

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

In the Matter of)	
)	
Eure Family Limited Partnership)	File No. EB-01-NF-201
)	
Owner of Antenna Structure)	NAL/Acct. No. 200132640006
Registration # 1018162)	
Mathews County, Virginia)	FRN 0005-0271-72

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 2002**Released: November 1, 2002**

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny an application for review filed on May 15, 2002, by Eure Family Limited Partnership (“Eure”) of a *Memorandum Opinion and Order* (“*MO&O*”)¹ issued by the Enforcement Bureau on April 17, 2002. In that *MO&O*, the Enforcement Bureau denied a petition for reconsideration of a *Forfeiture Order*² which assessed an \$8,000 forfeiture against Eure for failure to exhibit red obstruction lighting on its Mathews County, Virginia antenna structure between sunset and sunrise in willful violation of Section 17.51(a) of the Commission’s Rules (“*Rules*”).³

II. BACKGROUND

2. Eure owns an antenna structure in Mathews County, Virginia, with antenna structure registration (“*ASR*”) number 1018162. The *ASR* for the Mathews County tower indicates that red obstruction lighting is required between sunset and sunrise. On June 8, 2001, a resident of Harfield, Virginia contacted the FCC and reported that he had observed the Mathews County tower without its top beacon lit at night. On June 9, 2001, after sunset, an FCC agent inspected the structure and observed that the top beacon was not lit. Another FCC agent then contacted the Federal Aviation Administration’s (“*FAA*”) Leesburg, Virginia Flight Service Station, which advised the agent that there was no Notice to Airmen (“*NOTAM*”)⁴ in effect for the Mathews County tower. At the FCC agent’s request, the *FAA* issued a *NOTAM* for the Mathews County tower.

¹ *Eure Family Limited Partnership*, DA 02-878 (released April 17, 2002).

² *Eure Family Limited Partnership*, 16 FCC Rcd 21302 (Enf. Bur. 2001).

³ 47 C.F.R. § 17.51(a).

⁴ Tower owners are required to report any obstruction lighting outages to the nearest Flight Service Station or

3. On July 2, 2001, the Commission's Norfolk, Virginia Resident Agent Office ("Norfolk Office") issued a Notice of Violation ("NOV") to Eure⁵ for failing to exhibit red obstruction lighting on the Mathews County tower between sunset and sunrise in violation of Section 17.51(a) of the Rules. Eure filed a response to the NOV on July 20, 2001. In this response, Eure stated that it had operated the tower as an antenna site for WXEZ-FM, Yorktown, Virginia, and that it had monitored the tower lights using a telephone dial-up device that was programmed to notify WXEZ's engineer of any lighting outages until it sold WXEZ in October 2000. Eure further stated that by lease agreement dated January 5, 1999, it leased space on the Mathews County tower to Bullseye Broadcasting, LLC ("Bullseye"), licensee of WSRV(FM), Deltaville, Virginia, and that the terms of the lease agreement required Bullseye to monitor the tower lights and notify Eure of any lighting failures. Eure provided a letter from a principal of Bullseye, who stated that Bullseye failed to notify Eure of the malfunctioning beacon because he was unaware that the lease agreement obligated Bullseye to monitor the tower lights. Bullseye's principal also stated that the dial-up device used to monitor the tower lighting was never reprogrammed to notify Bullseye's engineer of any lighting outages after Eure sold WXEZ in October 2000. Finally, Eure indicated that the malfunctioning beacon had been repaired and that the dial-up device had recently been reprogrammed to notify Bullseye's engineer of any lighting outages.

4. On August 16, 2001, the Norfolk Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") for a forfeiture in the amount of \$8,000 to Eure for failure to exhibit red obstruction lighting on the Mathews County tower between sunset and sunrise in violation of Section 17.51(a) of the Rules.⁶ The NAL noted that the base forfeiture amount for tower lighting violations is \$10,000,⁷ but reduced the forfeiture amount to \$8,000 based on Eure's history of compliance with the Commission's rules. Eure filed a response to the NAL on September 17, 2001. In this response, Eure did not dispute that the violation occurred, but argued that the violation was inadvertent rather than willful because its contractor, Bullseye, failed to notify it of the extinguished beacon. In the *Forfeiture Order*, the Enforcement Bureau rejected this argument, noting that the Commission has long held licensees and other Commission regulatees responsible for the acts and omissions of their employees and independent contractors. Eure filed a petition for reconsideration of the *Forfeiture Order* on January 4, 2002. In the April 17, 2002, *MO&O*, the Enforcement Bureau denied Eure's petition, again concluding that Eure is responsible for the willful acts and omissions of its contractor.

