

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

In the Matter of	)	
	)	
Radio Plus, Inc.	)	File No.: EB-07-CG-139
	)	
Licensees of AM Station WFDL	)	NAL/Acct. No.: 20073232002
Waupun, Wisconsin	)	
Facility ID No. 42092	)	FRN: 0006949911

### FORFEITURE ORDER

**Adopted:** July 1, 2008

**Released:** July 3, 2008

By the Acting 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 Radio Plus, Inc. (“Radio Plus”), licensee of AM radio station WFDL in Waupun, Wisconsin, for willfully and repeatedly violating Section 73.49 of the Commission’s Rules (“Rules”)<sup>1</sup> by failing to enclose the WFDL antenna tower within an effective locked fence or other enclosure. In this *Order*, we consider Radio Plus’s arguments that the forfeiture amount should be cancelled or reduced because the violation was not willful and in light of its remedial efforts.

#### II. BACKGROUND

2. On February 6, 2007, an agent from the Enforcement Bureau’s Chicago Field Office conducted an inspection of the AM antenna tower used by Radio Plus to broadcast AM station WFDL. The WFDL antenna tower is series fed and, therefore, required to be fenced. Upon inspection of the WFDL antenna tower, the agent found that the antenna tower did not have a locked fence or an effectively locked enclosure surrounding the base of the tower. The wooden fence was found to be in poor condition. The top of the fence had pieces missing and the gate had a large area where the wooden slats were broken or missing. The fence gate was open and did not have a lock. The antenna site, located in Waupun, Wisconsin, is approximately 1300 feet northeast from Waupun Middle School and sports field. Notwithstanding the tower’s proximity to a school, the agent noted that there was no perimeter fence surrounding the property upon which the antenna structure was sited to prevent the public from accessing the tower. Later that day, the agent advised the Chief Operator and the General Manager of WFDL of the lack of an effectively locked enclosure surrounding the base of the WFDL tower. The Chief Operator and General Manager acknowledged the condition of the fence.

3. On July 27, 2007, the Chicago Field Office issued a Notice of Apparent Liability for Forfeiture (“*NAL*”) in the amount of \$7,000 to Radio Plus for failure to enclose the WFDL antenna tower within an effective locked fence as required under Section 73.49 of the Rules. In its response, Radio Plus does not dispute the condition of the fence at the time of the agent’s inspection on February 6, 2007. Radio Plus states, however, that its actions were not willful and that, prior to the inspection, it had

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<sup>1</sup> 47 C.F.R. § 73.49.

contacted contractors and that contractor availability and weather conditions prevented it from replacing the fence until the springtime. In this regard, Radio Plus submitted a proposal that it had obtained from a contractor in September 2006. Radio Plus also notes that, after the agent's inspection, Radio Plus requested that the contractor replace the fence as soon as the weather permitted. A new fence was completed on March 9, 2007. Radio Plus's response to the *NAL* also included a statement from the station's chief engineer, who states that he did not believe the condition of the fence was a danger to the public. The chief engineer further states that he is not sure exactly how the gate became open, but believes that it may have resulted from a rotten gate latch that blew open from snow and wind.

### III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>2</sup> Section 1.80 of the Rules,<sup>3</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Forfeiture Policy Statement").<sup>4</sup> In examining Radio Plus'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.<sup>5</sup> As discussed below, we have considered Radio Plus's response to the *NAL* in light of these statutory factors and have found that reduction or cancellation of the proposed forfeiture amount is not warranted.

5. Section 73.49 of the Rules states that antenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures.<sup>6</sup> Individual tower fences need not be installed if the towers are contained within a protective property fence.<sup>7</sup> Because WFDL broadcasts from a series-fed tower and there is no perimeter fence, the tower must be enclosed within an effective locked fence. As described above, at the time of the February 6, 2007 inspection, an agent found that the condition of the fence and gate, combined with the fact that the gate was open and did not have a lock, rendered the fence ineffective. Because the fence was in need of repair since at least September 2006, *i.e.*, the date Radio Plus obtained a proposal from a contractor, we find that the violation was repeated. Having found that the violation was repeated, we do not need to determine whether the violation was willful.<sup>8</sup> We nevertheless address Radio Plus's claim that the violation was not willful.

6. Section 312(f)(1) of the Act,<sup>9</sup> which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, 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

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<sup>2</sup> 47 U.S.C. § 503(b).

<sup>3</sup> 47 C.F.R. § 1.80.

<sup>4</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>5</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>6</sup> 47 C.F.R. § 73.49

<sup>7</sup> *Id.*

<sup>8</sup> See Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) (violator liable for forfeiture if violation is willful or repeated).

<sup>9</sup> 47 U.S.C. § 312(f)(1).

Commission authorized by this Act...."<sup>10</sup> "Willful" does not require a finding that there was an intent to engage in a violation.<sup>11</sup> Radio Plus does not dispute the agent's findings, which showed that the fence surrounding the tower was in such disrepair that the fence was rendered ineffective. By failing to repair the fence in a timely manner, it was Radio Plus's "omission" that resulted in its willful violation of Section 73.49 of the Rules.

7. We decline to reduce the proposed forfeiture amount based on Radio Plus's remedial efforts. Reductions based on good faith efforts to comply generally involve situations where violators demonstrated that they initiated measures to correct or remedy violations prior to the Commission's involvement.<sup>12</sup> Radio Plus's replacement of the fence *after* the February 6, 2007, inspection by the Chicago agents therefore does not support a good faith reduction. Further, we do not believe that Radio Plus's alleged efforts prior to the inspection warrant a good faith reduction. Although Radio Plus claims that weather and contractor availability prevented it from fixing the fence until the springtime, Radio Plus received a contractor proposal on September 17, 2006, and Radio Plus does not provide any explanation as to why the fence could not have been fixed at that time. Indeed, notwithstanding its claim that weather prevented the fence from being fixed until springtime, the fence was in fact fixed by March 9, 2007, as a direct result of the FCC agent's inspection on February 6, 2007. Finally, we believe that the fact that the gate was open and did not have a lock shows a level of neglect that negates any effort prior to the inspection that might have warranted a good faith reduction. Consequently, we decline to reduce the forfeiture amount on this basis.

#### IV. ORDERING CLAUSES

8. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Radio Plus, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$7,000 for willfully and repeatedly violating Section 73.49 of the Rules.<sup>13</sup>

9. 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>14</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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C.

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<sup>10</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>11</sup> *Id.*, citing *MCI Telecommunications Group*, 3 FCC Rcd 509, 514 n.22 (1988); *Hale Broadcasting Corporation*, 79 FCC Rcd 169, 171 (1980).

<sup>12</sup> *Cumulus Licensing Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 5286 (2008) (post-notification remedial efforts do not warrant mitigation of forfeiture).

<sup>13</sup> 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.49.

<sup>14</sup> 47 U.S.C. § 504(a).

20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov) with any questions regarding payment procedures. Radio Plus, Inc. shall also send electronic notification on the date said payment is made to [NER-Response@fcc.gov](mailto:NER-Response@fcc.gov)

10. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Radio Plus, Inc. at its address of record.

**FEDERAL COMMUNICATIONS COMMISSION**

G. Michael Moffitt  
Acting Regional Director, Northeast Region  
Enforcement Bureau