

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

In the Matter of
WiFi Services Caribbean, Inc.
San Juan, Puerto Rico
File No.: EB-FIELDSCR-19-00028514
NAL/Acct. No.: 202032020004
FRN: 0022942296

FORFEITURE ORDER

Adopted: October 26, 2020

Released: October 26, 2020

By the Regional Director, Region Two, Enforcement Bureau:

I. INTRODUCTION

1. The Federal Aviation Administration (FAA) uses terminal doppler weather radar stations to detect wind shear and other dangerous weather conditions near airports. Interference to these radar stations is unacceptable and, in certain circumstances, could be potentially life threatening. On April 22, 2020, the Enforcement Bureau (Bureau) issued a Notice of Apparent Liability (Notice) against WiFi Services Caribbean, Inc. (WiFi Services) for apparently operating two Unlicensed National Information Infrastructure (U-NII) devices in an unauthorized manner, and causing interference to an FAA terminal doppler weather radar station in San Juan, Puerto Rico, in violation of the Commission’s rules. The Bureau proposed a \$25,000 fine for those apparent statutory and regulatory violations.1 WiFi Services does not dispute the Bureau’s factual findings regarding its operations, but instead requests the cancellation or reduction of the proposed fine. After reviewing the record in this matter, including WiFi Services’ financial condition, we find that reducing the forfeiture to \$20,000 is appropriate here.

II. BACKGROUND

2. Legal Framework. Section 301 of the Communications Act of 1934, as amended (Act) states that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio” within the United States or its territories without a license granted by the Commission.2 Part 15 of the Commission’s rules provides an exception to this general section 301 license requirement and sets forth conditions under which such devices (intentional radiators) may operate without an individual license.3 Pursuant to section 15.1(b) of the Commission’s rules, however, “operation of an intentional . . . radiator that is not in accordance with the regulations in this part must be licensed. . . .”4 In order to avoid interference to the FAA’s terminal doppler weather radar installations, the Commission requires, pursuant to section 15.407(h)(2) of its rules, that U-NII devices operating in the 5.25 – 5.35 GHz (U-NII-2A) and 5.47 – 5.725 GHz (U-NII-2C) bands have Dynamic Frequency

1 See WiFi Services Caribbean, Inc., San Juan, Puerto Rico, Notice of Apparent Liability for Forfeiture and Order, 35 FCC Rcd 3674 (EB 2020), https://docs.fcc.gov/public/attachments/DA-20-433A1_Red.pdf.

2 47 U.S.C. § 301.

3 See 47 CFR §§ 15.1, et seq.

4 47 CFR § 15.1(b) (emphasis added).

Selection radar detection functionality, which allows them to detect the presence of radar systems and automatically avoid operating on the same channel as those nearby radar systems.⁵

3. *Factual Background.* In the *Notice*, the Bureau proposed a \$25,000 forfeiture against WiFi Services⁶ for apparent willful violations of section 301 of the Act,⁷ and sections 15.1(b) and 15.407(h)(2) of the Commission's rules.⁸ Specifically, the Bureau stated that its agent observed that WiFi Services had configured its two Ubiquiti devices (Stations) in a manner that disabled Dynamic Frequency Selection,⁹ meaning that the Stations were not configured to automatically detect the presence of the FAA's nearby terminal doppler weather radar station in San Juan, Puerto Rico, or configured to operate on an alternate channel to avoid causing interference to the radar station. Because the Stations operated without Dynamic Frequency Selection enabled, the Bureau found that WiFi Services required a license from the Commission to operate the Stations in the manner observed, which it did not have.

4. On May 22, 2020, WiFi Services submitted a response to the *Notice*.¹⁰ WiFi Services does not contest the Bureau's allegations that it operated two U-NII devices with Dynamic Frequency Selection disabled.¹¹ Instead, WiFi Services: (a) seeks cancellation or reduction of the forfeiture proposed in the *Notice* based on claims that its violations of section 301 of the Act and sections 15.1(b) and 15.407(h)(2) of the Commission's rules were neither willful nor repeated, (b) opposes the Bureau's upward adjustment for egregious conduct, and (c) seeks a reduction of the forfeiture based on the company's inability to pay the forfeiture proposed in the *Notice*.¹² On June 18, 2020, the Bureau requested additional information from WiFi Services to support its claim that it lacks the financial resources to pay the forfeiture proposed in the *Notice*.¹³ On July 21, 2020, WiFi Services supplemented the Response with the additional information that the Bureau requested.¹⁴

III. DISCUSSION

5. The Bureau proposed a forfeiture in this case in accordance with section 503(b) of the Act,¹⁵ section 1.80 of the Commission's rules,¹⁶ and the Commission's *Forfeiture Policy Statement*.¹⁷

⁵ See 47 CFR § 15.407(h)(2).

⁶ *Notice*, 35 FCC Rcd at 3674.

⁷ 47 U.S.C. § 301.

⁸ 47 CFR §§ 15.1(b), 15.407(h)(2).

⁹ *Notice*, 35 FCC Rcd at 3676, para. 9.

¹⁰ *WiFi Services Caribbean, Inc.*, Response to Notice of Apparent Liability for Forfeiture and Order (May 22, 2020) (on file in EB-FIELDSCR-19-00028514) (Response).

¹¹ Response at 4; see *Notice*, 35 FCC Rcd at 3676, para. 9.

¹² Response at 5, 7, 9.

¹³ E-mail from Matthew L. Gibson, Senior Field Counsel, Office of the Field Director, FCC Enforcement Bureau, to Carlos W. López-Freytes, Counsel to WiFi Services (June 18, 2020, 13:34 EDT) (on file in EB-FIELDSCR-19-00028514).

¹⁴ E-mail from Carlos W. López-Freytes, Counsel to WiFi Services, to Matthew L. Gibson, Senior Field Counsel, Office of the Field Director, FCC Enforcement Bureau (Jul. 21, 2020 11:09 EDT) (on file in EB-FIELDSCR-19-00028514) (Supplemental Response).

¹⁵ 47 U.S.C. § 503(b).

¹⁶ 47 CFR § 1.80.

¹⁷ *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*), recons. denied, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

When we assess forfeitures, section 503(b)(2)(E) 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.”¹⁸ We have fully considered the Response and Supplemental Response and find that a reduction of the forfeiture to \$20,000 is warranted.

6. *Liability.* WiFi Services’ failure to ensure that Dynamic Frequency Selection was enabled on the Stations, which it does not contest, was willful. For a violation to be considered “willful”, the violator must consciously commit or omit certain actions and need not be aware that such actions violate the Act or the Commission’s rules.¹⁹ Here, WiFi Services took the conscious and deliberate step of enabling the non-standard “Compliance Test” country code on the Stations, thereby placing the devices in an operating mode in which the Stations did not automatically observe the Commission’s requirement to enable Dynamic Frequency Selection when configured to operate in the U-NII-2C band. Thus, we reject WiFi Services’ argument that its failure to ensure that Dynamic Frequency Selection was enabled on the Stations was merely inadvertent and therefore not willful. Accordingly, WiFi Services’ conduct was willful within the meaning of the Act, and we find WiFi Services liable for violating section 301 of the Act and sections 15.1(b) and 15.407(h)(2) of the Commission’s rules.²⁰

7. *Forfeiture Amount.* As WiFi Services does not dispute that it failed to enable Dynamic Frequency Selection on the Stations, and, as this failure was willful, we fine the Company the \$20,000 base forfeiture propose in the *Notice*.²¹ In the *Notice*, we proposed a \$5,000 upward adjustment to the base forfeiture for egregious misconduct that was based on WiFi Services’ multiple interactions with Bureau personnel regarding the configuration of its U-NII devices and the assurances it provided in its January 30, 2019, e-mail that all of its U-NII devices were “installed and configured properly.”²² In the Response, WiFi Services explains that, at the time of its January 30, 2019, e-mail, WiFi Services had only restored 80% of its network following the devastating effects of Hurricane Maria.²³ Lacking evidence demonstrating that the Stations were operational at the time of WiFi Services’ January 30, 2019, certification, and accounting for the fact that the company was still in the process of restoring a significant portion of its wireless network, we find that WiFi Services’ violations were not egregious in nature. Accordingly, we cancel the \$5,000 upward adjustment proposed in the *Notice*.²⁴

¹⁸ 47 U.S.C. § 503(b)(2)(E).

¹⁹ See 47 U.S.C. § 312(f)(1) (defining “willful”). 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, and the Commission has so interpreted the term in the section 503(b) context. H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ . . . 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. The definition[] [is] intended primarily to clarify the language in Sections 312 and 503, and [is] consistent with the Commission’s application of those terms”); see, e.g., *S. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

²⁰ 47 U.S.C. § 301; 47 CFR §§ 15.1(b), 15.407(h)(2). We need not address WiFi Services’ argument that its conduct was not repeated within the meaning of section 503(b) of the Act, as the *Notice* did not allege repeated conduct. See *Notice*, 35 FCC Rcd at 3678, para. 16 (“WiFi Services Caribbean, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE . . . for willful violations of section 301 of the Act and sections 15.1(b) and 15.407(h)(2) of the Commission’s rules.”).

²¹ See *Notice*, 35 FCC Rcd at 3677, para. 12.

²² *Id.*, 35 FCC Rcd at 3678, para. 13.

²³ Response at 2.

²⁴ The portion of the Response arguing for the cancellation of the upward adjustment is based on WiFi Services’ interpretation of the meaning of “willful” under the Act. See Response at 8. The Response, however, also asserts

(continued....)

8. While we cancel the \$5,000 upward adjustment, we decline to further reduce the forfeiture amount based on the Company's claimed inability to pay the proposed fine. When addressing inability to pay claims, Commission precedent establishes that a forfeiture equivalent to 7.9% of the target's average gross revenues over a three-year period is generally appropriate.²⁵ In the Response and Supplemental Response, WiFi Services provided the Bureau with adequate documentation establishing that it lacks the ability to pay the full \$25,000 forfeiture proposed in the *Notice*. Consistent with applicable precedent and based on the company's average gross revenues in 2017, 2018, and 2019, we would ordinarily be willing to reduce the forfeiture to \$23,333. However, because we have already reduced the aggregate forfeiture by cancelling the \$5,000 upward adjustment proposed in the *Notice*,²⁶ we find that, under applicable precedents, WiFi Services' financial condition does not support a reduction of the forfeiture to an amount below \$20,000.