FAA office immediately if the outage is not corrected within 30 minutes. See 47 C.F.R. § 17.48(a). The FAA then issues a NOTAM, a written advisory to aircraft pilots regarding a hazard or potential hazard of which they should be aware. A NOTAM expires automatically after 15 days, unless the tower owner calls the FAA to extend the NOTAM.

⁵ The Norfolk Office issued the NOV to Eure Communications, Inc. because FCC records incorrectly listed Eure Communications, Inc. as the owner of the Mathews County tower. The response to the NOV, which was signed by C. Wesley Eure on behalf of both Eure Communications, Inc. and Eure Family Limited Partnership, indicated that ownership of the tower had been transferred to Eure Family Limited Partnership. On August 8, 2001, the Norfolk Office confirmed that the FCC records had been updated to list Eure Family Limited Partnership as the owner of the Mathews County tower.

⁶ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200132640006 (Enf. Bur., Norfolk Office, released August 16, 2001).

⁷ See 47 C.F.R. § 1.80(b)(4).

III. DISCUSSION

5. In its application for review, Eure argues that the forfeiture should be rescinded because the *MO&O* is not supported by evidence of a “willful” violation. Eure notes that the term “willful” means the “conscious and deliberate” commission or omission of an act⁸ and asserts that there is no evidence of “conscious” or “deliberate” action by Eure. Relying on the Merriam-Webster Collegiate Dictionary definitions of “conscious” and “deliberate,” Eure maintains that the “willful” standard requires the Commission to prove “that Eure’s conduct was done after perceiving, apprehending, or noticing that the tower light was out with a degree of controlled thought or observation” or “that Eure thought about deliberately or had a formal discussion before deciding not to report the tower light was out.” Eure contends that nothing in the record demonstrates that it should or could have known about the outage. Rather, Eure states that it had an agreement with a party whose duty it was to monitor the lights, Bullseye, and Bullseye failed to live up to that agreement. Eure also argues that there is no evidence of a willful violation by Bullseye. Finally, Eure asserts that it disagrees with Commission precedent holding that Commission licensees and regulatees are responsible for the willful acts and omissions of their independent contractors.

6. We reject Eure’s contention that the Commission must show that Eure knew about the light outage on its tower and made a deliberate decision not to repair the outage or report the outage to the FAA in order to establish a willful violation of Section 17.51(a). It is irrelevant whether Eure knew about the light outage on its tower because, as the Bureau correctly concluded in the *MO&O*, Eure is liable for the willful acts and omissions of Bullseye. We note that when the Commission revised the antenna structure rules in 1995, it made clear that antenna structure owners will have primary responsibility for maintaining the prescribed painting and lighting on their antenna structures and will not be permitted to circumvent this responsibility by entering into contractual arrangements.⁹ Specifically, the Commission stated that “[n]otwithstanding private contractual arrangements ... structure owners, are and will continue to be, held responsible for maintaining the prescribed structure painting and/or lighting. Any resolution concerning a failure to perform pursuant to a private contractual arrangement, including appropriate remedies or damages, are matters to be resolved in a local forum.”¹⁰

7. Moreover, as the Bureau stated in the *MO&O*, the Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,¹¹ and has “consistently refused to excuse licensees from forfeiture penalties

⁸ Section 312(f) of the Communications Act of 1934, as amended, (“Act”) states 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 Commission” 47 U.S.C. § 312(f). The Commission has stated that this definition applies to the term “willful” as used in Section 503(b) of the Act. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) (“*Southern California*”).

⁹ See *Streamlining the Commission’s Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission’s Rules Concerning Construction, Marking and Lighting Antenna Structures*, 11 FCC Rcd 4272, 4294-96 (1995); see also 47 C.F.R. § 17.2(c) (“Notwithstanding any agreements made between the owner and any entity designated by the owner to maintain the antenna structure, the owner is ultimately responsible for compliance with the requirements of this part.”).

¹⁰ 11 FCC Rcd at 4296.

¹¹ See *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972).

where actions of employees or independent contractors have resulted in violations.”¹² Eure states that it disagrees with *Wagenvoord Broadcasting Co.*, a case cited in the *MO&O* in which the Commission held that licensees are responsible for the acts and omissions of their independent contractors, in that this case has never been reviewed by a court and provides no reasoning for expanding the policy that licensees are responsible for the acts of their employees to include independent contractors.¹³ However, the fact that this case has never been reviewed by a court does not negate its holding. Further, the Commission has explained that under long established principles of common law, statutory duties are nondelegable and that employers are routinely held liable for breach of statutory duties by their independent contractors.¹⁴ Therefore, Eure’s lease agreement with Bullseye does not relieve Eure of its primary responsibility to maintain the lighting on its tower or its liability for any failure by Bullseye.

8. In the instant case, Eure had a lease agreement with Bullseye, which required Bullseye to monitor the tower lights and notify Eure of any lighting failure.¹⁵ There is no evidence that Bullseye made any attempt to comply with the tower lighting rule. Neither Eure nor Bullseye reprogrammed the telephone dial-up device used to monitor the tower lighting after Eure sold its FM station, WXEZ, in October 2000,¹⁶ and Bullseye did not inspect the device even once between October 2000 and June 9, 2001 to ensure that it was functioning properly. Thus, Bullseye failed either to monitor the tower lights daily or to properly maintain an automatic alarm system as required by the rules,¹⁷ which would have led it to discover the lighting outage. We therefore agree with the Bureau’s finding in the *MO&O* that Bullseye’s conduct was willful. As explained above, Eure is responsible for Bullseye’s willful conduct. Accordingly, we affirm the Bureau’s conclusion that Eure is liable for an \$8,000 forfeiture for failing to

¹² See *American Paging, Inc. of Virginia*, 12 FCC Rcd 10417, 10420 (Wireless Bur., Enf. and Cons. Inf. Div., 1997) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984)).

¹³ Eure dismisses the other cases cited in the *MO&O* in support of this policy, asserting that they simply reiterate the Commission’s policy that licensees are responsible for the acts and omissions of their employees and independent contractors.

¹⁴ See e.g., *Vista Services Corporation*, 15 FCC Rcd 20646, 20650 (2000), citing Restatement [Second] of Torts § 409, comment b at 371 and *Alva Steamship Co., Ltd. v. City of New York*, 616 F.2d 605, 609 (2d Cir. 1980) (exception to the rule of nonliability for the negligence of independent contractor is “the negligence of an independent contractor who performs a duty imposed by statute on the employer”).

¹⁵ Eure asserts that Bullseye misunderstood its legal obligations under the lease agreement. In support of this assertion, Eure provided a letter from Jim Campana, one of Bullseye’s principals and manager of Station WSRV, who stated that he was unaware that the lease agreement required Bullseye to monitor the tower lights. Mr. Campana further stated that he was present at the negotiation of the monthly fee under the lease agreement, but that the other details of the lease agreement were handled by Bullseye’s other principals. In addition, Mr. Campana stated that after learning of the light outage, he spoke with Bullseye’s engineer, Joe Wetherbee, who told him that there is a dial-up device to monitor the lights which was programmed to notify Eure’s engineer at WXEZ. Mr. Campana asserted that this device apparently was never reprogrammed to notify Mr. Wetherbee when Eure sold WXEZ in October 2000. Thus, while Mr. Campana may not have been aware of Bullseye’s obligations under the lease agreement, Bullseye’s other principals and Bullseye’s engineer were aware that the lease agreement obligated Bullseye to monitor the tower lights.

¹⁶ It is not clear from the record whether Eure informed Bullseye when it sold the FM station in October 2000 that the dial-up device had to be reprogrammed.

¹⁷ 47 C.F.R. § 17.47.

exhibit red obstruction lighting on its antenna structure between sunset and sunrise in willful violation of Section 17.51(a) of the Rules.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, Section 1.115(g) of the Rules,¹⁸ Eure Family Limited Partnership's application for review **IS DENIED**.

10. **IT IS FURTHER ORDERED** that 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.¹⁹ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200132640006 and FRN 0005-0271-72. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁰

11. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested to Eure Family Limited Partnership, 4026 George Washington Hwy., Yorktown, Virginia 23692, and to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ 47 C.F.R. § 1.115(g).

¹⁹ 47 U.S.C. § 504(a).

²⁰ See 47 C.F.R. § 1.1914.