

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

In the Matter of
JMK Communications, Inc.
Licensee of Station WPWC(AM)
Dumfries, Virginia
File No.: EB-11-CF-0110
NAL/Acct. No.: 201232340001
FRN No: 0007309503
Facility ID: 25995

FORFEITURE ORDER

Adopted: May 2, 2013

Released: May 3, 2013

By the Regional Director, Northeast 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 JMK Communications, Inc. (JMK), licensee of AM Station WPWC, in Dumfries, Virginia (Station), for its willful and repeated violation of Section 73.49 of the Commission’s rules (Rules).1 The noted violations involved JMK’s failure to enclose the Station’s antenna structures within effective locked fences or other enclosures.

II. BACKGROUND

2. On July 18, 2012, the Enforcement Bureau’s Columbia Office (Columbia Office) issued a Notice of Apparent Liability for Forfeiture and Order (NAL)2 to JMK for violating Section 73.49 of the Rules by failing to maintain effective locked fences or other enclosures around the Station’s four antenna structures. Specifically, an agent from the Columbia Office observed during an inspection conducted on September 2, 2011, that one of the Station’s antenna structures had no fencing at all around the base of the structure and the other three antenna structures had only partial fencing around their bases, thereby allowing unrestricted access to all the structures. The Columbia Office concluded that the damage to the fences was so extensive that they must have been in that condition for a significant period of time. The agent also had observed that there was no perimeter fence around the property where the antenna structures were located.

3. JMK submitted a response to the NAL requesting cancellation of the proposed \$7,000 forfeiture because (1) the damage to the fences surrounding the antenna structures resulted from an “unforeseeable natural disaster” that caused “extensive flooding” and (2) the antenna structure site “is protected from public intrusion by natural barriers,” thus ensuring that, during the brief time the fences were damaged, “there was no reasonable danger of public contact with the towers.”3 JMK also stated,

1 47 C.F.R. § 73.49.

2 JMK Communications, Inc., Notice of Apparent Liability for Forfeiture and Order, 27 FCC Red 8111 (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.

3 Letter from Peter Gutmann, Counsel for JMK Communications, Inc., to the Columbia Office, Northeast Region, Enforcement Bureau at 1-2 (dated August 17, 2012) (on file in EB-11-CF-0110) (NAL Response).

and provided supporting documentation, that new fences had been installed around the antenna structures as of July 23, 2012.<sup>4</sup>

### III. DISCUSSION

4. 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>5</sup> Section 1.80 of the Rules,<sup>6</sup> and the *Forfeiture Policy Statement*.<sup>7</sup> In examining JMK'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>8</sup> As discussed below, we have considered JMK's response in light of these statutory factors, and find that cancellation of the forfeiture is not warranted.

5. Section 73.49 of the Rules requires that antenna structures having radio frequency potential at the base must be enclosed within effective locked fences or other enclosures.<sup>9</sup> On September 2, 2011, agents from the Columbia Office observed that one of the Station's antenna structures had no fencing and the other three antenna structures had only partial fencing. Based on the degree of deterioration, agents concluded that the fences had been in disrepair for an extended period of time. In addition, JMK does not dispute the condition of the fences. Thus, based on the totality of the circumstances, we find that JMK willfully and repeatedly violated Section 73.49 of the Rules.

6. We now address JMK's arguments for cancellation of the forfeiture. First, we decline to cancel or reduce the forfeiture based on JMK's claim that the damage to the fences observed by the agents during the inspection on September 2, 2011, was the result of an unforeseeable natural disaster.<sup>10</sup> JMK does not provide the date, or any supporting documentation, that severe storms and flooding occurred in Dumfries, Virginia, immediately prior to the agent's inspection. JMK merely states that the agent's inspection of the fences "appears to have followed damage caused by extensive flooding and wind from several storms in quick succession."<sup>11</sup> The antenna structure site observed by the agent during the inspection on September 2, 2011, however, did not show any signs of a storm severe enough to have damaged and/or removed portions of the fences.<sup>12</sup> In fact, although JMK claims that it had to wait for the

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<sup>4</sup> *Id.* at 2.

