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

In the Matter of	)	
	)	
Tidewater Communications LLC	)	File Number: EB-05-NF-054
Owner of Antenna Structure # 1024387	)	NAL/Acct. No.: 200632640004
Grosse Point Farms, MI	)	FRN #: 0009269473
	)	
	)	
	)	

ORDER ON REVIEW

Adopted: February 4, 2010 **Released:** February 5, 2010

By the Commission:

I. INTRODUCTION

1. In this Order on Review ("*Order on Review*"), we deny the application for review filed by Tidewater Communications LLC ("Tidewater"),[1] seeking review of the Enforcement Bureau's ("Bureau") *Memorandum Opinion and Order*,[2] which granted in part and denied in part Tidewater's petition for reconsideration of a *Forfeiture Order*[3] issued October 20, 2006. We find that Tidewater has not provided grounds upon which to overturn the Bureau's decision.

II. BACKGROUND

2. Section 17.51(a) states that all red obstruction lighting shall be exhibited from sunset to sunrise unless otherwise specified.[4] The *Forfeiture Order* imposed a monetary forfeiture in the amount of $10,000 for failure to exhibit obstruction lighting on antenna structure # 1024387.[5] In the *Memorandum Opinion and Order*, the Enforcement Bureau reduced the forfeiture to $8,000 based on Tidewater's good faith efforts to comply with the Rules.[6]

3. In its Application for Review, Tidewater asserts that the Bureau applied a precedent or policy that should be overturned. Specifically, Tidewater claims that the Bureau's interpretation of what

[1] *See* 47 C.F.R. § 1.115.

[2] *Tidewater Communications LLC*, Memorandum Opinion and Order, 21 FCC Rcd 14589 (2006) ("*Memorandum Opinion and Order*").

[3] *Tidewater Communications LLC*, Forfeiture Order, 21 FCC Rcd. 11749 (Enf. Bur. South Central Region 2006) ("*Forfeiture Order*").

[4] 47 C.F.R. § 17.51.

[5] *Forfeiture Order* at 11752.

[6] *Memorandum Opinion and Order* at 14592.

constitutes a willful violation does not meet the legal standard and its policy of holding licensees responsible for violations resulting from "mistakes" or inadvertence is unlawful.[7]

III. DISCUSSION

4. We disagree with Tidewater's interpretation of the facts and law in this case. First, Tidewater seeks to defend its failure to light its antenna structure by relying on its employee's use of the company's light monitoring system.[8] Specifically, the record shows that Tidewater consciously installed a manual light monitoring system, which required staff to call the system to obtain a light reading. It is undisputed that Tidewater's employee called into the tower lighting system and recorded lighting levels in the log, which indicated outages on June 3, 4, and 5, 2005.[9] Similarly, it is undisputed that Tidewater's employee did not contact her supervisor regarding the low recorded lighting levels, which she had been instructed and periodically reminded to do, because she thought the tower lights were functioning properly. According to Tidewater, the employee believed that the lights were functioning because she heard two messages from the manual light monitoring system: "Tower lights on" and "No alerts pending." Tidewater concludes that its failure to light its antenna structure was a result of a mistaken employee's actions and was not willful.

5. Tidewater is incorrect that the action at issue does not fall within the definition of "willful." To be willful, the violator must consciously commit or omit certain actions and need not be aware that such actions violate the Rules.[10] In this case, Tidewater's employee called into the manual tower lighting system and recorded the light level in the log. She then listened to the system's recorded announcement. At that point, she consciously and deliberately made a determination that the lights were functioning, despite the low light level, and chose not to contact her supervisor. That she came to a faulty conclusion and acted accordingly does not mean that she acted unintentionally or unaware; she consciously and deliberately failed to act on the low lighting levels. Her failure to act led to the continued outage of the antenna structure in violation of Section 17.51(a) of the Rules. Accordingly, we do not believe, as Tidewater asserts, that the Bureau's conclusion that Tidewater's violation was willful "would not be tolerated by a court."[11] Moreover, even if this were a "mistake," it could still be found willful**;** we find no error in the Bureau's citation of Commission cases in support of its proposition that a violator can be held liable for violations resulting from mistakes.[12]

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[7] Tidewater's Application for Review at 8-9*, citing Liability of Mid-West Radio-Television, Inc.*, FCC 63-1024 (1963). *Midwest Radio-Television* was cited in *Hubbard Broadcasting, Inc.*, a copy of which was attached to *Primetime 24 Joint Venture v. Telcable Nacional*, 1990 U.S. Dist. Lexis 20034 (1990).

[8] Although no separate forfeiture was assessed, we note that Tidewater's use of a manual light monitoring system does not comply with Section 17.47(a) of the Rules, which requires either daily visual observation of the antenna structure's lights or an automatic indicator designed to register light failure or installation of an automatic alarm system designed to detect light failure. *See* 47 C.F.R. § 17.47(a). Instead, Tidewater consciously chose to use a noncompliant monitoring system that apparently contributed to the outage on subsequent days in June 2005.

[9] These lighting levels were 0.47%, 0.67%, and 0.037% for June 3, 4, and 5, 2005 respectively.

[10] Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides 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 authorized by this Act…." *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[11] Tidewater's Application for Review at 9.

[12] *Memorandum Opinion and Order*, 21 FCC Rcd at 14590-14591 at para. 6, *citing North Country Repeaters*, 19 FCC Rcd 22139 (Enf. Bur. 2004); *PBJ Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1988); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986); and *Triad Broadcasting Co., Inc.* 96 FCC 2d (1984)**.**

6. As to the law, Tidewater claims that the Bureau improperly relied on *Eure Family Limited Partnership* to support the well-established principle that "licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors."[13] All licensees and regulatees that are not sole proprietors rely upon employees and contractors to operate their businesses and remain ultimately responsible for the actions of the employees or contractors. To hold otherwise would allow licensees and regulatees to delegate or contract away their responsibilities to comply with the Rules. Tidewater states that *Eure Family Limited Partnership* should not be cited as precedent, because the forfeiture in that case was not paid or adjudicated against Eure Family Limited Partnership, but was the subject of a voluntary settlement.[14] Although Eure Family Limited Partnership may not have paid the forfeiture,[15] the Commission did not reverse its decision. Thus, while Eure Family Limited Partnership may not have admitted wrongdoing in the settlement, we may rely upon the Commission's interpretations in the forfeiture order and memorandum opinion and order when considering other cases.[16]

7. Tidewater again requests that the forfeiture be reduced or canceled, consistent with *Vernon Broadcasting, Inc.*[17] The Bureau previously distinguished the instant case from *Vernon Broadcasting*, *Inc*., on the grounds that Tidewater did not instruct its employees on its lighting procedures right before the June 2005 violation and did not regularly inspect the tower lights.[18] Tidewater asserts in its Application for Review that although its last formal instruction on the lighting procedures occurred in 2004, the chief engineer reviewed the operator logs on a weekly basis and discussed issues with the operators directly. According to the chief engineer, operators were aware of this review process and were

[13] *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863,-64, para. 7 (2002); *see also MTD, Inc.,* Memorandum Opinion and Order, 6 FCC Rcd 34 (1991) (holding that a company's reliance on an independent contractor to construct a tower in compliance of FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee's failure to conduct weekly EAS tests and to maintain the "issues/programs" list).

[14] The voluntary settlement occurred in a federal court and pertained solely to the collection of the forfeiture. This settlement occurred in lieu of a trial *de novo* and did not overturn the Commission's final order. As part of the settlement, Eure Family Limited Partnership did not admit or deny any violation set forth in the Forfeiture Order or Notice of Apparent Liability. Tidewater's counsel also served as counsel to Eure Family Limited Partnership. *See* Tidewater Application for Review, page 8.

[15] Eure Family Limited Partnership, however, made a voluntary contribution to the United States Treasury.

[16] *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) ("[M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course"). The Memorandum Opinion and Order in *Eure Family Partnership* is a final order of the Commission. Despite the voluntary settlement, no exceptional circumstances exist that would prompt the Commission to vacate or overturn that decision.

[17] *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275, 1277 (1986) (fencing forfeiture cancelled because licensee regularly inspected fence and inspected it shortly before inspection, fence was vandalized between the time of its inspection and agent inspection, and there was no evidence that the licensee was aware of the broken fence or that it had failed to monitor the condition of the site).

[18] *See Memorandum, Opinion and Order*, para. 6.

free to discuss questions with him at any time.[19] In addition, Tidewater states its chief engineer observed the antenna structure on a regular basis.[20]

8. We conclude that the instant case can be distinguished from *Vernon Broadcasting, Inc.* Vernon Broadcasting violated Section 73.49 of the Rules, which does not impose a daily observation requirement. Additionally, the former Field Operations Bureau found that vandals damaged the fence and that Vernon Broadcasting's actions did not contribute to the violation, *i.e.,* Vernon Broadcasting had not failed to monitor the condition of the fence. Here, no intervening act outside of the owner's control, like vandalism, led to the violation. Thus, although Tidewater's chief engineer was unaware of the lighting outage when the agent observed the outage,[21] the violation at issue stems from Tidewater's own employee's failure to act.

9. In further support of its request to reduce the forfeiture, Tidewater cites for the first time *U.S. v. Daniels*.[22] We find *Daniels* inapposite. That case involved the repeated violation of a rule that had been recently amended. Although irrelevant to whether a repeated violation occurred, the Court found that the Defendant was not aware of this new rule, had been complying in good faith with the broadcasting hours permitted under the previous rule, and ceased broadcasting immediately upon notification of the violation.[23] Accordingly, the Court found a reduction in the forfeiture appropriate due to the "nature of the violations involved here, the lack of complaints and the Defendant's good faith inadvertent mistakes."[24] In this case, however, Tidewater willfully violated a well-established rule. Moreover, the Bureau already reduced the forfeiture due to Tidewater's good faith efforts to comply with Rules, *i.e.*, notifying the Federal Aviation Administration ("FAA") after it became aware of the outage.[25]

10. Finally, Tidewater again asserts that the Bureau erred in not granting a reduction of its forfeiture based on its history of compliance. Tidewater argues, pursuant to Section 504(c) of the Act, that the facts underlying a notice of violation or unpaid forfeitures cannot be used against it until they have been adjudicated or paid.[26] We disagree.

11. The Commission interpreted Section 504(c) of the Act and found that:

> The statute says that the issuance of an NAL shall not be used against a person unless the forfeiture has been paid or the person is subject to a final court order to pay. It does not say that the facts underlying prior NALs shall not be used against a person. … It seems readily apparent that the Commission has authority to take into account, in assessing a forfeiture, a history of violations by a party that had not been the basis for prior NALs. That is, for example, if a licensee committed a minor violation of a rule, were admonished for it and then committed the same violation again, the

[19] *See* Declaration of Donald Crowder, page 1, attached to Tidewater Application for Review.

[20] *See id.*

[21] Tidewater's employee logged a light outage on June 3, 2005, but failed to contact the chief engineer. The Commission agent observed the light outage on June 4, 2005.

[22] *U.S. v. Daniels*, 418 F. Supp. 1074 (D.S.D. 1976).

[23] *See Daniels* at 1080.

[24] *Daniels* at 1080.

[25] *See Memorandum, Opinion and Order*, para. 7.

[26] 47 U.S.C. § 504(c).

> Commission could take the first violation into account in setting a forfeiture amount for the second violation. But, under petitioners' interpretation, if the first violation had been a more serious one that led to a forfeiture, the Commission could not take into account the first violation in setting the forfeiture amount for the second violation. This would be illogical, to say the least.[27]

The facts establish a prior violation cognizable under our precedent. In 2001, there was a light outage on Tidewater's antenna structure lasting more than 30 minutes that was not immediately reported to the FAA. Accordingly, a *Notice of Violation* was issued to Tidewater on November 16, 2001. Tidewater's response to the *Notice of Violation* did not deny that the light outage had occurred or that it had not immediately contacted the FAA. Rather, Tidewater admitted that its automatic light system malfunctioned and did not alert it to the light outage. After the release of the *Notice of Violation*, the Bureau issued a notice of apparent liability for forfeiture to Tidewater based on the 2001 outage. The Bureau subsequently cancelled the monetary forfeiture in light of downward adjustments for Tidewater's history of compliance and good faith efforts to comply with the Rules.[28] The *Notice of Violation* was not cancelled, and the underlying facts were properly considered by the Bureau in denying Tidewater's request in this case to reduce its forfeiture based on a history of compliance with the Rules.

12. Upon review of the Application for Review and the entire record herein, we conclude that Tidewater has failed to demonstrate that the Bureau erred in imposing a forfeiture for violation of Section 17.51(a) of the Rules. The Bureau properly decided the matters before it, and we uphold its decision to impose a $8,000 forfeiture in its *Forfeiture Order* and *Memorandum Opinion and Order*.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 1.115(g) of the Commission's Rules,[29] that the Application for Review filed by Tidewater Communications LLC **IS DENIED** and the *Memorandum Opinion and Order* **IS AFFIRMED**.

14. Payment of the $8,000 shall be made in the manner provided for in Section 1.80 of the Rules[30] within 30 days of the release of this *Order on Review*. 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 or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/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

[27] *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

[28] *See* Tidewater Communications LLC, Memorandum Opinion and Order, 18 FCC Rcd 5524 (Enf. Bur. 2003) ("*Memorandum Opinion and Order*").

[29] 47 C.F.R. § 1.115(g).

[30] 47 C.F.R. § 1.80.

[31] 47 U.S.C. § 504(a).

sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Tidewater will also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

15. **IT IS FURTHER ORDERED** that this Order shall be sent by regular mail and by certified mail, return receipt requested, to Tidewater Communications LLC at its address of record and to its attorney, Gary S. Smithwick, Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, NW, Suite 301, Washington, DC 20016.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary