

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

In the Matter of)	
)	
Ace of Hearts Disc Jockey Service, Inc.)	File No.: EB-09-TP-0185
)	NAL/Acct. No.: 201132700003
Licensee of Station W277AN)	FRN: 0008590853
Cape Canaveral, Florida)	Facility ID No.: 143943
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2013

Released: February 8, 2013

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, issued pursuant to Section 405 of the Communications Act of 1934, as amended (Act),¹ and Section 1.106 of the Commission's rules (Rules),² we deny the petition for reconsideration (Petition) filed by Ace of Hearts Disc Jockey Service, Inc. (Ace), licensee of translator station W277AN (Station) in Cape Canaveral, Florida.³ Ace seeks reconsideration of the *Forfeiture Order* issued by the Enforcement Bureau's South Central Region in this proceeding.⁴ The *Forfeiture Order* imposed a monetary forfeiture in the amount of eleven thousand dollars (\$11,000) against Ace for willfully and repeatedly violating Sections 73.1350 and 74.1235(e) of the Rules.⁵ The noted violations involved Ace operating its Station with unauthorized antenna equipment and with more than authorized power. As discussed below, we uphold the Bureau's prior ruling and affirm the \$11,000 forfeiture.

II. BACKGROUND

2. On March 8, 2011, the Enforcement Bureau's Tampa Office (Tampa Office) issued Ace a Notice of Apparent Liability for Forfeiture and Order (*NAL*) for its overpower operation and use of an unauthorized transmitting antenna system, in violation of Sections 74.1235(e) and 73.1350 of the Rules, respectively.⁶ As discussed in detail in the *NAL*, on October 28, 2009, and on February 7, September 22, and September 24, 2010, agents from the Tampa Office measured the field strength of Station W277AN's signal and determined that the Station was operating with more than its authorized transmitter power output

¹ 47 U.S.C. § 405.

² 47 C.F.R. § 1.106.

³ See Letter from Randy Bennett, Owner Ace of Hearts Disc Jockey Service, Inc., to Dennis Carlton, Regional Director, South Central Region, Enforcement Bureau (May 11, 2012) (Petition) (on file in EB-09-TP-0185).

⁴ See *Ace of Hearts Disc Jockey Service, Inc.*, Forfeiture Order, 27 FCC Rcd 4167 (Enf. Bur. 2012) (*Forfeiture Order*).

⁵ See *id.* See also 47 C.F.R. §§ 73.1350, 74.1235(e).

⁶ *Ace of Hearts Disc Jockey Service, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 3481 (Enf. Bur. 2011) (*NAL*). A more comprehensive recitation of the facts and history of this case can be found in the *NAL* and is incorporated herein by reference.

(TPO).⁷ On February 26 and September 22, 2010, during an on site investigation, agents from the Tampa Office observed that the meter on the Station's amplifier showed the Station operating with more than its authorized TPO.⁸ In addition, on February 7, February 26, and September 22, 2010, agents from the Tampa Office confirmed that a photograph taken on October 28, 2009 was accurate and that the Station was using a two-antenna array, although its authorization specified use of only one antenna.⁹ In view of the record evidence, the *NAL* proposed a \$13,000 forfeiture against Ace for violating Sections 74.1235(e) and 73.1350 of the Rules.¹⁰ Ace responded to the *NAL*, disputed some of the findings, and requested cancellation or reduction of the proposed forfeiture.¹¹

3. On April 23, 2012, the Bureau's South Central Region issued a *Forfeiture Order*, which affirmed the *NAL*'s findings, but reduced the \$13,000 proposed forfeiture to \$11,000 after further consideration of the factual circumstances surrounding the antenna equipment violation.¹² The Bureau, however, rejected Ace's claim that it had a history of overall compliance with the Rules, given contrary record evidence.¹³ Further, the Bureau rejected Ace's inability to pay claim because Ace failed to provide sufficient evidence to support and justify its request.¹⁴

