

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

In the Matter of	)	
	)	
Upper Peninsula Communications Inc.	)	File No. EB-10-DT-0352
	)	
Physical System ID# 002477	)	NAL/Acct. No. 201232360001
	)	
Powers, Michigan	)	FRN 0003772886

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: October 14, 2011

Released: October 18, 2011

By the District Director, Detroit Office, Northeast Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Upper Peninsula Communications Inc. (“Upper Peninsula”)<sup>1</sup>, former operator of a cable television system in Powers, Michigan, apparently willfully and repeatedly violated section 11.35(a) of the Commission’s rules (“Rules”)<sup>2</sup> by failing to install emergency alert system (“EAS”) equipment. We conclude that Upper Peninsula is apparently liable for a forfeiture in the amount of eight thousand dollars (\$8,000).

**II. BACKGROUND**

2. On November 3, 2010, an agent from the Enforcement Bureau’s Detroit Office inspected Upper Peninsula’s cable system serving Powers, Michigan with the cable system’s manager. The agent observed that Upper Peninsula did not have any EAS equipment installed, which the manager conceded.<sup>3</sup> The agent, subsequent to the inspection, determined that, although some of Upper Peninsula’s cable systems had received temporary waivers of the Commission’s deadline for certain cable systems to come into compliance with the EAS rules, the system serving Powers, Michigan never had such a waiver.<sup>4</sup>

<sup>1</sup> Upper Peninsula reported to an FCC agent that the sale of the system serving Powers, Michigan to Packerland Broadband was consummated on February 1, 2011. Upper Peninsula, however, still owns other cable systems in Michigan.

<sup>2</sup> 47 C.F.R. § 11.35.

<sup>3</sup> The manager told the agent that he believed Upper Peninsula did not need EAS equipment because of the small size of the cable system, *i.e.*, the system at the time was serving only fifty-five subscribers.

<sup>4</sup> See *Upper Peninsula Communications Inc.*, Order, 17 FCC Rcd 20112 (EB 2002) (granting Upper Peninsula temporary waivers of the EAS rules for several systems in order to give Upper Peninsula additional time to come into compliance with the EAS rules based on a demonstrated financial hardship). In 2006, the Commission denied Upper Peninsula’s request for an extension of the waiver for its systems serving Alpha, Michigan; Amasa, Michigan; Champion, Michigan; Detour, Michigan; Garden, Michigan; Germfask, Michigan; Marenisco, Michigan; Michigamme, Michigan; Nahma, Michigan; Phelps, Wisconsin and Wolverine, Michigan. See *EAS Waiver Extensions Granted to Very Small Cable Systems*, Public Notice, 21 FCC Rcd 7129 (2006) (granting extensions of waivers to some cable systems and denying waiver extensions to cable operators who were unable to demonstrate continuing financial hardship).

### III. DISCUSSION

3. Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>5</sup> provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. Section 312(f)(1) of the Act defines willful as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>6</sup> The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act<sup>7</sup> and the Commission has so interpreted the term in the section 503(b) context.<sup>8</sup> The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.<sup>9</sup> The term “repeated” means the commission or omission of such act more than once or for more than one day.<sup>10</sup>

4. Every analog and digital cable system is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to refrain from participation, and that request is approved by the Commission.<sup>11</sup> Cable systems must comply with EAS requirements on a headend basis.<sup>12</sup> The EAS enables the President and state and local governments to provide immediate and emergency communications and information to the general public.<sup>13</sup> State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.<sup>14</sup> Required monthly and weekly tests originate from EAS Local or State Primary

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<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 U.S.C. § 312(f)(1).

<sup>7</sup> H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., section 503)... As defined ... ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission’s application of those terms ...”).

<sup>8</sup> See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) *recon. denied*, 7 FCC Rcd 3454 (1992).

<sup>9</sup> See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision, Inc.*”) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

<sup>10</sup> Section 312(f) (2) of the Act, 47 U.S.C. § 312(f) (2), which also applies to violations for which forfeitures are assessed under section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”

<sup>11</sup> 47 C.F.R. §§ 11.11, 11.41.

<sup>12</sup> 47 C.F.R. § 11.11.

<sup>13</sup> 47 C.F.R. §§ 11.1, 11.21.

<sup>14</sup> 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

sources and must be retransmitted by the participating cable system.<sup>15</sup> As the nation's emergency warning system, the EAS is critical to public safety, and we recognize the vital role that cable systems play in ensuring its success. The Commission takes seriously any violations of the Rules implementing the EAS and expects full compliance from its regulatees.

5. Section 11.35(a) of the Rules states that "EAS Participants are responsible for ensuring that the EAS Encoders, EAS Decoders, and Attention Signal generating and receiving equipment used as part of the EAS are installed so that the monitoring and transmitting functions are available during the times the stations and systems are in operation...."<sup>16</sup> On November 3, 2010, an agent from the Detroit Office observed that Upper Peninsula's cable system serving Powers, Michigan did not have any operational EAS equipment installed, which was confirmed by the manager of the cable system. Because Upper Peninsula consciously operated its cable system in Powers, Michigan without EAS equipment for more than one day, we find the apparent violations to be willful and repeated.<sup>17</sup> Based on the evidence before us, we find that Upper Peninsula apparently willfully and repeatedly violated section 11.35(a) of the Rules by failing to install EAS equipment at its cable system in Powers, Michigan.

6. Pursuant to the Commission's *Forfeiture Policy Statement* and section 1.80 of the Rules, the base forfeiture amount for EAS equipment not installed or operational is \$8,000.<sup>18</sup> In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, 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>19</sup> Applying the *Forfeiture Policy Statement*, section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Upper Peninsula is apparently liable for a total forfeiture in the amount of \$8,000.<sup>20</sup>

#### IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.204(b), 0.311, 0.314 and 1.80 of the Commission's rules,

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<sup>15</sup> 47 C.F.R. § 11.61.

<sup>16</sup> 47 C.F.R. § 11.35.

<sup>17</sup> With regard to the manager's claim that he (and perhaps Upper Peninsula's owners as well) believed that the system did not need EAS equipment in light of the system's size, we note that it is longstanding Commission policy that lack of specific intent to violate Commission rules (even based on a lack of knowledge) is not a mitigating factor. See *Profit Enterprises, Inc.*, 8 FCC Rcd 2846, 2846 (1993) (denying the mitigation claim of a manufacturer/distributor who thought that the equipment certification and marketing requirements were inapplicable, stating that its "prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed . . . ignorance of the law is [not] a mitigating factor"); *Bureau D'Electronique Appliquee, Inc.*, Forfeiture Order, 20 FCC Rcd 17893, 17896-7 (Enf. Bur., Spectrum Enf. Div. 2005) (denying the mitigation claim of a manufacturer/distributor who admitted that "lack of actual knowledge" may not negate a finding of willfulness, but that such factors[s] warranted a downward adjustment of the proposed forfeiture amount).

<sup>18</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); 47 C.F.R. § 1.80.

<sup>19</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>20</sup> We note that the duration of the violation would normally be grounds for an upward adjustment, but because of the system's small number of subscribers, we will refrain from doing so in this case. Future violations of our EAS rules, however, may be subject to larger penalties.

Upper Peninsula Communications Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eight thousand dollars (\$8,000) for violation of section 11.35(a) of the Rules.<sup>21</sup>

8. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Upper Peninsula Communications Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

9. 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 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.<sup>22</sup> If you have questions about payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov). Upper Peninsula shall also send electronic notification on the date said payment is made to [NER-Response@fcc.gov](mailto:NER-Response@fcc.gov).

10. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules.<sup>23</sup> Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Detroit Office, 24897 Hathaway Street, Farmington Hills, Michigan, 48335 and include the NAL/Acct. No. referenced in the caption. Upper Peninsula also shall email the written response to [NER-Response@fcc.gov](mailto:NER-Response@fcc.gov).

11. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

<sup>21</sup> 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204(b), 0.311, 0.314, 1.80, 11.35(a).

<sup>22</sup> See 47 C.F.R. § 1.1914.

<sup>23</sup> 47 C.F.R. §§ 1.80(f)(3), 1.16.

12. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail, to Upper Peninsula Communications Inc., 397 US 41, Carney, Michigan 49812.

FEDERAL COMMUNICATIONS COMMISSION

James A. Bridgewater  
District Director  
Detroit Office  
Northeast Region  
Enforcement Bureau