

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

In the Matter of	)	
	)	
Wagenvoord Advertising Group, Inc.	)	File No.: EB-FIELDSCR-12-00000481
	)	NAL/Acct. No.: 201232620003
Licensee of Radio Station KLRG-AM	)	FRN: 0010300747
Sheridan, AR	)	Facility ID No.: 14053
	)	

**FORFEITURE ORDER**

**Adopted:** March 1, 2013

**Released:** March 1, 2013

By the Regional Director, South Central Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Wagenvoord Advertising Group, Inc. (Wagenvoord), licensee of Station KLRG-AM (Station), in Sheridan, Arkansas, for willful and repeated violation of Section 73.49 of the Commission's rules (Rules).<sup>1</sup> The noted violation involved Wagenvoord's failure to have an effective locked fence around its antenna structure.

**II. BACKGROUND**

2. On July 19, 2012, the Enforcement Bureau's New Orleans Office (New Orleans Office) issued a Notice of Apparent Liability for Forfeiture and Order (*NAL*)<sup>2</sup> to Wagenvoord for its failure to enclose its antenna structure within an effective locked fence. Wagenvoord submitted a response to the *NAL* requesting cancellation of the proposed \$7,000 forfeiture because it claims (1) the antenna structure does not pose a public safety hazard since it stands on top of a 7-foot concrete pylon which does not have radio frequency (RF) potential at its base, or alternatively, qualifies as an "other enclosure,"<sup>3</sup> (2) the *NAL*

<sup>1</sup> 47 C.F.R. § 73.49.

<sup>2</sup> *Wagenvoord Advertising Group, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8126 (Enf. Bur. 2012). A comprehensive recitation of the facts and history of this case can be found in the *NAL* and is incorporated herein by reference.

<sup>3</sup> Letter from Dan J. Alpert, Counsel for Wagenvoord Advertising Group, Inc., to Walter Gernon, District Director, New Orleans Office, South Central Region, Enforcement Bureau, at 3-5 (Aug. 18, 2012) (on file in EB-FIELDSCR-12-00000481) (*NAL Response*). Wagenvoord submitted photographs showing that its antenna structure was constructed on top of a 7-foot cement pylon and encased by an additional 19 ¾ inches worth of insulator. Moreover, the antenna structure is located in the center of the cement pylon, 22 ¼ inches from the edge of the pylon. "Thus, in order for a member of the public to reach the electrically-charged tower base, from the ground level, a person would have to be able to (i) reach upwards seven feet, and then reach an additional 22 ¼ inches at approximately a 22 degree angle – a distance of approximately nine feet in total. . . ." See Letter from Dan J. Alpert, Counsel for Wagenvoord Advertising Group, Inc., to Walter Gernon, District Director, New Orleans Office, South Central Region, Enforcement Bureau at 2 (Nov. 19, 2012). See also Letter from Dan J. Alpert, Counsel for Wagenvoord Advertising Group, Inc., to Walter Gernon, District Director, New Orleans Office, South Central Region, Enforcement Bureau (Nov. 1, 2012).

overstated the size of the break in the fence surrounding the antenna structure,<sup>4</sup> and (3) the Station's engineer did not admit, as alleged in the *NAL*, that he had been aware of the fence's condition for about two weeks.<sup>5</sup>

### III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),<sup>6</sup> Section 1.80 of the Rules,<sup>7</sup> and the *Forfeiture Policy Statement*.<sup>8</sup> In examining Wagenvoord's response, Section 503(b)(2)(E) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>9</sup> As discussed below, we have considered Wagenvoord's response in light of these statutory factors and find that cancellation or reduction of the forfeiture is not warranted.

4. Section 73.49 of the Rules states that antenna structures "having radio frequency (RF) potential at the base . . . must be enclosed within effective locked fences or other enclosures."<sup>10</sup> Wagenvoord argues that this rule does not apply, because the base of the concrete structure at ground level does not have RF potential.<sup>11</sup> We disagree and find that the base referenced in Section 73.49 refers to the base of the metal portion of the antenna structure, not the base of anything to which the structure may be attached. Here, it is undisputed that the Station's antenna structure had radio frequency potential at the metal base (albeit not at ground level). Thus, we conclude the rule does apply and Wagenvoord is required to enclose the antenna structure within an effective locked fence or other enclosure.

5. In the alternative, Wagenvoord asserts that the forfeiture should be cancelled, as in *Bennett Broadcasting FO*,<sup>12</sup> because the 7-foot concrete base qualifies as an "other enclosure." We disagree. In *Bennett Broadcasting FO*,<sup>13</sup> the antenna structure was located in a flood plain, which precluded the erection of a fence, and local zoning laws forced Bennett Broadcasting to develop an alternative to a fence. The Bureau cancelled the forfeiture and concluded the concrete base met the "other enclosure" requirement based on the "totality of the circumstances."<sup>14</sup> Thus, the Bureau did not conclude that all concrete bases qualify as "other enclosures," as Wagenvoord implies. Here, Wagenvoord was not precluded from erecting a fence, and there is no evidence that it was unable to construct<sup>15</sup> or maintain an

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<sup>4</sup> *NAL Response* at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> 47 U.S.C. § 503(b).

<sup>7</sup> 47 C.F.R. § 1.80.

<sup>8</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

<sup>9</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>10</sup> 47 C.F.R. § 73.49.

<sup>11</sup> *NAL Response* at 5.

<sup>12</sup> *Christopher H. Bennett Broadcasting of Washington, Inc.*, Forfeiture Order, 23 FCC Rcd 11285 (Enf. Bur. 2008) (*Bennett Broadcasting FO*) (cancelling AM tower fencing forfeiture because of totality of circumstances – antenna structure built on 12-foot pier base in flood plain).

<sup>13</sup> *Id.*

<sup>14</sup> *Bennett Broadcasting FO*, 23 FCC Rcd at 11287.

<sup>15</sup> Indeed Wagenvoord constructed a partial fence around the antenna structure.

effective locked fence around its antenna structure. Moreover, Wagenvoord failed to produce any other precedent in which the Bureau accepted something less than a fence to comply with Section 73.49 of the Rules.<sup>16</sup> Therefore, we find no basis to require anything other than an effective locked fence in this case.

6. Turning to Wagenvoord's argument regarding the condition of the fence, it is undisputed that there was a gap in the fence surrounding the antenna structure. Agents from the New Orleans Office observed the gap in the fence surrounding the antenna structure on two separate days – January 24 and 25, 2012. It is irrelevant whether the gap covered “over half of the fence”<sup>17</sup> or “20-25 feet,”<sup>18</sup> because, based on Wagenvoord's own measurements, the gap was large enough to afford people access to the base. Thus, the fence was not effective

7. We also disagree with Wagenvoord's claim that the forfeiture should be cancelled because the Station's engineer did not admit that he was aware the fence had been down for about two weeks.<sup>19</sup> Wagenvoord's assertion regarding the statement, which provided further evidence that Wagenvoord knew about the condition of the fence, yet took no action to repair it, is inconsistent with the contemporaneous notes of the inspection taken by the agent. Notwithstanding this claim, the New Orleans Office had sufficient evidence of the repeated and willful nature of the violation from its inspection of the antenna structure.<sup>20</sup> Accordingly, based on the evidence before us, we affirm the findings in the *NAL* and find that Wagenvoord willfully and repeatedly violated Section 73.49 of the Rules by failing to enclose its antenna structure within an effective locked fence.

8. For the reasons discussed above, we find no basis to reduce or cancel the proposed forfeiture in this case. Although the Commission has “credited natural barriers or even [natural] conditions that temporarily impede direct access to a tower as mitigating factors,”<sup>21</sup> no such natural conditions are present here. Wagenvoord provides no reason why it was unable to construct an effective locked fence around the base of its antenna structure, and no natural barriers impeded access to the tower. Thus, based on the totality of the circumstances, we find cancellation or reduction of the forfeiture unwarranted and impose a forfeiture in the amount of \$7,000.

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<sup>16</sup> Wagenvoord cites to the instructions to the Application for Construction Permit for Commercial Broadcast Station Form, which state that “access to AM stations must be restricted by a fence or other barrier that will preclude casual or inadvertent access to the site . . . .” *NAL Response* at 4. The phrase “prevent casual or inadvertent access” was meant to describe the effective locked fence referenced in Section 73.49. The “other barrier” is an alternative only when construction of a fence is not possible.

<sup>17</sup> *NAL*, 27 FCC Rcd at 8126. The agents from the New Orleans Office did not measure the gap in the fence and did not walk around the entire perimeter of the fence. The agents concluded over half of the fence was lying on the ground based on an approximation of what was visible from their vantage point. The photographs of the site appear to confirm the agents' conclusion.

<sup>18</sup> *NAL Response* at 2.

<sup>19</sup> Wagenvoord asserts that the Station's engineer stated the Station's nighttime operations had been down for about two weeks and did not say anything regarding the length of the fencing violation. *NAL Response* at 3.

<sup>20</sup> Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law and provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 (2001).

<sup>21</sup> *NAL Response* at 4, citing *Buchanan Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 4360 (Enf. Bur. 2000) (reducing forfeiture because “the muddy conditions around the base of the tower arguably impeded access, making the lack of effective fencing a less significant safety hazard”) and *A Radio Company, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 2019 (Enf. Bur. 2007) (reducing forfeiture because base of tower surrounded by 12-inch deep swampy water filled with crocodiles, leeches, and local sewage overflow, thereby reducing safety hazard of lack of effective fencing) (*A Radio Company MOO*).

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission's rules, Wagenvoord Advertising Group, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for violation of Section 73.49 of the Commission's rules.<sup>22</sup>

10. 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 Forfeiture Order.<sup>23</sup> If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.<sup>24</sup> Wagenvoord Advertising Group, Inc. shall send electronic notification of payment to [SCR-Response@fcc.gov](mailto:SCR-Response@fcc.gov) on the date said payment is made. 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.<sup>25</sup> 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.

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.<sup>26</sup> 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](mailto:ARINQUIRIES@fcc.gov).

<sup>22</sup> 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 73.49.

<sup>23</sup> 47 C.F.R. § 1.80.

<sup>24</sup> 47 U.S.C. § 504(a).

<sup>25</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>26</sup> See 47 C.F.R. § 1.1914.

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by both First Class Mail and Certified Mail Return Receipt Requested to Wagenvoord Advertising Group, Inc. at 2360 NE Coachman Rd., Clearwater, FL 33765, and to its counsel, Dan J. Alpert, at 2120 N 21<sup>st</sup> Rd., Arlington, VA 22201.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton  
Regional Director  
South Central Region  
Enforcement Bureau