4. On May 11, 2012, Ace filed the instant Petition, urging the Bureau to reconsider its decisions in the *Forfeiture Order*. Specifically, Ace asks the Bureau to reduce the forfeiture, and states that it "agrees to enter into an installment payment plan."¹⁵ In support of its request for reconsideration, Ace asserts: "Since February 2010[,] multiple applications have been on file with the [C]ommission towards W277AN's operational status and/or intent. Any alleged discrepancies and/or confusion towards the antennas or operations after that date is not the fault of Ace."¹⁶ Ace also asserts that its request for reduction based on history of compliance with the rules should be granted because, contrary to what was stated in the *Forfeiture Order*, it was not provided multiple warnings of the overpower violation.¹⁷ Finally, Ace asks the Bureau to reduce the \$11,000 forfeiture based on inability to pay; in this regard, Ace

⁷ *Forfeiture Order*, 27 FCC Rcd at 4167, para. 2. When operating with its authorized transmitter output power of 61 watts, the expected field strength for Station W277AN's signal is 47 mV/m. On October 28, 2009, and on February 7, September 22, and September 24, 2010, agents from the Tampa Office measured the field strength for Station W277AN's signal at 82 mV/m, 92 mV/m, 74 mV/m, and 82 mV/m, respectively.

⁸ *Id.* On February 26 and September 22, 2010, agents from the Tampa Office observed that the meter on the amplifier for Station W277AN registered a power output of 172 watts and 140 watts, respectively, which is 280% and 229% over the station's authorized power.

⁹ *Id.* at 4167-68, para. 2. License File Number BLFT-20070220AA0. The license specifically describes the antenna type as "Non-Directional, OMB MP-1." Based on manufacturer specifications, the OMB MP-1 consists of only one antenna section.

¹⁰ See *NAL*, 26 FCC Rcd at 3483-84, paras. 9, 11.

¹¹ See *Forfeiture Order*, 27 FCC Rcd at 4168, para. 2 (citing Letter from Randy Bennett, Principal Owner, Ace of Hearts Disc Jockey Services, Inc., to District Director, Tampa Office (Mar. 8, 2011) (on file in EB-09-TOP-0185) (*Response to NAL*)).

¹² See *Forfeiture Order*, *supra* note 4.

¹³ *Id.*, 27 FCC Rcd at 4171, para. 8.

¹⁴ *Id.* at 4171-72, para. 9.

¹⁵ Petition at 2.

¹⁶ *Id.*

¹⁷ *Id.*

asserts that it has been in bankruptcy preparations and that its principal owner, Randy Bennett, is in foreclosure proceedings.¹⁸

III. DISCUSSION

5. Petitions for reconsideration are granted only in limited circumstances. Reconsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order, or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.¹⁹ A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.²⁰ As discussed below, we find that Ace has not provided any basis to warrant reconsideration.

A. Operation with Unauthorized Antenna Equipment

6. In the *Forfeiture Order*, the Bureau affirmed the *NAL*'s finding that Ace violated Section 73.1350 of the Rules by operating its Station with an unauthorized antenna system—i.e., by operating a two-antenna array transmission system when its license authorized operation using only one antenna. Agents from the Bureau's Tampa Office confirmed this violation based on photographs taken on October 28, 2009, and based on direct observations on February 7, 2010, February 26, 2010, and September 22, 2010.²¹ As discussed in the *Forfeiture Order*, Ace asserted that it had always intended to use a two-antenna array, but mistakenly submitted, as a result of a typographical error, a license application with an antenna code of MP-1 (reflecting a request for one antenna), rather than MP-2 (reflecting a request for a two-antenna array).²² The Bureau did not find the asserted typographical error a sufficient basis to excuse the violation, and reminded Ace that it remained responsible for reviewing and ensuring the accuracy of the information contained in the authorization, and for operating in conformity with its authorization.²³

¹⁸ *Id.* Ace also alleges that the *Forfeiture Order* “totally ignored the facts surrounding the demonstrated bias and verbal profanity of one of the Tampa Field Inspectors.” *Id.* We simply did not find any need to address such unsubstantiated charges in the *Forfeiture Order*, especially because they do not affect our decision on the merits of the case. In any event, we address them now. Ace asserted in its response to the *NAL* that “one of the agents engaged in a highly improper, unprofessional, yelling and screaming episode toward the Licensee.” *Response to NAL* at 3. However, neither of the two agents present during the inspection recall such an episode, and none of the individuals who submitted affidavits in support of Ace's response mentioned verbal profanity or yelling. Accordingly, we do not find this unsubstantiated allegation credible; and, in any event, the Bureau's findings with respect to the violations would still stand. Ace also states in its Petition (at 1) that the Tampa Office mailed the *Forfeiture Order* to an old address. The Tampa Office did not mail the *Forfeiture Order* to the P.O. Box that Ace identified in its Petition because a previous letter mailed to that P.O. Box in January 2012 was returned unclaimed. The *Forfeiture Order* was mailed to the last previously delivered address. In any event, we find no harm to Ace on this issue, since Ace ultimately received a copy of the *Forfeiture Order* and submitted a timely petition for reconsideration.

¹⁹ See 47 C.F.R. § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (Enf. Bur. 2000) (citing *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)). See, e.g., *Ely Radio, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 7608, 7610, para. 6 (Enf. Bur. 2012) (providing standard of review for petitions for reconsideration).

²⁰ *EZ Sacramento, Inc.*, 15 FCC Rcd at 18257, para. 2.

²¹ See *Forfeiture Order*, 27 FCC Rcd at 4167-68, para. 2.

²² *Id.* at 4169-70, para. 6.

²³ *Id.*

The Bureau, however, reduced the forfeiture amount for the antenna violation from \$5,000 to \$3,000, given other factors that served to mitigate the violation.²⁴

7. In its Petition, Ace contends that the Bureau erred in finding that Ace violated Section 73.1350, arguing that any discrepancies about its antenna authorization was not its fault, but instead due to Commission delay in granting the various applications that it filed as of February 2010.²⁵ We deny Ace's request for reconsideration of the Bureau's finding on this issue. A licensee cannot operate in conformity with its license modification application based on the assumption that the application will later be granted. Until such modification application has been granted, licensees are expected to operate in strict conformity with its current license authorization, unless it has been granted special temporary authority in the interim.²⁶ In this case, Ace's license, during the dates of the violation in 2009 and 2010, authorized use of only one antenna (not two). Therefore, the Bureau properly determined that anytime Ace operated its Station using a two-antenna array, it was in violation of Section 73.1350 notwithstanding the pendency of any corrective application.

8. Furthermore, even if we were to disregard (which we do not) any antenna violations after Ace filed its modification application in February 2010, the record is still replete with prior violations of Section 73.1350. Agents from the Tampa Office confirmed that Ace used an unauthorized antenna system on October 28, 2009, and Ace admitted that its violation had been continuous since its operations began.²⁷ Thus, Ace cannot dispute that it repeatedly operated its station with an unauthorized antenna system even before it filed its modification application. For these reasons, we find no basis for reconsideration of this issue and, therefore, affirm the conclusion in the *Forfeiture Order* that Ace willfully and repeatedly violated Section 73.1350 of the Rules.

B. Denial of Prior History of Compliance Claim

9. We also deny Ace's request that we reconsider its history of compliance claim so as to justify a reduction in the forfeiture amount. It is undisputed that Ace was warned by agents from the Tampa Office about its overpower operations on February 6, 2010, and that this warning preceded the *NAL*. The record also shows that Ace was observed by agents from the Tampa Office operating its station overpower on February 7, February 26, September 22, and September 24, 2010.²⁸ Therefore, we agree

²⁴ *Id.* at 4170, para. 6. The Bureau determined, after further review of the facts, that the error in the application did not have a significant impact on the station's transmitting output power and did not otherwise preclude compliance with the other technical requirements specified on Ace's license. The Bureau also recognized that Ace had since filed a license modification application to authorize use of a two-antenna array.

²⁵ See Petition at 2. Contrary to Ace's assertion, we were unable to locate any applications filed in February 2010 that would have corrected Ace's antenna violation. Based on Commission records, it appears that Ace submitted a corrective application on June 6, 2011 (and not in February 2010). See License File No. BLFT-20070220AAA. See also *Forfeiture Order*, 27 FCC Rcd at 4170.

²⁶ 47 C.F.R. §§ 73.1350(a), 73.1635(a).

²⁷ See *Response to NAL*, *supra* note 11.

²⁸ *NAL*, 26 FCC Rcd at 3481-83, paras. 3, 8. In its Petition (at 2), Ace avers that the Station is currently operating within its authorized power level, but insists that any prior overpower violation was unintentional. Ace also implies that the Commission's failure to inform Ace of its overpower operations prior to the February 6, 2010 inspection mitigates its culpability for those earlier violations. In the context of a forfeiture action, however, a "willful" violation does not require a finding that the rule violation was intentional. Rather, the term "willful" means that the violator knew that it was taking or not taking the action in question, irrespective of any intent to violate the Rules. See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992). Thus, it was not necessary for agents to inform Ace of its violations prior to February 6, 2010.

with the *Forfeiture Order*'s finding that, "given the multiple times in which it was found in violation of Section 74.1235(e) after it had received [a] warning of the violation, it is factually incorrect for Ace to assert that it has a history of compliance."²⁹

10. Furthermore, as discussed in the *Forfeiture Order*, it was appropriate to reject Ace's history of compliance claim because of case precedent indicating that Mr. Bennett, Ace's principal owner, was involved in an unauthorized transfer of a station even before the agents investigated Ace for possible violations of Sections 73.1350 and 74.1235(e) of the Rules.³⁰ We note that Ace did not dispute this finding in its Petition; and this fact, alone, serves as a sufficient basis for rejecting Ace's claim that it has a history of overall compliance with FCC requirements. We therefore affirm the *Forfeiture Order*'s denial of any forfeiture reduction based on Ace's assertion that it has a history of overall compliance.

C. Denial of Inability to Pay Claim

11. Finally, we deny Ace's renewed request for reduction of the forfeiture based on its inability to pay claim. Ace implies in its Petition that changed financial circumstances are forcing it and its principal owner into bankruptcy preparations, but Ace did not submit any supporting documentation.³¹ After the Petition was filed, the Bureau provided Ace an opportunity to supplement its Petition with documentation to support its claim that it "has been in bankruptcy preparations,"³² yet Ace simply resubmitted copies of tax returns that were already considered in the *Forfeiture Order*.³³ Ace explains that it is unable to provide documentation of any bankruptcy preparations by asserting that it "cannot even afford the retainer to pay the attorney to start any type of proceedings, so until further notice everything just sits."³⁴ Similarly, Ace's principal owner further asserts that he has hired a law group to represent him, but provides no specific information or documentation of this fact or of the purported "current house foreclosure filed in Brevard County Court, plus several collections from credit cards, and various financial judgments from others."³⁵ In the absence of financial and/or other reliable documentation

²⁹ *Forfeiture Order*, 27 FCC Rcd at 4171, para. 8. Ace is correct that paragraph 8 of the *Forfeiture Order* contained a typographical error, in that there was only one warning, not "warnings." However, this error does not alter the findings in the *Forfeiture Order*.

³⁰ *Id.* As noted in the *Forfeiture Order*, licensee David Carus & Associates admitted that, in 2004, it transferred full ownership of certain FM translator stations and an Aural STL to Community Radio Foundation of Florida, Inc., without prior Commission approval, and that Mr. Bennett was a party to the unauthorized transfer based on his control of Community Radio Foundation of Florida. See *David Carus & Associates*, Order, 26 FCC Rcd 7521 (Enf. Bur. 2011).

³¹ See Petition at 2. See *Neal Davis*, File No. EB-11-MA-0009, Memorandum Opinion and Order, DA 12-1534, 2012 WL 4470558, at *1, para. 3 (Enf. Bur. Sept. 28, 2012) (reminding requesting party of the need to provide financial or other documentation to support or corroborate asserted financial status).

³² Letter from Diane Law-Hsu, Regional Counsel, South Central Region, Enforcement Bureau, to Randy Bennett, Principal of Ace of Hearts Disc Jockey Services, Inc. (May 22, 2012) (on file in EB-09-TP-0185) (*May 22, 2012 Letter to Ace*).

³³ See *Marshall D. Martin*, Memorandum Opinion and Order, 22 FCC Rcd 1076 (Enf. Bur. 2007) (rejecting consideration of regulatee's purported bankruptcy status because it failed "to demonstrate that there is any pending bankruptcy proceeding"). See also *Adelphi Communications*, Forfeiture Order, 18 FCC Rcd 7652, 7654, para. 8 (Enf. Bur. 2003) (finding that a Chapter 11 bankruptcy filing—alone, without submission of financial documentation—does not support an inability to pay claim and, therefore, does not provide a basis to adjust or cancel an assessed forfeiture).

³⁴ Letter from Randy Bennett, Principal of Ace of Hearts Disc Jockey Service, Inc., to Diane Law-Hsu, Regional Counsel, South Central Region, Enforcement Bureau (June 10, 2012) (on file in EB-09-TP-0185).

³⁵ *Id.*

necessary to support or corroborate Ace's asserted changed financial circumstances, we have insufficient basis by which to fully evaluate Ace's request for reconsideration of its inability to pay claim and, therefore, must deny its request.³⁶

D. Conclusion

12. Because Ace's Petition does not demonstrate a material error or omission in the underlying order or raise any additional facts that justify reconsideration, we see no reason to disturb the determinations reached in the *Forfeiture Order*. Accordingly, we affirm the *Forfeiture Order* and find Ace liable for a monetary forfeiture in the amount of \$11,000 for willfully and repeatedly violating Sections 73.1350 and 74.1235(e) of the Rules. In its Petition, Ace requests the opportunity to make payment under an installment plan arrangement.³⁷ If Ace wishes to make payment under such an arrangement, Ace is directed to follow the instructions provided in paragraph 17, below.³⁸

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 405 of the Communications Act of 1934, as amended,³⁹ and Section 1.106 of the Commission's rules,⁴⁰ that the Petition for Reconsideration filed by Ace of Hearts Disc Jockey Service, Inc. **IS DENIED**.

14. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,⁴¹ Ace of Hearts Disc Jockey Service, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for violation of Sections 73.1350 and 74.1235(e) of the Rules.⁴²

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Memorandum Opinion and Order.⁴³ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of

³⁶ Moreover, we continue to have questions regarding the extent of the financial sources available to Ace, given evidence in the record that suggests that third party sources have been contributing to Ace's operations, which impacts consideration of Ace's inability to pay claim. In response to the Petition, the Bureau requested additional documentation regarding all of Ace's financial resources, and specifically requested information about three entities believed to have provided financial resources to Ace. See *May 22, 2012 Letter to Ace, supra* note 32. Ace, however, failed to provide the requested information or to address, in any way, the evidence amassed by the Bureau that these third parties have paid for Ace's operational expenses. See Letter from Ralph Barlow, District Director, Tampa Office, to Randy Bennett, Ace of Hearts Disc Jockey Services, Inc. (Oct. 25, 2011) (on file in EB-09-TP-0185); *Forfeiture Order*, 27 FCC Rcd at 4172 n.32.

³⁷ Petition at 2 ("Ace would like and request financial reconsideration review of this ruling to reduce this amount and Ace agrees to enter into an installment payment plan.").

³⁸ In its Petition (at 3), Ace asks for "expedited processing and approval" of pending applications, which Ace identified as BPFT-20110603AAA and BRFT-20110913AAD. The Enforcement Bureau does not have final authority to grant these pending applications. Any request for status information concerning pending broadcast applications should be directed to the Media Bureau.

³⁹ 47 U.S.C. § 405.

⁴⁰ 47 C.F.R. § 1.106.

⁴¹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

⁴² 47 C.F.R. §§ 73.1350, 74.1235(e).

⁴³ 47 C.F.R. § 1.80.

Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁴⁴ Ace of Hearts Disc Jockey Service, Inc. shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made.

16. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁵ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

17. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁴⁶ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

⁴⁴ 47 U.S.C. § 504(a).

⁴⁵ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁶ See 47 C.F.R. § 1.1914.

18. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Ace of Hearts Disc Jockey Service, Inc. at P.O. Box 100095, Palm Bay, FL 32910.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau