willfully and repeatedly violated Section 73.49 of the Rules. Considering the entire record and the factors listed above, we find that neither reduction nor cancellation of the proposed \$7,000 forfeiture is warranted.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹² and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹³ WSMN Broadcasting, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willful and repeated violation of Section 73.49 of the Rules.

8. 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, that case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁴ 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, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.¹⁵

9. **IT IS FURTHER ORDERED** that a copy of this *Forfeiture Order* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to WSMN Broadcasting, LLC at its address of record and to counsel for WSMN Broadcasting, LLC at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

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

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transferee "will have sufficient financing and managerial capacity to ensure enclosure within an effective locked fence of WSTX(AM)'s antenna as required by Section 73.49." *Family Broadcasting, Inc.*, Order to Show Cause Why the Licenses for Stations WSTX(AM) and WSTX-FM, Christiansted, U.S. Virgin Islands, Should Not Be Revoked, 20 FCC Rcd 9463 para. 7(g) (2005) (subsequent history omitted).

¹² 47 U.S.C. § 503(b).

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

¹⁴ 47 U. S. C. § 504(a).

¹⁵ See 47 C.F.R. § 1.1914.