

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

In the Matter of	)	
	)	
Western Wireless Corporation	)	File No. EB-02-TS-659
and	)	NAL/Acct. No. 200332100004
WWC Holding Co., Inc.,	)	FRN 0003764719
Licensee of Cellular Radio Station KNKN343,	)	
CMA583 – North Dakota 4 –	)	
McKenzie RSA	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** November 17, 2004

**Released:** December 1, 2004

By the Commission: Chairman Powell issuing a separate statement.

1. In this *Memorandum Opinion and Order* (“*Order*”), we cancel the \$200,000 *Notice of Apparent Liability for Forfeiture* (“NAL”) issued to Western Wireless Corporation and its wholly owned subsidiary, WWC Holding Co., Inc. (collectively “Western”), licensee of Cellular Radio Station KNKN343, CMA583 – North Dakota 4 – McKenzie RSA.<sup>1</sup> The NAL found that Western was operating radio transmitting equipment from an unauthorized location in Medora, North Dakota (“Medora tower”) in apparent willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“Act”).<sup>2</sup>

2. Under the Commission’s environmental processing rules, licensees and applicants are required to assess proposed facilities to determine whether the facilities may significantly affect the environment as defined in Section 1.1307 of the Commission’s rules.<sup>3</sup> If proposed facilities may have significant environmental effects, the rules require licensees to prepare and file with the Commission Environmental Assessments (“EAs”) prior to construction.<sup>4</sup> Consistent with the National Historic Preservation Act of 1966, as amended (“NHPA”),<sup>5</sup> Section 1.1307(a)(4) of the Commission’s rules requires licensees to prepare and to submit EAs to the Commission if their proposed facilities may affect one or more properties listed, or eligible for listing, (“historic properties”) in the National Register of Historic Places (“National Register”).<sup>7</sup> If the Commission finds, after reviewing an EA and any

<sup>1</sup>*Western Wireless Corporation and WWC Holding Co., Inc.*, 18 FCC Rcd 10319 (2003).

<sup>2</sup>47 U.S.C. § 301.

<sup>3</sup>47 C.F.R. § 1.1307.

<sup>4</sup>See 47 C.F.R. §§ 1.1308 and 1.1311.

<sup>5</sup>See 47 C.F.R. § 1.1312; see also 47 C.F.R. § 22.165(c).

<sup>6</sup>16 U.S.C. §§ 470-470w. In particular, Section 106 of the NHPA requires Federal agencies, such as the Commission “prior to the issuance of any license ... [to] take into account the effect of the undertaking on any district, site, building, structure or object that [qualifies as a Historic Property].” 16 U.S.C. § 470f.

<sup>7</sup>47 C.F.R. § 1.1307(a)(4). The Commission recently amended its rules to require licensees, in ascertaining whether their proposed actions may affect properties that are listed or eligible for listing in the National Register, to follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, as

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comments received, that a proposed facility will not have a significant environmental effect, it will issue a finding of no significant impact (“FONSI”) and grant the application.<sup>8</sup> If the Commission finds that a proposed action will have a significant environmental effect and the applicant does not choose to amend its application,<sup>9</sup> the licensee may not commence construction until the Commission concludes further environmental processing, including the preparation of Environmental Impact Statements (“EISs”).<sup>10</sup>

3. In August 1999, Western constructed the 180-foot monopole tower on a bluff overlooking Medora, North Dakota. Western constructed the tower in view of properties listed in the National Register, without first filing an EA with and undergoing environmental review at the Commission. In November 1999, shortly after the tower was built, the State Historic Preservation Office (“SHPO”) wrote the Commission regarding the effect of the tower on area historic properties.<sup>11</sup> In turn, on December 14, 1999, the Commission’s Wireless Telecommunications Bureau (“WTB”) notified Western that its Medora facility may significantly affect historic properties.<sup>12</sup>

4. On May 12, 2003, the Commission ultimately proposed enforcement action against Western, by issuing the *NAL* that found Western apparently liable for a \$200,000 forfeiture for operation of radio transmitting equipment from an unauthorized location in willful and repeated violation of Section 301 of the Act. Because of the Commission’s expressed concern that the Medora tower had and continued to have a significant environmental effect on historic properties, it concluded that the circumstances justified substantially increasing the proposed forfeiture from the \$4,000 base amount for operation at an unauthorized location to \$200,000.<sup>13</sup>

5. On June 13, 2003, Western filed a response to the *NAL*,<sup>14</sup> and on June 20 and November 4, 2003, supplemented its response.<sup>15</sup> In its response, Western disputed the findings in the *NAL* and sought cancellation of the *NAL* and rescission of its findings. Western maintained, *inter alia*, that after the WTB notified it in December 1999 of the historic preservation concerns, it cooperated in good faith with the WTB and others to resolve this matter, noting its ongoing efforts to establish effective mitigation

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modified and supplemented by two Nationwide Programmatic Agreements to be published as appendices to Part 1 of the Commission’s rules. *See Nationwide Programmatic Agreement Regarding the Section 106 National Preservation Act Review Process*, WT Docket No. 03-128, Report and Order, FCC 04-222 (rel. October 5, 2004).

<sup>8</sup>See 47 C.F.R. § 1.1308(d).

<sup>9</sup>See 47 C.F.R. §§ 1.1308(c), 1.1309.

<sup>10</sup>See 47 C.F.R. §§ 1.1305, 1.1314, 1.1315, 1.1317.

<sup>11</sup>See Letter from Michael E. Simonson, Review and Compliance Coordinator, State Historical Society to Frank Stilwell, Commercial Wireless Division, Wireless Telecommunications Bureau (November 15, 1999).

<sup>12</sup>See Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau, to Grant Hoovestol, Western Wireless Corporation (December 14, 1999).

<sup>13</sup>The Commission also directed Western to file, within 30 days of the release of the *NAL*, a sworn statement describing its plans to cease operation at its Medora Tower site or to bring that site into compliance with our environmental rules. *See NAL*, 18 FCC Rcd at 10327 ¶ 21. Since the *NAL* was issued, Western has been operating the Medora facility through consecutive grants of special temporary authority (“STAs”) issued by WTB staff.

<sup>14</sup>Response of Western Wireless Corporation and WWC Holding Co, Inc. to Notice of Apparent Liability for Forfeiture (filed June 13, 2003) (“*NAL Response*”). *See also* Addendum I (sworn statement of William J. Hackett).

<sup>15</sup>See Letter from Michael D. Sullivan, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (June 20, 2003); Letter from John F. Clark, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (November 4, 2003).

measures as well as submissions of periodic status reports to the WTB.<sup>16</sup>

6. As previously noted, the record establishes that in a December 1999 letter, the WTB advised Western that continued operation of the Medora tower may adversely affect historic properties. In response to the December 1999 letter, the record further establishes that Western worked cooperatively and in good faith with the WTB and others to address the historic preservation issues, before the period covered by the NAL. Specifically, the record establishes that after the December 1999 letter and before the NAL, Western engaged the SHPO in meetings, held two public hearings, provided the WTB with regular status reports, made offers to prepare and submit an EA to the Commission, and ultimately proposed mitigation measures in a draft Memorandum of Agreement (“MOA”).<sup>17</sup> Indeed, the SHPO believes that the proposed mitigation measures, if implemented, “will eliminate, reduce or mitigate any adverse effect from the Medora tower on any and all historic properties sufficiently so that such effect will be resolved.”<sup>18</sup> Based on the unique circumstances at issue, we conclude that it is appropriate as a matter of equity to cancel the NAL and not to impose a forfeiture here. We emphasize that our decision here to cancel the NAL was based on the unusual and unique facts and circumstances of this case and does not represent a more generalized weakening of our enforcement obligations. In the future, if entities fail to prepare and file EAs and the facts and circumstances warrant enforcement action, we will take such action.

