

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

In the Matter of)	File No. EB-02-AT-379
)	NAL/Acct. No. 200332480012
Fun Media Group, Inc.)	FRN No. 0007-3298-65
Owner of Antenna Structure #1043249 in)	
Scant City, Alabama)	
Arab, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2007

Released: May 24, 2007

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* ("MO&O") we deny the Application for Review filed on November 10, 2005, by Fun Media Group ("FMG"),¹ licensee of FM Station WAFN, Arab, Alabama, of the Enforcement Bureau's ("Bureau") *Memorandum Opinion and Order* released on October 11, 2005.² In affirming the Bureau's *Forfeiture Order*,³ the *Bureau MO&O* denied FMG's petition for reconsideration of a monetary forfeiture in the amount of eight thousand dollars (\$8,000) for willful violation of Section 17.50 of the Commission's Rules ("Rules").⁴ The noted violation involves FMG's failure to clean and repaint its antenna structure to maintain good visibility.

II. BACKGROUND

2. To help ensure air safety, the Commission has rules regarding the registration, construction, marking and lighting of antenna structures.⁵ Section 17.50 of the Rules provides that antenna structures requiring painting must be cleaned or repainted as often as necessary to maintain good visibility. Violations of the painting and cleaning requirement are significant because they pose a risk to air safety.⁶

3. FMG, in addition to being the licensee of WAFN, is also the registered owner of that station's antenna structure ("the WAFN tower"), antenna structure registration ("ASR") number 1043249,

¹ Application for Review filed by Fun Media Group, Inc., on November 10, 2005 ("*Application for Review*").

² *Fun Media Group, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 16149 (Enf. Bur. 2005) ("*Bureau MO&O*").

³ *Fun Media Group, Inc.*, Forfeiture Order, 19 FCC Rcd 10230 (Enf. Bur. 2004) ("*Forfeiture Order*").

⁴ 47 C.F.R. § 17.50.

⁵ See, e.g., *SpectraSite Communications, Inc.*, Notice of Apparent Liability, 18 FCC Rcd 22799 (2003), Forfeiture Order, 19 FCC Rcd 17673 (2004).

⁶ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1084 (2004), *aff'd sub nom. CTIA v. FCC*, 466 F. 3d 105 (D.C. Cir. 2006).

located in Scant City, Alabama. As indicated by the Commission's ASR database, the WAFN tower is assigned obstruction lighting and marking requirements that include alternate painted bands of aviation orange and white.⁷

4. On October 29, 2002, the Bureau received a complaint from a private airplane pilot about the visibility of the WAFN tower. On October 30, 2002, an agent from the Atlanta, Georgia, Field Office ("Atlanta Office") inspected the WAFN tower. Using binoculars from distances of 100 feet to one-quarter mile, the agent observed that the paint of the WAFN tower was severely chipped and faded and that this precluded good visibility, in violation of Section 17.50 of the Rules.

5. On December 6, 2002, the Bureau released a *Notice of Apparent Liability for Forfeiture* ("NAL") proposing a \$10,000 forfeiture for FMG's alleged willful violation of Section 17.50 of the Rules.⁸ In its January 13, 2003, response ("NAL response"), FMG sought cancellation of the forfeiture, contending that the WAFN tower complied with the painting requirement and that payment of the proposed forfeiture would be a financial hardship.⁹ FMG also stated that the WAFN tower was painted on December 23, 2002. On June 8, 2004, the Bureau released a *Forfeiture Order* in the amount of \$8,000 finding FMG in willful violation of Section 17.50 of the Rules. In analyzing economic hardship claims, the Commission generally looks to a company's gross revenues as the best indicator of its ability to pay assessed forfeitures.¹⁰ The *Forfeiture Order* did not find a basis to reduce the forfeiture amount based on an inability to pay, but did reduce the amount of the forfeiture from the \$10,000 proposed by the NAL to \$8,000 on the basis of FMG's history of overall compliance.¹¹

6. On July 8, 2004, FMG filed a petition for reconsideration, arguing that the *Forfeiture Order* should be vacated because the WAFN tower was compliant with the painting requirement and payment of the forfeiture would be a financial hardship.¹² On October 11, 2005, the Bureau issued the *Bureau MO&O*, which rejected FMG's arguments and denied its petition for reconsideration. Specifically, the *Bureau MO&O* found that there was nothing in FMG's petition to warrant overturning the agent's determination that the WAFN tower did not comply with the painting requirement – rejecting FMG's arguments that the agent was too far from the tower to make accurate observations, that precipitation limited visibility on the day the agent observed the tower, that statements by third parties contradict the agent's observations and that photographs show that the tower was properly maintained. The *Bureau MO&O* also rejected FMG's argument that the financial information submitted by FMG warrants cancellation or reduction of the forfeiture.

