

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

In the Matter of	)	File No. EB-03-AT-077
	)	
Cumulus Licensing Corp.	)	NAL/Acct. No. 200332480025
Owner of Antenna Structures	)	
#1052722 and #1052724	)	FRN: 0005-2603-77
near Savannah, Georgia	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 30, 2006**

**Released: February 2, 2006**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. By this *Memorandum Opinion and Order*, we deny a Petition for Reconsideration filed on January 27, 2005 by Cumulus Licensing Corporation (“Cumulus”), owner of two antenna structures, registration numbers 1052722 and 1052724, in Savannah, Georgia, of the Enforcement Bureau’s *Forfeiture Order*<sup>1</sup> released December 28, 2004, assessing a forfeiture amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 17.50 of the Commission’s Rules (“Rules”).<sup>2</sup> The noted violation involves the failure of Cumulus to clean and repaint its antenna structures to maintain good visibility.

**II. BACKGROUND**

2. On August 22, 2001, an agent from the Atlanta Office inspected the subject antenna structures associated with AM radio station WBMQ, Savannah, Georgia, and found that the paint on the antenna structures was badly faded and peeling, greatly reducing the structures’ visibility. On September 19, 2001, the Atlanta Office issued a *Notice of Violation* (“NOV”) to Cumulus, noting, among other things, a violation of Section 17.50 of the Rules. On October 15, 2001, Cumulus responded that it was acquiring bids to repaint the structures and anticipated that the towers would be painted by December 31, 2001.

3. On October 18, 2001, the Atlanta Office issued a *Continuation of Notice of Violation* requesting a status report on the antenna structure repainting. On January 9, 2002, Cumulus replied that it would decide no later than January 31, 2002, whether to repaint or replace the towers. On February 4, 2002, Cumulus submitted an additional reply stating that it planned to replace the structures by June or July of 2002. On July 31, 2002, Cumulus submitted another reply stating that it planned to relocate the operations for WBMQ to another existing structure in Savannah, Georgia, after which it would dismantle the current antenna structures.

<sup>1</sup> *Cumulus Licensing Corp.*, 19 FCC Rcd 24815 (Enf. Bur. 2004) (“*Forfeiture Order*”).

<sup>2</sup> 47 C.F.R. § 17.50.

4. On March 18 and 19, 2003, an agent of the Atlanta Office again inspected the antenna towers, determined that the structures remained unpainted and that the orange and white aviation bands were not distinguishable at a distance of one-half mile. On May 27, 2003, the Atlanta Office issued a *Notice of Apparent Liability for Forfeiture*<sup>3</sup> for apparent willful<sup>4</sup> and repeated<sup>5</sup> violation of Section 17.50 of the Rules. In its August 1, 2003 Response to the *NAL* (“Response”), Cumulus—which stated that it operated 260 stations across the country—did not contest the violation. Rather, Cumulus sought a reduction in the proposed forfeiture amount because it acted promptly to cure the violation once it received Commission notice and because of an overall history of compliance.

5. On December 28, 2004, the Assistant Chief, Enforcement Bureau, released a *Forfeiture Order* finding that Cumulus willfully and repeatedly violated Section 17.50 of the Rules, and issued a monetary forfeiture in the amount of \$10,000.<sup>6</sup> The Enforcement Bureau held that curative measures initiated in response to Commission notification do not nullify or mitigate prior forfeitures or violations. Moreover, the Enforcement Bureau denied the Cumulus claim of a history of overall compliance based on evidence of numerous violations connected with the operation and maintenance of its other stations.<sup>7</sup>

6. On January 27, 2005, Cumulus filed a Petition for Reconsideration of the *Forfeiture Order*. Cumulus did not dispute the Enforcement Bureau’s findings, but rather, sought a reduction in the forfeiture amount due to the “exceptional circumstances” it continued to encounter in attempting to comply with the Rules. Cumulus explained that the absence of a central authority to specify the requirements for dismantling the subject towers had resulted in a series of delays. Cumulus averred that often, once it met the specific requirements of one agency, “another agency impose[d] different and sometimes conflicting requirements.” Cumulus asserted that it was “still not legally able to dismantle the towers,” explaining that doing so would lead to severe monetary penalties from other government agencies.<sup>8</sup> Cumulus stated that although it was making “every effort to comply” with the Rules, it had experienced setbacks and delays due to approvals needed from a variety of governmental agencies before dismantling the towers. Cumulus also discussed some of the “substantial progress” it had made toward dismantling the towers, by (1) consulting with the relevant governmental agencies and obtaining some of the required regulatory approvals, (2) hiring consultants to evaluate environmental and safety issues and recommend the best approach to dismantling the towers and (3) contracting a construction company to

---

<sup>3</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480025 (Enf. Bur., Atlanta Office, released May 27, 2003) (“*NAL*”).

<sup>4</sup> Section 312(f)(1) of the Communications Act of 1934, as amended (“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 regulation of the Commission authorized by this Act . . .” The *Conference Report* for Section 312(f)(1) of the Act indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312 of the Act. See H.R. Rep. 97<sup>th</sup> Cong. 2d Sess. 51 (1982); see *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting*”) and *Western Wireless Corporation*, 18 FCC Rcd 10319, 10326 n.56 (2003) (“*Western Wireless*”).

<sup>5</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that a violation is “repeated” if it continues for more than one day. The *Conference Report* for Section 312(f)(2) of the Act indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312 of the Act. See H.R. Rep. 97<sup>th</sup> Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting*, 6 FCC Rcd at 4388 and *Western Wireless*, 18 FCC Rcd at 10326 n.56.

<sup>6</sup> See n.1.

<sup>7</sup> *Forfeiture Order*, 19 FCC Rcd at 24818 ¶¶ 15-16.

<sup>8</sup> Cumulus alleged that it was required to obtain authorization from the Army Corps of Engineers prior to dismantling the towers, and that to do so without such approval could potentially subject Cumulus to a liability of over \$100,000. Petition for Reconsideration at 3.

oversee the demolition.<sup>9</sup> Cumulus explained that it had obtained certain environmental agency approvals concerning protected species,<sup>10</sup> filed applications for approvals to dismantle the towers and would continue to update the Commission on its progress in curing the violation. On August 3, 2005, Cumulus informed the Enforcement Bureau that it had completed demolition of the subject towers on July 22, 2005.

### III. DISCUSSION

7. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act, Section 1.80 of the Rules, and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>11</sup> In examining the Cumulus Petition for Reconsideration, 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 any other such matters as justice may require.<sup>12</sup>

#### A. Tower Painting Violation

8. Background. Section 303(q) of the Act grants the Commission authority to oversee antenna structure painting requirements.<sup>13</sup> Section 303(q) of the Act is codified in Part 17 of the Rules. Section 17.50 of the Rules states that antenna structures requiring painting must be cleaned or repainted as often as necessary to maintain good visibility. The Commission has consistently stressed the importance of compliance with antenna structure rules in light of air safety concerns.<sup>14</sup>

9. Discussion. In its Petition for Reconsideration of the Forfeiture Order, Cumulus did not dispute the Commission's finding that the antenna structures violated Section 17.50 of the Rules. At the time of the filing, Cumulus claimed that due to governmental procedural impediments it was not yet able to dismantle the towers in order to comply with the Rules, but subsequently Cumulus has reported that the towers were successfully demolished on July 22, 2005. Cumulus sought a downward adjustment of the forfeiture amount due to the "exceptional circumstances" it faced in its attempts to cure the Rule violation over the course of nearly four years—namely, navigating complex and conflicting governmental regulations and incurring unexpected expenses. We find that the Cumulus request for a reduction in the forfeiture amount on the basis of "exceptional circumstances" is flawed and is denied.

---

<sup>9</sup> Cumulus asserted that this process involved, among other things, measuring the lead in the top soil prior in order to determine the extent of the clean up after the towers were dismantled. *Id.*

<sup>10</sup> Cumulus submitted a partial list of the governmental agencies involved in the antenna tower demolition approval process: the Environmental Protection Agency, Federal Aviation Administration, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Georgia Department of Natural Resources and the Chatham County Department of Building Safety & Regulatory Services.

<sup>11</sup> *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).

<sup>12</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>13</sup> 47 U.S.C. § 303(q).

<sup>14</sup> See *SpectraSite Communications*, 18 FCC Rcd. 22799 (2002) (stressing the importance of compliance with antenna structure rules in light of air safety considerations); see *AT&T Wireless*, 17 FCC Rcd at 21870 (stressing the importance of compliance with antenna structure rules in light of air safety considerations).