<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</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>8</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>9</sup> 47 C.F.R. § 73.49.

<sup>10</sup> *NAL Response* at 2.

<sup>11</sup> *NAL Response* at 1.

<sup>12</sup> We are not persuaded by the undated, out-of-context photograph submitted by JMK as evidence of "a segment of the wooden fence that previously had surrounded the towers but that was washed away in the flood waters and was found a considerable distance from the site." *NAL Response* at 1. We also note that, in its *NAL Response*, JMK addresses what it believes caused damage to "segments of the wooden fence" and "major portions of the former tower fencing," but does not address the antenna structure that had no fence at all. Because we find no basis to conclude that a natural disaster was the cause of the damage to the fences that were missing "portions" or "segments," we find it unnecessary to consider whether a natural disaster could have washed away an entire fence.

ground to dry before it could replace the fence after the agent's inspection, the agent found on the day of the inspection that the ground was solid enough for him to drive down an access road and onto the field where the antenna structures were located.<sup>13</sup> For all these reasons, we believe that it was negligence on the part of JMK, and not a natural disaster, that resulted in the absence of one fence and the deterioration of the other three fences. We therefore decline to cancel or reduce the forfeiture on these grounds.

7. We also reject JMK's claim that the forfeiture should be cancelled because the seriousness of the violation is mitigated by the fact that several sides of the antenna structure site were surrounded by a body of water and a 30-foot cliff, thereby limiting access to the site between the time the fences were damaged and the time the fences were fixed.<sup>14</sup> First, the inaccessibility to the site on several sides is irrelevant if the site is easily accessible from another side of the site. As noted above, the agent was able to easily gain access to the antenna structure site by driving down an access road and, at the time of the agent's inspection, the access road was not closed off by a locked gate, as JMK reports is now the case.<sup>15</sup> Second, by JMK's own admission, the public can gain access by "swimming or boat" and we disagree with JMK that the difficulties associated with accessing the antenna structure site in that manner ensures "[n]o reasonable danger of public access"<sup>16</sup> We therefore find that neither cancellation nor reduction is warranted on this basis and impose a forfeiture in the amount of \$7,000.

#### IV. ORDERING CLAUSES

8. 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, JMK Communications, 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>17</sup>

9. 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>18</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>19</sup> JMK Communications, Inc. shall send electronic notification of payment to [NER-Response@fcc.gov](mailto:NER-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>20</sup> When completing the FCC Form 159, enter the

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<sup>13</sup> We also note that the complaint that prompted the agent's inspection referenced an online article, dated August 20, 2011, which contained a photograph showing a severely damaged fence at the Station's antenna structure site. *See Crew Called to Fire at Radio Tower*, Potomac Local News (August 20, 2011) [www.potomaclocal.com](http://www.potomaclocal.com). Thus, even prior to the agent's inspection on September 2, 2011, there is evidence that at least one of the fences was severely damaged.

<sup>14</sup> *NAL Response* at 2.

<sup>15</sup> *Id.*; Agent's Statement on file in EB-11-CF-0110.

<sup>16</sup> *NAL Response* at 2; *see also cf. A Radio Company, Inc.*, Memorandum Opinion and Order, 22 FCC Red 2019 (2007) (reducing forfeiture because 12-inch deep swamp filled with crocodiles and leaches surrounding antenna structure was considered a semi-permanent barrier impeding access to the base of the antenna structure).

<sup>17</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>18</sup> 47 C.F.R. § 1.80.

<sup>19</sup> 47 U.S.C. § 504(a).

<sup>20</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

10. Any request for making full payment over time 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>21</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).

11. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to JMK Communications, Inc. at 4525 Wilshire Boulevard, Los Angeles, California 90010, and to its counsel, Peter Gutmann at Womble Carlyle Sandridge & Rice, 1200 Nineteenth Street, NW, Suite 500, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt  
Regional Director  
Northeast Region  
Enforcement Bureau

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<sup>21</sup> See 47 C.F.R. § 1.1914.