

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

In the Matter of)	
)	
Tidewater Communications LLC)	File Number: EB-05-NF-054
Owner of Antenna Structure # 1024387)	NAL/Acct. No.: 200632640004
Gross Point Farms, MI)	FRN #: 0009269473
)	

FORFEITURE ORDER

Adopted: October 18, 2006

Released: October 20, 2006

By the Regional Director, South Central Region, 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 Tidewater Communications LLC (“TC”), owner of antenna structure #1024387, located at or near North 36 50' 05" and West 076 16' 09" in Norfolk, Virginia, for willful violation of Section 17.51(a) of the Commission’s Rules (“Rules”).¹ The noted violation involves TC’s failure to exhibit obstruction lighting on antenna structure # 1024387.

II. BACKGROUND

2. On June 4, 2005, an agent from the Commission’s Norfolk Office of the Enforcement Bureau (“Norfolk Office”) observed antenna structure # 1024387 after sunset with a top and middle flashing beacon extinguished. The Antenna Structure Registration (“ASR”) for the structure specifies that it must be painted and lit. The Federal Aviation Administration (“FAA”) had not issued a Notice to Airmen (“NOTAM”) regarding the lighting outage.

3. On June 6, 2005, the agent from the Norfolk Office interviewed employees of TC about the tower lighting outage observed by the agent on June 4, 2005. The employees stated that TC used a manual light indicating system to check the status of the lighting on the antenna structure once every 24 hours and then logged the results. According to written instructions, employees were to notify TC’s chief operator and the FAA immediately of any lighting problems. The agent inspected the lighting logs for the antenna structure and found that TC noted a lighting outage in its logs on June 3, 4, and 5, 2005 and did not notify the FAA of the outage until June 5, 2005. Additionally, the agent observed that TC had listed a lighting outage in its logs on August 4, 2004 but did not notify the FAA of the outage until August 10, 2004. The chief operator for the station stated that he believed the logs were accurate. On June 6, 2005, TC employees stated that they were aware that the antenna structure was required to be painted and lit, that the structure’s lights were to be monitored once every 24 hours, and that they were required to notify the FAA immediately of any known extinguishments of top steady or flashing lights which last more than 30 minutes. The employees could not explain why TC failed to notify the FAA of the lighting outages, as required, on August 4, 2004, June 3, 2005, and June 4, 2005.

¹ 47 C.F.R. § 17.51(a).

4. On November 23, 2005, the Norfolk Office issued a *Notice of Apparent Liability for Forfeiture* to TC in the amount of ten thousand dollars (\$10,000) for the apparent willful violation of Section 17.51(a) of the Rules.² On December 23, 2005, the Norfolk Office received TC's response to the *NAL* requesting a reduction or cancellation of the proposed forfeiture.

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the 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*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"). In examining TC's response, 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 other such matters as justice may require.⁵

6. Section 17.51(a) states that all red obstruction lighting shall be exhibited from sunset to sunrise unless otherwise specified.⁶ On June 3 and June 4, 2005, a TC employee logged lighting problems at 8:30 p.m., but did not notify the chief operator and the FAA of the lighting problems and did not visually inspect the antenna structure to determine which lights were extinguished. On June 4, 2005, at approximately 9:45 p.m., an agent from the Norfolk Office observed that the top and middle red obstruction lighting beacons on antenna structure # 1024387 were extinguished after sunset and that a NOTAM had not been issued by the FAA. Accordingly, on June 4, 2005, TC failed to notify the FAA immediately of a lighting outage that required more than 30 minutes to correct.⁷ TC employees only notified the FAA of a lighting outage on June 5, 2005.

7. In its response, TC argues that the proposed forfeiture should be cancelled, because the violation was not willful. TC asserts that the violation occurred solely because of employee error. TC claims that the employee on duty on June 3 and 4, 2005 was trained to notify the chief operator immediately if the readings for the tower lights were less than 92 percent. Although the readings for the tower lights read 0.47% and 0.67% on June 3 and June 4, 2005, TC asserts that the employee simply made a mistake and failed to notify the chief operator of the apparent malfunction. TC states that the employee has been strongly reprimanded, that all employees have been reminded of the station's standard operating procedures, and that the lights were repaired promptly.

8. A "willful" violation under section 503(b) means "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁸ TC argues that it

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632640004 (Enf. Bur., Norfolk Office, November 23, 2005) ("*NAL*").

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 47 C.F.R. § 17.51.

⁷ *See* 47 C.F.R. § 17.48.