7. In its Application for Review, filed November 10, 2005, FMG seeks "reversal" of the *Bureau MO&O*. FMG reiterates the arguments made in its petition for reconsideration. FMG also argues that the Bureau improperly cited remedial measures taken after the issuance of the NAL as support for its determination that FMG violated Section 17.50 of the Rules and that the Bureau erroneously rejected

⁷ See 47 C.F.R. § 17.21(a).

⁸ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480012 (Enf. Bur. Atlanta Office, released December 6, 2002).

⁹ FMG supplemented the *NAL Response* on January 17, 2003, with statements by John Hain and Robert Murphy and on April 23, 2004, with a confidential submission of FMG's federal income tax returns for a three year period.

¹⁰ *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("PJB").

¹¹ *Forfeiture Order*, 19 FCC Rcd at 10233.

¹² FMG supplemented its petition for reconsideration on July 8, 2004, with a confidential submission of federal tax returns for two additional years accompanied by resubmission of the previously submitted federal tax returns for the three year period.

FMG's financial hardship claim because it failed to consider financial indicators other than FMG's gross revenues.

III. DISCUSSION

A. Violation of Section 17.50 of the Rules

8. As discussed below, we conclude that FMG willfully violated Section 17.50 of the Rules. FMG disputes the Bureau's finding that the agent observed severely chipped and faded paint which reduced the visibility of the WAFN tower and claims that the Bureau did not meet its burden of establishing a violation of Section 17.50 of the Rules. When determining whether an entity has violated Section 17.50 of the Rules, the Commission routinely gives its field agents' observations deference.¹³ As indicated in the discussion below, we find nothing in FMG's application for review to warrant overturning the agent's determination.

9. First, FMG notes that the agent observed the WAFN tower from distances of 100 feet to one quarter mile and questions whether "a ground inspection from a distance as far away as a quarter mile could have permitted a proper analysis."¹⁴ The agent's observations with binoculars,¹⁵ at distances as close as 100 feet, followed established procedures and FMG has provided no additional information to demonstrate that the agent's distance from the WAFN tower affected his ability to properly observe the condition of the tower's paint.

10. FMG also contends that precipitation limited visibility on the day the agent observed the WAFN tower.¹⁶ Section 17.50 of the Rules, however, makes no distinction on the basis of weather conditions. Moreover, precipitation during the agent's observations would not necessarily have prevented the agent from properly observing the condition of the WAFN tower's paint. FMG has provided nothing to indicate that precipitation undermined the agent's ability to determine whether the WAFN tower's painting complied with Section 17.50 of the Rules on October 30, 2002.

11. Next, FMG contends that statements by "independent third parties" John Hain and Robert Murphy contradict the agent's observations.¹⁷ We disagree. As noted in the *Bureau MO&O*, neither statement specifically addresses the condition of the WAFN tower's paint on the date of the agent's inspection, October 30, 2002.¹⁸ Mr. Hain's statement, dated January 10, 2003, asserts that he visited the WAFN tower sometime (date unspecified) during the six months prior to the date of his statement (January 10, 2003), and found that it was "painted orange white and did not show any rust" but provides no information as to the condition of the WAFN tower's paint on October 30, 2002. Mr. Murphy's statement asserts that he has "never had a problem seeing the towers east of the City of Arab, ... [that] they are depicted on the Atlanta Sectional ... [and] all pilots have the correct and up to date charts on board" Specifically, Mr. Murphy provides copies of flight plans in the area of the tower's location,

¹³ *Radio X Broadcasting Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 12217, 12218 (2006) *citing William L. Needham and Lucille Needham*, Forfeiture Order, 18 FCC Rcd 5521 (Enf. Bur. 2002) (upholding the field agent's determination that the tower's painted bands were not clearly visible, despite tower owner's assertion that it had no difficulty discerning the painted bands and maintained a painting schedule for the tower).

¹⁴ *Application for Review* at 5-6.

¹⁵ FMG acknowledges the agent's use of binoculars but not its effect on his ability to observe the condition of the WAFN tower's paint. *Application for Review* at 5.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 6.

¹⁸ *Bureau MO&O*, 20 FCC Rcd at 16151.

dated September 29, 2002, more than a month prior to the agent's observation, to support his statement. Murphy's statement provides no information about the condition of the tower's paint on October 30, 2002. By contrast, the pilot who filed the complaint in this case reported that the WAFN tower was insufficiently visible on October 29, 2002, the day before the inspection.

12. FMG also argues that photographs of the WAFN tower originally submitted with its response to the *NAL* show that it was "properly visible."¹⁹ According to FMG, the photographs were taken from one quarter mile on December 9, 2002. We find that the resolution of the photographs taken by FMG is not sufficient to demonstrate that the WAFN tower was "properly visible." We agree with the Bureau's finding that FMG's photographs cannot overcome the agent's observations on October 30, 2002, from as close as 100 feet with the benefit of using binoculars.²⁰

13. Finally, FMG asserts that, in the *Bureau MO&O*, the Bureau cited "subsequent remedial measures" taken after the issuance of the *NAL* as support for its determination that FMG violated Section 17.50 of the Rules before issuance of the *NAL* and argues that this was improper. Specifically, FMG points to the language "as a factual matter, FMG states that the tower was painted 'in December 23, 2002,' almost two months after the agent's observations."²¹ The quoted language simply restates FMG's assertion that it painted the WAFN tower. We find nothing in the *Bureau MO&O* that uses FMG's remedial measures to support the Bureau's determination that FMG violated Section 17.50 of the Rules.

14. In sum, we find that FMG has provided nothing that warrants overturning the agent's determination that the WAFN tower's painting was not compliant with Section 17.50 of the Rules on October 30, 2002. We, accordingly, affirm the Bureau's determination that FMG willfully violated Section 17.50 of the Rules.

B. Inability to Pay

15. As discussed below, we conclude that reduction of the monetary forfeiture is not warranted on the basis of inability to pay. In the application for review, FMG again seeks a reduction of the forfeiture on the basis of inability to pay.²² The Bureau found that FMG's gross revenues, as shown by its five years of federal income tax returns, are sufficiently large to belie its financial hardship claim.²³ FMG claims that the Bureau did not take into account "such other matters as justice may require," as required by Section 503(b)(2)(E) of the Communications Act of 1934 as amended ("Act"),²⁴ and did not follow the policy set forth in *PJB*.²⁵ In *PJB*, the Commission held that "in some cases, other financial indicators, such as net losses may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture."²⁶ We note, however, that FMG's federal income tax returns show that it had no net losses over the five year period²⁷ and, accordingly, we need not address the question of whether net losses would

¹⁹ *Application for Review* at 6-7.

²⁰ *Bureau MO&O*, 20 FCC Rcd at 16151.

²¹ *Application for Review* at 7.

²² *Application for Review* at 3-4.

²³ *Bureau MO&O*, 20 FCC Rcd at 16152.

²⁴ 47 U.S.C. § 503(b)(2)(E).

²⁵ *Application for Review* at 3-4.

²⁶ *PJB*, 7 FCC Rcd at 2089.

²⁷ FMG's federal income tax returns also indicate substantial increases in FMG's net worth.

justify a downward adjustment of FMG's forfeiture. Furthermore, FMG does not specify what financial indicators other than net losses should be considered and our examination of FMG's financial information finds none that support FMG's position. Accordingly, we affirm the Bureau's rejection of FMG's claim of inability to pay, which we find unsupported by the record.

16. Conclusion. We have examined FMG's Application for Review pursuant to the statutory factors prescribed by Section 503(b)(2)(E) of the Act and in conjunction with *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,²⁸ and Section 1.80 of the Rules.²⁹ Having done so, we find no reason to reverse the Bureau's earlier decision and, therefore, we deny FMG's application for review and affirm the *Bureau MO&O* finding FMG liable for a forfeiture in the amount of \$8,000.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Section 1.115(g) of the Rules,³⁰ Fun Media Group's Application for Review of the Bureau's October 11, 2005, *Memorandum Opinion and Order* IS DENIED and the Bureau's *Memorandum Opinion and Order* IS AFFIRMED.

18. 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.³¹ Payment of the forfeiture must be made by check, money order or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.³²

19. IT IS FURTHER ORDERED that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Fun Media Group, Inc., 981 Brindlee Mountain Parkway, Arab, AL 35016, and to its counsel, M. Scott Johnson, Esq., Fletcher, Heald & Hildreth, 1300 North 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

²⁹ 47 C.F.R. § 1.80.

³⁰ 47 C.F.R. § 1.115(g).

³¹ 47 U.S.C. § 504(a).

³² See 47 C.F.R. § 1.1914.