9. In the Response and the Supplemental Response, WiFi Services also seeks a further reduction of the forfeiture on the basis of its financial condition to a value of 2% to 5% of its average gross revenues.²⁷ In support of that request, WiFi Services relies on two cases: *Care Broadcasting, Inc.*²⁸ and *PJB Communications of Virginia*.²⁹ While we agree that WiFi Services' financial documentation supports a reduction of the \$25,000 forfeiture originally proposed in the *Notice*, the Bureau is not bound by either *Care Broadcasting* or *PJB Communications* for purposes of establishing the amount of the reduction. *Care Broadcasting* is a decision issued by the Media Bureau and is therefore not binding on the Enforcement Bureau. Indeed, in *Care Broadcasting*, the Media Bureau noted that the Bureau applies a different standard when reducing a forfeiture based on limited financial means.³⁰ Likewise, *PJB Communications* merely asserted that a forfeiture of 2% of the company's gross revenues was not excessive in that case.³¹ As the Media Bureau correctly noted in *Care Broadcasting*,³² when the Bureau grants a forfeiture reduction based on a target's ability to pay, it follows precedents establishing that a forfeiture equivalent to 7.9% of the target's average gross revenues is generally appropriate. We find no basis to deviate from precedents in this case.

IV. CONCLUSION

10. Based on the record before us and in light of the applicable statutory factors, we conclude that WiFi Services willfully violated section 301 of the Act and sections 15.1(b) and 15.407(h)(2) of the

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facts that pertain to our upward adjustment analysis but which were not known to the Bureau at the time of issuing the *Notice*. Our cancellation of the upward adjustment is based solely upon WiFi Services' clarification of the factual record and not upon WiFi Services' legal argument, which we reject for the same reasons set forth in paragraph 6, *supra*.

²⁵ See *Broadband Telecommunications Network Corp.*, Forfeiture Order 35 FCC Rcd 1552, 1554-55, para. 7 (EB 2020), citing *Coleman Enterprises, Inc., d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24389, para. 11 (2000) (reducing forfeiture to 7.9% of the company's gross revenues), *recons. denied*, 16 FCC Rcd 10016 (2001).

²⁶ See *supra* para. 7.

²⁷ Response at 9.

²⁸ *Care Broadcasting, Inc.*, Forfeiture Order, 25 FCC Rcd 1411 (MB 2010).

²⁹ *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992).

³⁰ *Care Broadcasting*, 25 FCC Rcd at 1413, para. 9 (noting that "the Enforcement Bureau has found that a forfeiture as high as 7.9 percent of the violator's gross revenue was not excessive despite claims of financial hardship").

³¹ *PJB Communications*, 7 FCC Rcd at 2089, para. 9.

³² See *supra* note 30.

Commission's rules. We further find, after consideration of the entire record, including the Response and Supplemental Response, that a reduction of the forfeiture amount to \$20,000 is appropriate.³³

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act,³⁴ and section 1.80 of the Commission's rules,³⁵ WiFi Services Caribbean, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of Twenty Thousand Dollars (\$20,000) for willfully violating section 301 of the Act³⁶ and sections 15.1(b) and 15.407(h)(2) of the Commission's rules.³⁷

12. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) calendar days after the release of this *Forfeiture Order*.³⁸ WiFi Services Caribbean, Inc. shall send electronic notification of payment to the Office of the Field Director, Enforcement Bureau, Federal Communications Commission, at field@fcc.gov, with copy to matthew.gibson@fcc.gov, on the date said payment is made. If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to section 504(a) of the Act.³⁹

13. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),⁴⁰ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:⁴¹

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN). For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number

³³ Any entity that is a "Small Business Concern" as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, "Oversight of Regulatory Enforcement," in addition to other rights set forth herein.

³⁴ 47 U.S.C. § 503(b).

³⁵ 47 CFR § 1.80.

³⁶ 47 U.S.C. § 301.

³⁷ 47 CFR §§ 15.1(b), 15.407(h)(2).

³⁸ 47 CFR § 1.80.

³⁹ 47 U.S.C. § 504(a).

⁴⁰ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

⁴¹ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the “Pay by Credit Card” option. Please note that there is a \$24,999.99 limit on credit card transactions.

- Payment by ACH must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

14. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 45 L Street, NE, Washington, DC 20554.⁴² Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

15. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Mr. Jorge M. Baragaño, President, WiFi Services Caribbean, Inc., 808 Avenida Fernandez Juncos, San Juan, Puerto Rico 00907, and to Carlos W. López-Freytes, Esq., CWL Legal Services, PSC, 1374 Ave. Ashford, Apt. 8B, San Juan, PR 00907.

FEDERAL COMMUNICATIONS COMMISSION

Ronald Ramage
Regional Director, Region Two
Enforcement Bureau

⁴² See 47 CFR § 1.1914.