

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

In the Matter of	)	File No.: EB-09-SJ-0013
	)	
Ayustar Corporation	)	NAL/Acct. No.: 201032680001
	)	
San Juan, PR	)	FRN: 0008739229
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** November 23, 2010

**Released:** November 23, 2010

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny the petition for reconsideration filed by Ayustar Corporation (“Ayustar”)<sup>1</sup> in response to the *Forfeiture Order* issued by the Enforcement Bureau’s South Central Region (“EB South Central Region”) on January 8, 2010.<sup>2</sup> The *Forfeiture Order* imposed a monetary forfeiture in the amount of ten thousand dollars (\$10,000) for Ayustar’s willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“Act”),<sup>3</sup> involving Ayustar’s operation of unlicensed radio transmitters.

**II. BACKGROUND**

2. On November 12, 2009, the Enforcement Bureau’s San Juan Office issued a *Notice of Apparent Liability for Forfeiture* to Ayustar in the amount of \$10,000, for the apparent willful and repeated violation of Section 301 of the Act.<sup>4</sup> On December 3, 2009, Ayustar submitted a response to the *NAL* requesting reduction or cancellation of the proposed forfeiture based “solely on the lack of capacity of Ayustar to pay the established fine.”<sup>5</sup> In the *Forfeiture Order*, the EB South Central Region found that Ayustar’s documented gross revenues did not warrant a reduction based on inability to pay and imposed a forfeiture in the amount of \$10,000. On February 2, 2010, Ayustar filed a petition for reconsideration requesting reduction or cancellation of the forfeiture based on its net losses rather than its gross revenues.<sup>6</sup>

**III. DISCUSSION**

<sup>1</sup> Ayustar is a wireless internet service provider using Unlicensed National Information Infrastructure (U-NII) devices in San Juan, PR.

<sup>2</sup> *Ayustar Corporation*, Forfeiture Order, 25 FCC Rcd 945 (Enf. Bur. South Central Region 2010) (“*Forfeiture Order*”).

<sup>3</sup> 47 U.S.C. § 301.

<sup>4</sup> *Ayustar Corporation*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 201032680001 (Enf. Bur., rel. November 12, 2009) (“*NAL*”).

<sup>5</sup> Letter from Stefan Lechnar, Chief Executive Officer, Ayustar Corporation, to San Juan Office at 1 (December 3, 2009) (“*Ayustar Response*”).

<sup>6</sup> Letter from Stefan Lechnar, Chief Executive Officer, Ayustar Corporation, to Dennis P. Carlton, Regional Director, South Central Region, Enforcement Bureau (February 2, 2010) (“*Ayustar Petition*”).

3. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>7</sup> Section 1.80 of the Commission's Rules ("Rules"),<sup>8</sup> and the Commission's *Forfeiture Policy Statement*.<sup>9</sup> In examining Ayustar'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 other such matters as justice may require.<sup>10</sup> As discussed below, we decline to reduce the forfeiture on the basis of Ayustar's claim of an inability to pay.

4. In its petition, Ayustar requests that the Commission "take into consideration other financial indicators, such as net losses," to determine its ability to pay the forfeiture.<sup>11</sup> Citing *First Greenville Corporation*,<sup>12</sup> *Benito Rish*,<sup>13</sup> and *Pinnacle Communications*,<sup>14</sup> Ayustar notes that "the Commission took into consideration the Profit and Losses [sic] of the respective companies, including in one of the cases, the net liabilities in light of default in payments."<sup>15</sup> Ayustar requests that the Commission similarly consider its continuing monthly losses. Ayustar claims that paying the forfeiture could have a negative impact on its ability to retain employees.<sup>16</sup>

5. We do not find that Ayustar's financial situation warrants a reduction of the forfeiture. Generally, the Commission has found that "a licensee's gross revenues are the best indicator of its ability to pay a forfeiture."<sup>17</sup> The Commission, citing *PJB Communications*, has also held that "[i]f gross revenues are sufficiently great. . . the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture."<sup>18</sup> Such is the case here. Ayustar's documented gross revenues are sufficiently great that we do not find a reduction appropriate. As Ayustar notes, the Commission has in a few limited cases looked to other factors, including profits and losses, to determine ability to pay.<sup>19</sup> Those cases, however, involved licensees in severe financial distress. Ayustar has failed to demonstrate that it is experiencing a comparable level of financial distress or that it otherwise should qualify for an exception to our gross revenues policy. For example, unlike the entities in *Pinnacle Communications* and *First Greenville Corporation*, Ayustar has not indicated that it is facing foreclosure, that it is unable to secure funding to cover its losses, or that its owners have personally guaranteed loans on its behalf.<sup>20</sup>

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<sup>7</sup> 47 U.S.C. § 503(b).

<sup>8</sup> 47 C.F.R. § 1.80.

<sup>9</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

<sup>10</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>11</sup> Ayustar Petition at 1.

<sup>12</sup> *First Greenville Corporation*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 7399 (1996).

<sup>13</sup> *Benito Rish*, Memorandum Opinion and Order, 10 FCC Rcd 2861 (1995).

<sup>14</sup> *Pinnacle Communications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 15496 (1996).

<sup>15</sup> Ayustar Petition at 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17106.

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* nn.12-14.

<sup>20</sup> Cf. *First Greenville Corporation* (considered that the station's losses exceeded its income and that the sole shareholder funded those losses and received no income from the station when reducing proposed forfeiture); *Pinnacle*

Moreover, unlike the entity in *Benito Rish*, Ayustar services a large metropolitan area, with a significant potential customer base.<sup>21</sup> Accordingly, based on our review of the instant case, we deny Ayustar's petition for reconsideration and affirm the forfeiture in the amount of \$10,000.

#### IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED**, pursuant to Section 405 of the Communications Act of 1934, as amended,<sup>22</sup> and Section 1.106 of the Commission's Rules,<sup>23</sup> that the petition for reconsideration filed by Ayustar Corporation **IS DENIED**.

7. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>24</sup> Ayustar Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for willful and repeated violation of Section 301 of the Act.

8. 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 *Memorandum Opinion and 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>25</sup> Payment of the forfeiture must be made by credit card, 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. 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. Ayustar Corporation shall also send electronic notification to [SCR-Response@fcc.gov](mailto:SCR-Response@fcc.gov) on the date said payment is made.

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*Communications, Inc.* (considered that the licensee was in default of a loan personally guaranteed by licensee's owner, that the loan was entered into to avoid foreclosure, and that the licensee and its owner would receive no cash from sale of the license when cancelling forfeiture).

<sup>21</sup> *Cf. Benito Rish* (considered the station's unprofitable history and the fact that it served a small community of license with a population of 425 when reducing proposed forfeiture).

<sup>22</sup> 47 U.S.C. § 405.

<sup>23</sup> 47 C.F.R. § 1.106.

<sup>24</sup> 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>25</sup> 47 U.S.C. § 504(a).

9. **IT IS FURTHER ORDERED** that this *Memorandum Opinion and Order* shall be sent by regular mail and by certified mail, return receipt requested, to Ayustar Corporation at its address of record.

**FEDERAL COMMUNICATIONS COMMISSION**

P. Michele Ellison  
Chief, Enforcement Bureau