

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

In the Matter of

WLTH Radio, Inc.
WLTH(AM)
Gary, Indiana

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File No. EB-03-CG-054

NAL/Acct. No. 200432320001

FRN 0004 9887 62

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 2006

Released: April 7, 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 WLTH Radio, Inc. ("WLTH"), licensee of AM radio station WLTH, Gary, Indiana, and owner of the station's antenna structures. WLTH seeks reconsideration of a *Forfeiture Order*¹ issued by the Enforcement Bureau ("Bureau") on December 16, 2004, in the amount of sixteen thousand dollars (\$16,000) to WLTH, for willful and repeated violation of Sections 17.4(a), 17.48 and 17.51(a) of the Commission's Rules ("Rules").² The noted violations involve WLTH's failure to register the antenna structure for the station, failure to notify the Federal Aviation Administration ("FAA") of a known antenna structure light outage, and its failure to exhibit the required red obstruction lighting. For the reasons discussed below, we reduce the forfeiture amount to four thousand dollars (\$4,000) based on WLTH's demonstrated inability to pay.

II. BACKGROUND.

2. WLTH has two antenna structures – one located in Gary, Indiana, and used for WLTH's daytime transmissions ("the day antenna structure") and the other located in a rural area near Gary, Indiana, and used for WLTH's nighttime transmissions ("the night antenna structure"). The day antenna structure's height is more than 200 feet above ground level ("AGL") and that structure is subject to the registration, lighting and marking requirements specified in Part 17 of the Rules.³ The night antenna structure, whose height is less than 200 feet AGL, is not subject to those requirements.

¹ *WLTH Radio, Inc.*, 19 FCC Rcd 23612 (Enf. Bur. 2004).

² 47 C.F.R. §§ 17.4(a), 17.48(a) and 17.51(a).

³ 47 C.F.R. § 17.1 et seq. According to the Commission's records, WLTH's day antenna structure is required to have red obstruction lighting at night. (The information is from the Commission's "towpub" data base, which contains information concerning antenna structures that existed before the Commission required antenna structure registration.)

3. On February 14, 2003, the Commission received a complaint alleging that WLTH's antenna structure lighting was not operational. The agent at the Commission's Chicago, Illinois, Field Office ("Chicago Office") checked the Commission's antenna structure registration ("ASR") data base on February 26, 2003, and determined that WLTH's day antenna structure was not registered.⁴ On March 5 and 6, 2003, respectively, the agent informed a WLTH employee and the station's engineer by telephone that the Commission had received the complaint. On March 12, 2003, the station engineer told the agent by telephone that there were underground cabling problems that resulted in a lighting outage at the day antenna structure and that he did not know the length of the outage because the power loss was sporadic.

4. On March 12, 2003, the station engineer also told the agent that he had not notified the Federal Aviation Administration ("FAA") of the lighting outage.⁵ On March 19, 2003, the agent contacted the FAA and determined that the FAA's records indicated that WLTH notified the FAA of the lighting outage on March 12, 2003. In a letter dated March 26, 2003, WLTH stated that it had corrected the lighting outage.

5. Based on its investigation, on December 23, 2003, the Bureau's Chicago Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL")⁶ to WLTH in the amount of sixteen thousand dollars (\$16,000) for WLTH's apparent willful and repeated violations of Sections 17.4(a), 17.48(a), and 17.51(a) of the Rules. In response to the NAL, WLTH did not dispute the fact that its day antenna structure was not registered or illuminated. WLTH initially contended that its day antenna structure was less than 200 feet AGL and, therefore, was not subject to the Commission's antenna structure registration and lighting requirement but later reported that a September 4, 2004, survey found that the antenna structure's height was 202.97 feet AGL. WLTH also contended that hunters caused the lighting outage by shooting out the antenna structure lights and that it notified the FAA of the outage on March 5, 2003. In the *Forfeiture Order*, issued on December 16, 2004, the Bureau rejected WLTH's arguments, found the violations to be willful and repeated, and imposed a forfeiture of \$16,000. In its petition for reconsideration of the *Forfeiture Order*, WLTH does not dispute its Rule violations but argues that the forfeiture should be reduced or cancelled because it is now in compliance with the Rules and is unable to pay the forfeiture.

III. DISCUSSION

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

⁴ On February 26, 2003, the Chicago Office sent WLTH a letter informing it of the lighting and registration violations. The ASR data base indicates that WLTH's day antenna structure is now registered.

⁵ On March 12, 2003, the Chicago Office issued a *Notice of Violation* to WLTH for its failure to notify the FAA of the outage as required by Section 17.48(a) of the Rules.

⁶ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432320001 (Enf. Bur., Chicago Office, rel. December 23, 2003).

⁷ 47 U.S.C. § 503(b).

⁸ 47 C.F.R. § 1.80.

Forfeiture Guidelines.⁹ In examining the WLTH petition for reconsideration, 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.¹⁰

A. Correction of Violations Argument

1. Background

7. The *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules¹¹ permit downward adjustment of forfeitures on the basis of a minor violation, good faith or voluntary disclosure, history of overall compliance or inability pay as well as other factors within the discretion of the Commission and its staff.

2. Discussion

8. WLTH argues that its correction of the violations mitigates the forfeiture. No mitigation is warranted on the basis of WLTH's correction of the violations. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), "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."¹²

B. Inability to Pay Argument

1. Background

9. Under the *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules,¹³ inability to pay is a downward adjustment factor for Section 503 forfeitures. In analyzing economic-hardship claims, the Commission generally looks to a company's gross revenues from the three most recent tax years as a reasonable and appropriate yardstick to determine its ability to pay an assessed forfeiture.¹⁴ Indeed, the Commission stated that if a company's gross revenues are sufficiently large, the fact that net losses are

⁹ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

¹⁰ 47 U.S.C. § 503(b)(2)(D).

¹¹ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

¹² See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGV L, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

¹³ See *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

¹⁴ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089, ¶ 8 (1992); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07, ¶ 43.

reported, alone, does not necessarily signify an inability to pay.¹⁵

2. Discussion

10. WLTH argues that its revenues and financial losses justify reduction or cancellation of the monetary forfeiture on the basis of economic hardship and has submitted copies of its federal income tax returns for 2001, 2002 and 2003 to support this claim. After reviewing WLTH's claim and the supporting documentation, we believe that payment of the \$16,000 forfeiture would pose a financial hardship and conclude that a reduction of the proposed forfeiture amount to \$4,000 is appropriate, as it would represent an amount more consistent with Commission precedent.¹⁶

IV. CONCLUSION

11. We have considered the forfeiture amount and we have examined WLTH's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(D) of the Act,¹⁷ and in conjunction with the *Forfeiture Policy Statement* as well. While we find that WLTH willfully and repeatedly violated Sections 17.4(a), 17.48 and 17.51(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 \$4,000 is appropriate.

V. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of Act¹⁸ and Section 1.106 of the Rules,¹⁹ the petition for reconsideration filed by WLTH, on January 5, 2005, **IS GRANTED ONLY TO THE EXTENT INDICATED ABOVE AND IS DENIED IN ALL OTHER RESPECTS.**

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.²⁰ Payment may be made by credit card to the Commission's Credit and Debt Management Center at

¹⁵ See, e.g., *Local Long Distance, Inc.*, 15 FCC Rcd 24385 (2000), *recon. denied*, 16 FCC Rcd 10023, 10025, ¶ 6 (2001); *Independent Communications, Inc.*, 14 FCC Rcd 9605 (1999), *recon. denied*, 15 FCC Rcd 16060, 16060, ¶ 2 (2000); *Hoosier Broadcasting Corp.*, 14 FCC Rcd 3356 (CIB 1999), *recon. denied*, 15 FCC Rcd 8640, 8641, ¶ 7 (Enf. Bur. 2000).

¹⁶ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 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).

¹⁷ 47 U.S.C. § 503(b)(2)(D).

¹⁸ 47 U.S.C. § 405.

¹⁹ 47 C.F.R. § 1.106.

²⁰ 47 U.S.C. § 504(a).

(202) 418-1995 or by mailing a check or similar instrument, payable to the order of the 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, SW, Room 1A625, Washington, D.C. 20554.²¹

14. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by regular mail Certified Mail Return Receipt Requested to WLTH Radio, Inc., P. O. Box 2300, Gary, Indiana 46409, and to its counsel, Allan G. Moskowitz, Kaye Scholer LLP, 901 15th Street, N.W., Suite 1100, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Kris Anne Monteith
Chief, Enforcement Bureau

²¹ See 47 C.F.R. § 1.1914.