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 504(b) of the Act, and Section 1.80(f)(4) of the rules,<sup>19</sup> the prior *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 20332100004 **IS CANCELLED**.

8. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class mail and certified mail return receipt requested to Mr. William J. Hackett, Director of Regulatory Compliance, Western Wireless Corporation, 401 9th Street, NW, Suite 550, Washington, DC 20004, and to its counsel, Michael Deuel Sullivan, Esq., Wilkinson Barker Knauer, LLP, 2300 N Street, NW, Suite 700,

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<sup>16</sup>See NAL Response at 83 and Exhibit 28.

<sup>17</sup>See NAL Response at 11-14; Letter from Michael Deuel Sullivan, Esq. to Daniel Abeyta, Commercial Wireless Division, Wireless Telecommunications Bureau (August 24, 2001); Letter from Michael Deuel Sullivan, Esq. to Magalie Roman Salas, Secretary, Federal Communications Commission (June 11, 2001); Letter from Michael Deuel Sullivan, Esq. to Daniel Abeyta, Commercial Wireless Division, Wireless Telecommunications Bureau (January 9, 2001) at 3; Letter from Michael Deuel Sullivan, Esq. to Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau (November 20, 2000); Letter from Michael Deuel Sullivan, Esq. to Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau (April 7, 2000); Letter from Michael Deuel Sullivan, Esq. to Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau (February 16, 2000); *see also* Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau to Michael Deuel Sullivan, Esq. (November 13, 2000) (acknowledging that Western kept the Commission abreast by submitting progress reports and “continued the Section 106 National Historic Preservation Act (“NHPA”) process by meeting with, and accepting comments from the SHPO, representatives of the National Park Service, and members of the public concerning the constructed tower in Medora, North Dakota, and ultimately developing mitigation proposals”) at 1; Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau to Michael Deuel Sullivan, Esq. (March 8, 2000) (directing Western to submit regular progress reports at 30-day intervals) at 1; Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau to Michael Deuel Sullivan, Esq. (February 4, 2000) (advising Western not to file an EA until “after completion of the MOA . . . with the SHPO,” since the tower was already constructed) at 1.

<sup>18</sup> Letter from Merlan E. Paaverud, Jr., State Historic Preservation Officer, State Historical Society of North Dakota to Amos Loveday, Federal Communications Commission, Wireless Telecommunications Bureau (January 12, 2004) at 2.

<sup>19</sup>47 U.S.C. § 504(b); 47 C.F.R. § 1.80(f)(4).

Washington, DC 20037-1128, and John F. Clark, Esq., Perkins Cole, LLP, 607 14th Street, NW, Suite 800, Washington, DC 20005-2011.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*In the Matter of Western Wireless Corporation and WWC Holding Co., Inc.*

On all the facts of this matter, I support the Commission's decision to cancel the Notice of Apparent Liability for Forfeiture previously issued against Western Wireless Corporation and WWC Holding Co., Inc. I note, however, that the Commission recently revised its environmental rules to implement a Nationwide Programmatic Agreement that tailors, streamlines, and clarifies the procedures for evaluating the effects of undertakings on historic properties under the National Historic Preservation Act.<sup>20</sup> The new rule makes clear that the provisions of the Nationwide Programmatic Agreement are mandatory and binding upon applicants, and that non-compliance with its procedures will subject a party to potential enforcement action.<sup>21</sup> Given the clarity of the procedures specified in the Nationwide Programmatic Agreement, I would find it particularly difficult to excuse a failure to follow these mandatory steps going forward. Accordingly, I expect to consider the existence of this revised rule in assessing whether, and the amount in which, a forfeiture is appropriate in the event of future rule violations.

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<sup>20</sup>*Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Report and Order, FCC 04-222 (rel. Oct. 5, 2004).

<sup>21</sup>*Id.* at ¶ 169.