

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re )  
 )  
Fayetteville Cellular Telephone Company )  
L.P. ) File No. 620EF0021  
 )  
Notice of Apparent Liability for Forfeiture for )  
Cellular Radiotelephone Service Station )  
KNKA485 Fayetteville, North Carolina )

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 28, 1997; Released: February 4, 1997**

By the Chief, Enforcement Division, Wireless Telecommunications Bureau

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. Fayetteville Cellular Telephone Company, L.P. ("FCTC"), has filed a "Response to Notice of Apparent Liability of Fayetteville Cellular Telephone Company Limited Partnership," requesting a reduction or elimination of a forfeiture which was assessed in the amount of \$4,000. *See Fayetteville Cellular Telephone Company L.P.*, 11 FCC Rcd 12266 (1996). FCTC is a subsidiary of GTE Mobilnet. The Commission issued the Notice of Apparent Liability for Forfeiture ("NALF") against FCTC, licensee of Cellular Radiotelephone Service Station KNKA485, Fayetteville, North Carolina, for willful and repeated violations of Section 22.371(b) of the Commission's Rules, 47 C.F.R. § 22.371(b).<sup>1</sup> The Commission found that FCTC had failed to give directional AM broadcast station WIDU (AM) prior notice before constructing a tower within 3 km (1.9) miles of the AM station's broadcast array. There is no dispute that FCTC failed to give prior notice. FCTC argues that the characterization of FCTC's actions as "willful and repeated" is erroneous. Furthermore, FCTC argues that its attempt to remediate the violation should be considered. For the reasons stated below, we affirm our finding of liability, and, accordingly, affirm the \$4,000 forfeiture.

<sup>1</sup> 47 C.F.R. § 22.371(b) (1996) states, in its pertinent part:

If tower construction or modification is planned within 3 kilometers (1.9 miles) of a directional AM broadcast station array, the Public Mobile Service licensee must notify the licensee of the AM broadcast station in advance of the planned construction or modification . . .

## I. BACKGROUND

2. FCTC represents that shortly after construction of the cellular base station in question, it was contacted by WIDU (AM) and informed that the 190-foot tower was approximately 0.87 km (0.54 miles) from the antenna system of WIDU (AM), resulting in interference. Response at 4. FCTC states that it then hired Communications Engineering Services, P.C. ("CES"), to eliminate the interference problem. According to an August 4, 1995 letter from B. Scott Baxter of CES to Mr. Wes Cookman of WIDU (AM), the detuning of the tower was completed on July 22, 1995.

3. On October 3, 1995, WIDU (AM) filed a Complaint with the Chief, AM Branch, Audio Services Division of the Mass Media Bureau, complaining that the above actions of FCTC violated Section 22.371(b) of the Commission's rules and that FCTC's tower was causing "destructive interference". WIDU (AM) requested that the Commission direct FCTC to cease operation pending the completion of the remedial action, direct FCTC to assume all costs necessary to restore WIDU (AM)'s authorized radiation pattern, and direct FCTC to conduct and submit detailed proof of performance measurements in accordance with Part 73 of the Commission's rules documenting the results of the restoration of WIDU (AM)'s pattern.

4. The Commission adopted and released the NALF against FCTC on September 27, 1996. A copy of the NALF was also sent to WIDU (AM). On October 22, 1996, FCTC filed a response to the NALF. No response has been filed by WIDU (AM).

## I. DISCUSSION

5. In its response, FCTC does not dispute any of the factual findings. Instead, FCTC argues that CES's "explanation of the events that led to the complaint is somewhat misleading and should not be relied upon as a basis for the apparent liability for forfeiture finding." Response at 2. In addition, FCTC disputes the Commission's finding that FCTC's violation of Section 22.371(b) was willful and repeated.

6. Section 503(b) of the Communications Act of 1934, as amended, ("Act") authorizes the Commission to impose forfeitures on licensees for "willful" or "repeated" violations of Commission rules. Section 312 of the Act defines the term "repeated" to mean the "commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). This definition applies to Section 503(b) of the Act. See H.R. REP. NO. 97-765, 97th Cong., 2d Sess. 50-51 (1982). Since FCTC's cellular base station existed for more than one day in violation of Section 22.371(b), the violation was repeated.

7. Section 312 of the Act defines the term "willful" to mean 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." 47 U.S.C.

§ 312(f)(1). This definition applies to Section 503(b) of the Act. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). As the Commission has stated before, "[w]illfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question, such as using a radio transmitter, as opposed to being accidental (for example, brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully." *Robert J. Hartman Cessapolis, MI*, 9 FCCR 2057 ¶ 8 (1994).

8. FCTC argues that it did not commit a "willful" violation of Section 22.371(b) because it attempted to comply with this requirement. Specifically, FCTC argues that it checked its own database to determine if the proposed site was located near any other facility with which the proposed facility might interfere. In the case at hand, however, FCTC's own database incorrectly indicated the location of the WIDU (AM) antenna system. Response at 3-4. These claims are, however, irrelevant as stated above.<sup>2</sup> A violation of FCC rules which results from an inadvertent mistake is still considered a willful violation. FCTC's construction of the facility was a "conscious" and "deliberate" act and therefore "willful" under Section 503(b) of the Act.

9. FCTC also argues that "its actions in this dispute mitigate the nature of the rule violation and warrant a diminution of the penalty imposed." Response at 3. FCTC contends argues that, after it was contacted by WIDU (AM) concerning the potential interference, it sought to detune its facility thereby eliminating any interference caused to WIDU (AM). Response at 4.

10. Section 503(b)(2)(B) of the Act authorizes the Commission to impose forfeiture penalties not to exceed \$100,000 for each violation or each day of a continuing violation by a common carrier. In assessing a forfeiture, Section 503(b) of the Act requires the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, and other such matters as just may require." 47 U.S.C. § 503(b)(2)(D). FCTC's detuning of the tower is a factor which, while not expressly referenced in the NALF, was properly considered in proposing the initial forfeiture amount. See NALF at ¶ 5. See also *AllCity Paging, Inc.*, 9 FCC Rcd 6485 (1994) (assessing \$3,500 forfeiture for failure to file notifications of construction). FCTC has not met the criteria in 47 C.F.R. § 1.80(f)(3) establishing why the penalty should not be imposed or should be reduced.

## I. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Fayetteville Cellular Telephone Company, L.P., SHALL FORFEIT TO the United States the sum of four thousand dollars (\$4,000) for willful and repeated violations of Section 22.371(b) of the Commission's Rules. Payment of the forfeiture may be made by

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<sup>2</sup> The Commission further notes that the tower was allegedly built only 0.54 miles from the AM station array. It should have been visibly obvious at that range that FCTC was building its facility too close to the AM station array.

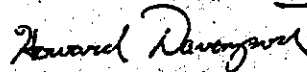
mailing a check or similar instrument, payable to the order of the Federal Communications Commission, within thirty (30) days of the release date of this Order, sending it to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above captioned proceeding.

12. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(a):

13. IT IS FURTHER ORDERED that a copy of this Notice SHALL BE SENT to Suzanne Carmel, Esq., GTE Mobilnet of Fayetteville Inc.,<sup>3</sup> 1850 M Street, N.W., Suite 1200, Washington, D.C. 20036-5801 by Certified Mail, Return Receipt Requested.

14. IT IS FURTHER ORDERED that a copy of this Notice SHALL BE SENT to counsel for WIDU (AM), Mark J. Prak, Esq., Elizabeth F. Crabill, Esq., Brooks, Esq., Pierce, McLendon, Humphrey & Leonard, L.L.P., Suite 1600, First Union Capitol Center, Raleigh, NC 27601.

FEDERAL COMMUNICATIONS COMMISSION



Howard Davenport

Chief, Enforcement Division

Wireless Telecommunications Bureau

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<sup>3</sup> GTE Mobilnet of Fayetteville is the general partner of the Fayetteville Cellular Telephone Company Limited Partnership.