10. First, Cumulus did not take any steps to bring its antenna towers into compliance with the Rules until after it was notified of the painting violation by the Atlanta Office.<sup>15</sup> Although Cumulus described the progress it made (as well as the regulatory setbacks and delays it experienced) in complying with the Rules, any such steps were remedial in nature. As noted in the *Forfeiture Order*, the Commission has consistently found that "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."<sup>16</sup> Accordingly, we affirm the finding in the *Forfeiture Order*, and deny the Cumulus request to decrease the forfeiture amount, noting that this request was previously fully discussed and satisfactorily rejected in the *Forfeiture Order*.<sup>17</sup>

11. Second, we also deny the Cumulus Petition for Reconsideration to the extent that it seeks to carve out an exception to the Commission's determination that remedial measures do not mitigate a Rule violation, when circumstances surrounding post-notice efforts rise to the level of "exceptional circumstances." Cumulus asserted that the actions taken since it was placed on notice of the tower painting violation were complicated by conflicting governmental regulations and expense which it contended should serve as mitigating factors to decrease the forfeiture amount.

12. We disagree. The cost and complexity of remedial measures—even if they rise to the level of arguably "exceptional circumstances"—are not a basis for mitigating a Rule violation.<sup>18</sup> We affirm the finding in the *Forfeiture Order* that "Cumulus should have known of, and acted on, the lack of paint on the towers prior to or immediately upon their purchase of the station and associated towers."<sup>19</sup> Cumulus, operator of more than 260 stations nationally, acquired the subject antenna structures on March 26, 1998. On September 19, 2001, Cumulus received official notice of the violation from the Commission. Cumulus did not come into compliance with the Rules until July 22, 2005, nearly four years after receiving notice of the violation. The proffered "exceptional circumstances" do not provide mitigating circumstances which warrant a decrease of the forfeiture amount.<sup>20</sup> As a result of our review, we affirm the determination of the *Forfeiture Order* and conclude that Cumulus willfully and repeatedly violated Section 17.50 of the Rules and that a \$10,000 forfeiture is warranted.

### III. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 405 of the Act<sup>21</sup> and Section 1.106 of the Rules,<sup>22</sup> the October 29, 2004 Petition for Reconsideration filed by Cumulus Licensing Corporation of the Enforcement Bureau's December 28, 2004 *Forfeiture Order* **IS DENIED**.

---

<sup>15</sup> "Upon being notified of the painting violation on September 19, 2001, by the FCC field office inspector, Cumulus immediately took steps to correct the problem." Response at 2.

<sup>16</sup> *Forfeiture Order*, 19 FCC Rcd at 24818 ¶ 15 citing *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994).

<sup>17</sup> *Forfeiture Order*, 19 FCC Rcd at 24817-18 ¶¶ 9-16.

<sup>18</sup> *Tower Properties of Florida, Inc.*, 18 FCC Rcd. 26094, 26096 ¶ 11 (Enf. Bur. 2003) (once notified by the Commission of a tower painting violation, subsequent unforeseen and unavoidable circumstances which allegedly caused a delay in remedial efforts to comply with the Rules were not deemed mitigating factors and had no bearing on the subject forfeiture).

<sup>19</sup> *Forfeiture Order*, 19 FCC Rcd at 24817 ¶ 14.

<sup>20</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>21</sup> 47 U.S.C. § 405.

<sup>22</sup> 47 C.F.R. § 1.106.

14. **IT IS ALSO ORDERED THAT**, pursuant to Section 503(b)(2)(D) of the Act and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>23</sup> Cumulus Licensing Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willfully and repeatedly violating Section 17.50 of the Rules.

15. 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>24</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 payment of the full amount of the NAL under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12<sup>th</sup> Street, S.W., Room 1A625, Washington, D.C. 20554.<sup>25</sup>

16. **IT IS FURTHER ORDERED THAT** a copy of this *Memorandum Opinion and Order* shall be sent by first class mail and certified mail, return receipt requested, to Cumulus Licensing Corp. and its Counsel, Mark N. Lipp, Vinson & Elkins L.L.P., 1455 Pennsylvania Ave., NW, Suite 600, Washington, D.C. 20004-1008.

#### FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief, Enforcement Bureau

---

<sup>23</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>24</sup> 47 U.S.C. § 504(a).

<sup>25</sup> 47 C.F.R. § 1.1914.