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

should not be held responsible for the mistake of its employee. However, the “Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,”⁹ and when the actions of independent contractors or employees have resulted in violations, the Commission has “consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”¹⁰ It is also well established that a mistake resulting in a rule violation is considered a willful violation.¹¹ TC has not presented any evidence that these precedents should not apply here, and, therefore, we decline to cancel the forfeiture on this basis.

9. TC also argues that the forfeiture should be cancelled or reduced, because its chief operator notified the FAA of the outage on June 5, 2005, before the agent interviewed TC’s employees. Although the Commission has reduced forfeitures based on good faith efforts to comply with the Rules initiated prior to agents’ notification of violations, TC is not entitled to such a reduction. On June 4, 2005, after the agent observed the tower lighting outage and confirmed that no NOTAM had been issued, he called TC’s contact number posted on the antenna structure and left a message that the tower’s lights were out and that TC should contact him as soon as possible. Accordingly, TC cannot claim that it took good faith corrective action prior to being notified of the violation by the Commission.¹² Moreover, contacting the FAA after being notified of the tower violation does not, as TC asserts, demonstrate that the violation was not willful. Corrective action taken to come into compliance with the Rules is expected, and does not nullify or mitigate any prior forfeitures or violations.¹³

10. Based on the evidence before us, we find that TC willfully violated Section 17.51(a) of the Rules by failing to exhibit red obstruction lighting on its antenna structure.¹⁴

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

⁹ *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863,-64, para. 7 (2002); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991)(holding that a company's reliance on an independent contractor to construct a tower in compliance of FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee's failure to conduct weekly EAS tests and to maintain the "issues/programs" list).

¹⁰ *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420, para. 11 (Enf. & Cons. Inf. Div., Wireless Tel. Bur. 1997) (quoting *Triad Broadcasting Company*, 96 FCC 2d 1235, 1244 (1984)).

¹¹ A violation resulting from an inadvertent mistake or a failure to become familiar with the Commission's requirements is considered a willful violation. See *North Country Repeaters*, 19 FCC Rcd 22139 (Enf. Bur. 2004); *PBJ 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 (1984).

¹² See *Jorge L. Estrada*, Forfeiture Order, 19 FCC Rcd 22603, 22605 (Enf. Bur. 2004) (finding that corrective actions taken after notification by the Commission is not a mitigating factor).

¹³ See *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099 (1994).

¹⁴ We note that TC questioned whether it was being cited for violations that occurred in August 2004, in addition to those that occurred in June 2005. The *NAL* was issued for the violations that occurred in June 2005. However, TC's noncompliance in 2004 serves as useful background demonstrating the context of the misconduct and may be considered in determining the appropriate forfeiture amount. See *Roadrunner Transp. Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671 (2000).

11. Finally, TC requests a reduction of the forfeiture based upon its history of compliance with the Rules. TC claims it would be inappropriate to consider the Notice of Violation issued to it on November 16, 2001 as evidence of non-compliance with the Rules, because the Enforcement Bureau granted its petition for reconsideration and cancelled the forfeiture stemming from the “2001 matter.”¹⁵ In the *Memorandum Opinion and Order* cited by TC, the Enforcement Bureau stated that “[a]pplying the two downward adjustment criteria to this case (good faith and history of overall compliance), we find sufficient reason to cancel Tidewater's \$10,000 forfeiture.” The Enforcement Bureau did not conclude that a violation had not occurred, and it did not cancel the Notice of Violation issued to TC on November 16, 2001 for violation of Sections 17.51(a) and 17.47(2) of the Rules. Accordingly, we conclude that TC is not entitled to a reduction of the forfeiture based on history of compliance with the Rules.

12. We have examined TC’s 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 no reduction of the proposed \$10,000 forfeiture is warranted.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹⁶ and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s Rules,¹⁷ Tidewater Communications LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willfully violating Section 17.51(a) of the Rules.

14. 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.¹⁸ 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. 20554.¹⁹

¹⁵ See Tidewater Communications LLC, Memorandum Opinion and Order, 18 FCC Rcd 5524 (Enf. Bur. 2003) (“*Memorandum Opinion and Order*”). TC states that the Enforcement Bureau cancelled the \$10,000 forfeiture because the “violation was not willful.” However, this language is not included within the text of the *Memorandum Opinion and Order*.

¹⁶ 47 U.S.C. § 503(b).

¹⁷ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.51(a).

¹⁸ 47 U.S.C. § 504(a).

¹⁹ See 47 C.F.R. § 1.1914.

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Tidewater Communications LLC at its record of address and to its attorney, Gary S. Smithwick, Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, NW, Suite 301, Washington, DC 20016.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau