

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

In the Matter of)	
)	
Blountstown Communications, Inc.)	File No.: EB-03-TP-192
Licensee of Radio Stations WYBT (AM) &)	NAL/Acct. No. 200432700006
WPHK (FM))	FRN 0000040428
Blountstown, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 2007

Released: January 29, 2007

By the Assistant 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 Blountstown Communications, Inc. ("Blountstown"), licensee of Stations WYBT (AM) and WPHK (FM), Blountstown, Florida. Blountstown seeks reconsideration of the *Forfeiture Order*¹ in which the Enforcement Bureau ("Bureau") found it liable for a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000), for willful violations of Sections 11.35, 73.49, and 73.3526(c) of the Commission's Rules ("Rules").² The noted violations involve Blountstown's failure to ensure operational Emergency Alert System ("EAS") equipment, failure to enclose the AM station's antenna tower within an effective locked fence, and failure to make available a complete public file. For the reasons discussed below, we reduce the forfeiture amount from \$25,000 to \$12,480.

II. BACKGROUND

2. On April 7, 2003, agents from the Commission's Enforcement Bureau's Tampa, Florida Field Office ("Tampa Office") inspected station WYBT (AM) and WPHK (FM) in Blountstown, Florida. The agents found the stations' EAS equipment inoperative,³ the AM antenna system's high RF potential exposed and accessible, and a public file which consisted only of a Commission station license and tower registration. On December 16, 2003, the District Director of the Tampa Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$25,000 to Blountstown.⁴ Blountstown did not file a response to the NAL. On April 16, 2004, the Bureau issued the *Forfeiture Order*, which imposed a monetary forfeiture in the amount of \$25,000. Blountstown subsequently filed a petition for reconsideration ("petition") of the *Forfeiture Order* on May 17, 2004, requesting cancellation or reduction of the forfeiture. Specifically, the petition requests: (1) cancellation of the Section 11.35 violation based on proffered evidence that Blountstown acted in compliance with Section 11.35(b) in an

¹ *Blountstown Communications, Inc.*, 19 FCC Rcd 6894 (Enf. Bur. 2004).

² 47 C.F.R. §§ 11.35, 73.49 and 73.3526(c).

³ During the inspection, the agents observed that the last evidence of EAS operation in the stations' EAS logs was dated April 1999. Further, the EAS logs did not reflect that the equipment had been removed from service for repair.

⁴ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432700006 (Enf. Bur., Tampa Office, rel. December 16, 2003).

effort to maintain operational EAS equipment; (2) cancellation of the Section 73.3526(c) violation based on the existence of a public file and misunderstanding surrounding its production at the time of the inspection; (3) cancellation or reduction of the Section 73.49 violation based on environmental circumstances and remediation efforts; and (4) cancellation or reduction of the monetary forfeiture based on Blountstown's inability to pay and its record of compliance. In support of these contentions, Blountstown submitted affidavits, relevant broadcast station daily log sheets, as well as its Federal tax returns for the relevant three year period.

3. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934,⁵ as amended ("Act"), 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 examining Blountstown's petition, 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 such other matters as justice may require.⁸

III. DISCUSSION

A. Violation of Section 11.35(a) of the Rules

1. Background

4. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and attention signal generating and receiving equipment used as part of the EAS are installed and operational so that the monitoring and transmitting functions are available during the times the station is in operation.

2. Discussion

5. Blountstown admits that stations WYBT and WPHK did not have fully operational EAS equipment during the inspection; that is, Blountstown could generate EAS reports, but the stations could not receive EAS alerts from the stations Blountstown was required to monitor. Blountstown, however, contends that there is no basis for violation, and the forfeiture amount for this violation should be cancelled because Blountstown was in full compliance with Section 11.35(b) of the Rules,⁹ which permits operation without the EAS equipment for a 60 day period if the EAS equipment becomes defective. Section 11.35(b) specifically allows a broadcast station to continue operation without EAS equipment when: the presently installed EAS equipment becomes defective and that fact is noted on the broadcast station log, repairs or replacements are made within 60 days, and the broadcast station log documents the date and time the repairs were completed. In an affidavit by the Station Principal and General Manager, Mr. Harry Hagan,¹⁰ Blountstown affirmed that the EAS equipment failed on March 5, 2003, at which point it logged the incident in the broadcast station log and began corrective action. The EAS equipment was again fully

⁵ 47 U.S.C. § 503.

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. § 11.35(b) ("If the EAS Encoder or EAS Decoder becomes defective, the broadcast station . . . may operate without the defective equipment pending its repair or replacement for 60 days without further FCC authority.").

¹⁰ *See* Affidavit of Harry Hagan, Blountstown Station Principal and General Manager, May 17, 2004.

operational on April 10, 2003, within the 60 day period permitted under Section 11.35(b). Blountstown supports these assertions with copies of the relevant station daily log sheets for the stations that document the actions Blountstown took to maintain and correct the EAS system.¹¹ We note that Blountstown's petition for reconsideration does not address the observations made by the agents during the inspection that Blountstown had not logged the EAS equipment failure, and subsequent repair, in the stations' EAS logs. However, we find that the documentation provided by Blountstown regarding the failure of the EAS system and its repair within the specified time period demonstrates compliance by Blountstown with Section 11.35(b). Based on the evidence submitted, we therefore cancel the eight thousand dollar (\$8,000) forfeiture for the violation of Section 11.35(a) of the Rules.¹²

B. Violation of Section 73.3526(c)

1. Background

6. Section 73.3526(c) of the Rules requires that every permittee or licensee of an AM, FM, TV or Class A TV station in the commercial broadcast services shall maintain a public inspection file, which shall be available for public inspection at any time during business hours. The Commission has found that reasonable access to the public inspection file serves the important purpose of facilitating citizen monitoring of a station's operations and public interest performance, and fostering community involvement with local stations, thus helping to ensure that stations are responsive to the needs and interests of their local communities.¹³

2. Discussion

7. Blountstown contends that it maintains a public file for both stations, that the file existed at the time of the inspection, and Blountstown's failure to produce the file was a result of a misunderstanding between the manager and the Commission agents. Blountstown provided affidavits by the staff person present at the time of the investigation, Cathy Hagan, as well as the Station Principal, Harry Hagan, attesting to the fact that the public file was not produced because the Commission agents withdrew the request to view the file. Blountstown cites *Radio One Licenses, Inc.* ("Radio One"),¹⁴ wherein the Commission canceled the forfeiture for a public inspection file violation based on additional findings that the public inspection file existed at the time of the inspection, despite the station's failure to provide the file upon two requests by the Inspecting Agent.

¹¹ Attached to Mr. Hagan's affidavit are three log sheets: one dated March 5, 2003 (the day the equipment failed), a second one dated April 7, 2003 (the day of the inspection) and a third one dated April 10, 2003, which demonstrated that the EAS receiver was repaired.

¹² See *American Family Association, Inc.*, 18 FCC Rcd 16530 (Enf. Bur. 2003) (canceling the EAS violation based on a finding that a defective EAS system that is repaired within the statutory period permitted under Section 11.35(b) does not violate Section 11.35(a) when supported by logs of the incident). Although Blountstown does not provide the quantity of documents provided by American Family Association --namely, an entire year's worth of log sheets--the quality and significance of the log sheets submitted coupled with the affidavit provided are sufficient to support cancellation of the forfeiture amount for the EAS violation. See *Tidewater Communications*, 18 FCC Rcd 5524 (Enf. Bur. 2003) (NAL canceled where affidavit and supporting documentation demonstrated compliance with rule).

¹³ *Review of the Commission's Rules regarding the Main Studio Rule and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691, 15700 (1998). See also *Union Broadcasting, Inc.*, 19 FCC Rcd 18588, 18590 (Enf. Bur. 2004).

¹⁴ *Radio One Licenses, Inc.*, 16 FCC Rcd 15326 (Enf. Bur. 2000); *reconsideration granted in part*, 17 FCC Rcd 20408, 20409 (Enf. Bur. 2002). Subsequent Commission decisions denied two *Radio One* reconsiderations on other grounds, 18 FCC Rcd 15964 (2003), 18 FCC Rcd 25481 (2003). Blountstown cited the case, *Licensee of Station WBOT (FM)*, but the actual cite is *Radio One*, as given above.

8. The rule cited in *Radio One*, Section 73.3526(a)(2),¹⁵ however, is a different rule than the one cited in the instant case; Section 73.3526(a)(2) requires that the public file exist and be maintained, which *Radio One* eventually proved. As explained above, Section 73.3526(c) requires that the public file be accessible. Ms. Hagan, the one who dealt with the agent's request to see the file, admits in her affidavit that the file was not immediately available; she did not know its exact whereabouts. Further, she claims that the agent withdrew his request for the file; the agent, however, disputes that statement. In Commission cases that have involved this Section, the Commission has found a violation under similar circumstances where the entire file was not made available at the time of the inspection.¹⁶ Thus, based on the evidence, we find that Blountstown willfully violated Section 73.3526(c) of the Rules by failing to make available a complete public inspection file. Blountstown's request to cancel or reduce the forfeiture amount of ten thousand dollars (\$10,000.00) is thereby denied.

C. Violation of Section 73.49

1. Background

9. Section 73.49 of the Rules requires AM station towers with radio frequency potential at the base to be enclosed with effective locked fences or other enclosures. The Enforcement Bureau has imposed forfeitures for violation of this rule in numerous cases because of the safety concerns to the public that fencing violations represent.¹⁷

2. Discussion

10. In addition to the antenna tuner and feedline being exposed, the FCC investigation established that neither the property nor the base of the AM station tower was enclosed, as required by Section 73.49. Blountstown argues that the surrounding area is swamp; therefore, it is not conducive to fencing and requires the talents of an expert installer. Because Blountstown was in the process of employing an expert installer prior to the investigation and installation of the fence occurred immediately after the investigation, Blountstown contends that these pre-inspection attempts constitute a voluntary corrective effort and requests cancellation of this violation based on the decision in *East Tennessee Radio Group*.¹⁸ In addition, Blountstown claims that the environmental conditions themselves served as a natural deterrent to inadvertent interference with the equipment.

11. This case is factually distinguishable from *East Tennessee*, as *East Tennessee* concerned the investigation of a Section 17.57 violation, involving a failure to notify the Commission of a change in antenna ownership. The activity in *East Tennessee* involved a replacement item while Blountstown involves the initial construction of a required item. Due to repeated acts of vandalism, *East Tennessee* was forced to repeatedly replace its sign identifying the ownership of the antenna structure. Prior to the Commission investigation, the engineer knew the sign had been removed for the third time and had already ordered a replacement. In contrast, Blountstown's facility was completed in April 2002 and did not have appropriate fencing more than a year later. However, according to the affidavit of Mr. Hagan, between the time the facility was completed and the Commission inspection, he made a number of

¹⁵ 47 C.F.R. § 73.3526(a)(2)

¹⁶ See *Jesse C. and Ernestine A. Ross*, 19 FCC Rcd. 20823 (Enf. Bur. 2004), *aff'd on other grounds*, 21 FCC Rcd. 7913 (Enf. Bur. 2006); *Victory & Power Ministries, Inc.*, 19 FCC Rcd. 19761 (Enf. Bur. 2004); *EICB-TV, LLC.*, 19 FCC Rcd. 18611 (Enf. Bur. 2004); *Marion R. Williams*, 19 FCC Rcd. 15324 (Enf. Bur. 2004); and *Willis Broadcasting Corp.*, 17 FCC Rcd. 7053 (Enf. Bur. 2002).

¹⁷ See, e.g., *East Texas Broadcasting Company, Inc.*, 19 FCC Rcd 22491 (Enf. Bur. 2004) and *Buchanan Broadcasting Company, Inc.* 15 FCC Rcd 24363 (2000).

¹⁸ 18 FCC Rcd 27084 (Enf. Bur. 2003).

attempts to have the fence installed, which we will consider as good faith efforts.¹⁹ As for the marshy terrain, the surrounding environment is not a mitigating factor in determining compliance with the Rule. As the Commission has stated, “[n]either the Rules nor case law permit[s] ‘natural barriers’ to meet the requirements of Section 73.49 of the Rules.”²⁰ Therefore, due to Blountstown’s good faith efforts to find a contractor to build the fence, the forfeiture of \$7,000 is reduced to \$5,600.

D. Inability to Pay and History of Compliance

1. Background

12. Under the *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules,²¹ 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.²² Indeed, the Commission has stated that if a company’s gross revenues are sufficiently large, the fact that net losses are reported, alone, does not necessarily signify an inability to pay.²³ Forfeitures have also been downwardly adjusted in cases where Commission licensees claim, and agency records confirm, a history of overall compliance with the Act and the Rules.²⁴

2. Discussion

13. Blountstown contends that it is unable to pay the monetary forfeiture as exhibited by its Federal tax returns. We have reviewed the financial information Blountstown provided, and we find in light of the reduction discussed herein this information does not provide a basis for further reduction of the forfeiture.²⁵

¹⁹ See *Big Island Radio*, 19 FCC 20819 (Enf. Bur. 2004); *Southern Media Communications, Inc.*, 19 FCC 18146 (Enf. Bur. 2004) (forfeiture amounts reduced where licensees were able to demonstrate by affidavits that they had taken steps towards correcting the noted problems before the Commission inspection).

²⁰ *Pittman Broadcasting Services, LLC*, 19 FCC Rcd 15320, 15322 (Enf. Bur. 2004) (determining that marshy conditions or other “natural barriers” are not sufficient to constitute compliance with Section 73.49). See *Forrester, et al.*, 19 FCC Rcd 11030 (Enf. Bur. 2004) (finding that failure to demonstrate the existence of a locked fence or other enclosure cannot be mitigated by natural environmental deterrents).

²¹ 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.

²² See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17106-07, ¶ 43.

²³ See, e.g., *Local Long Distance, Inc.*, 15 FCC Rcd 24385 (2000), *recon. denied*, 16 FCC Rcd 10023, 10025 (2001); *Independent Communications, Inc.*, 14 FCC Rcd 9605 (1999), *recon. denied*, 15 FCC Rcd 16060, 16060 (2000); *Hoosier Broadcasting Corp.*, 14 FCC Rcd 3356 (CIB 1999), *recon. denied*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2000).

²⁴ 47 C.F.R. § 1.80(b)(4) (“Section II. Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment Criteria”).

²⁵ See *PJB Communications of Virginia, Inc.*, *supra* n. 20 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator’s gross revenues); *Hoosier Broadcasting Corporation, Inc.*, *id.* at 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues). In this case, the forfeiture represents a smaller percentage than that issued in *Hoosier Broadcasting Corp.*, but a higher percentage compared to the forfeiture issued in *PJB Communications of Virginia, Inc.*

14. Finally, Blountstown asserts that the instant forfeiture amount should be reduced because of Blountstown's history of overall compliance.²⁶ We agree that a reduction of the forfeiture amount is warranted, based upon our review of the record and finding that Blountstown has a history of overall compliance with the Rules. Accordingly, we further reduce the forfeiture amount from \$15,600 to \$12,480 pursuant to Section 1.80(b)(4) of the Rules.²⁷

15. We have examined Blountstown's Petition for Reconsideration pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Blountstown willfully violated Sections 73.49 and 73.3526(c) of the Rules and find that, although cancellation of the monetary forfeiture is not warranted, reduction of the forfeiture amount to \$12,480 is appropriate.

IV ORDERING CLAUSES

16. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 405 of the Act²⁸ and Section 1.106 of the Rules,²⁹ Blountstown's petition for reconsideration of the April 16, 2004, *Forfeiture Order IS GRANTED IN PART* to the extent indicated **AND DENIED IN ALL OTHER PARTS** as specified herein.

17. **IT IS FURTHER ORDERED THAT** Blountstown Communications, Inc. is **LIABLE FOR A MONETARY FORFEITURE** in the amount of twelve thousand, four hundred eighty dollars (\$12,480) for willful and repeated violation of Section Sections 73.49 and 73.3526(c) of the Rules.

18. 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.³⁰ 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, SW, Room 1A625, Washington, D.C. 20554.³¹

²⁶ See Mr. Hagan's affidavit at p. 2, and Blountstown's petition at p. 4.

²⁷ See *Max Media of Montana, L.L.C.*, 18 FCC Rcd 21375, 21379 (Enf. Bur. 2003) (further reducing the proposed forfeiture from \$11,000 to \$8,800 for antenna structure lighting and registration violations due to the licensee's history of overall compliance); *South Central Communications Corp.*, 18 FCC Rcd 700, 702 (Enf. Bur. 2003) (reducing the proposed forfeiture from \$10,000 to \$8,000 for antenna structure lighting violations due to the licensee's history of overall compliance).

²⁸ 47 U.S.C. § 405.

²⁹ 47 C.F.R. § 1.106.

³⁰ 47 U.S.C. § 504(a).

³¹ See 47 C.F.R. § 1.1914.

19. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Blountstown Communications, Inc., 20872 N.E. Kelly Avenue, Blountstown, Florida 32424, to 612 North Jefferson Street, Perry, Florida 32347, and to John S. Neely, Miller and Neely, P.C., 6900 Wisconsin Ave., Suite 704, Bethesda, MD 20815.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau