

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

In the Matter of:)	
)	
Cumulus Licensing LLC)	File No.: EB-IHD-20-00031223
)	NAL Acct. No.: 202132080015
Former Licensee of Stations)	FRN: 0002834810
WEGC(FM), Sasser, GA)	
Facility ID Number: 40463;)	
WJAD(FM), Leesburg, GA)	
Facility ID Number: 57782;)	
WKAK(FM), Albany, GA)	
Facility ID Number: 831;)	
WQVE(FM), Albany, GA)	
Facility ID Number: 54704; and)	
WALG(AM), Albany, GA)	
Facility ID Number: 54703)	

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby submits comments in response to the Commission’s Notice of Apparent Liability (NAL) in the above-referenced proceeding.² NAB urges the Commission to eliminate the proposed penalty of \$32,000 for Cumulus Licensing LLC’s (Cumulus’s) apparent failure to upload its annual EEO public file report in certain stations’ online public inspection files or the stations’ websites as well as

¹ The National Association of Broadcasters (NAB) is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Cumulus Licensing LLC*, File No. EB-IHD-20-00031223, FCC 22-17 (Feb. 25, 2022) (NAL).

Cumulus's alleged failure to analyze its EEO program. The proposed penalty is unlawful and unjust.

Broadcasters take seriously their obligation to comply with the Commission's rules, including its EEO paperwork requirements. At the same time, inadvertent mistakes, especially those that do not trigger complaints and produce no cognizable harm, should not lead to monetary penalties, especially those in the tens of thousands of dollars or more. The Commission's rules are and should be designed to achieve substantive outcomes, not to serve as regulatory landmines with substantial fines for mere administrative errors. We respectfully submit, however, that in this case the NAL elevates ministerial compliance over substance, unfairly penalizing Cumulus for understandable and inevitable human error that ultimately caused no harm. The Commission is not required to assess monetary penalties in such situations, and we strongly urge the Commission to eliminate its proposed forfeiture based on the harmless, unintentional, and self-reported errors at issue in the NAL.

In the event the Commission nevertheless believes a forfeiture is warranted under these circumstances, we also urge the Commission to revisit its conclusion that prior Cumulus rule violations warrant upward adjustment of the base forfeiture amount. The Commission should not consider prior violations when there has been an intervening transfer of control, or when violations have occurred nearly two decades ago. Neither instance suggests that there is a pattern of noncompliance, especially when the alleged transgressions are for different rules and/or have occurred for distinct reasons. In this instance, many of the prior violations cited by the NAL occurred prior to a 2018 transfer of control of Cumulus, and the Commission even relies on unrelated actions from 2003 to justify its proposed forfeiture.

Finally, it bears noting in this particular instance that the Commission presents no factual basis for its conclusion that Cumulus failed to analyze its EEO efforts based solely on

its failure to upload its annual EEO public file report. The Commission cannot lawfully assess penalties based on unsubstantiated conjecture, especially the face of evidence to the contrary. We urge the Commission not to impose a forfeiture based on an apparent conflation of the substantive duty to analyze and the administrative duty to upload. The Commission offered no other evidence indicating that Cumulus otherwise did not meet a duty to analyze.

II. THE COMMISSION SHOULD ELIMINATE ITS PROPOSED FORFEITURE

Following the release of the NAL, NAB contacted Cumulus for more information regarding the underlying circumstances. Based on its understanding of the facts, NAB urges the Commission to eliminate the NAL's proposed forfeiture. More broadly, we urge the Commission to apply a more balanced and reasonable approach to proposed forfeitures going forward.

A. The Commission Should Re-evaluate Its Decision to Impose a Forfeiture

Commission licensees have an obligation to comply with Commission rules and NAB does not in any way suggest that compliance with Commission rules is unimportant. We respectfully submit, however, that the Commission's primary interest in promulgating and enforcing its rules should be the advancement of the substantive policy goals underlying those rules, not the imposition of monetary forfeitures for their own sake.

Accordingly, we urge the Commission to rethink its approach to enforcement actions surrounding simple errors or oversight. Human error is inevitable, particularly in a heavily regulated industry such as broadcasting. Personnel changes, confusion over the implementation of new rules, and simple oversight can all lead to actions that technically violate the letter of the Commission's rules. Where a licensee makes an administrative mistake which causes no apparent harm to the public the Commission should exercise a

reasonable degree of discretion in determining how best to reach its substantive goals and whether there are alternatives to forfeitures.

The NAL notes that, under Commission precedent, “where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial actions undertaken by licensee, excuse or nullify a licensee’s rule violation.”³ That is an accurate characterization of the Commission’s precedent. It is also a policy that holds licensees to an unreasonable and unrealistic standard of flawless compliance, divorcing enforcement from reality. Fortunately, the Commission retains substantial discretion to issue warnings or reduced forfeiture amounts, which the Commission has previously described as “an effective compliance tool in some cases involving minor or first time violations.”⁴ The Enforcement Bureau’s own published guide, while not binding on the Commission, suggests that “[a]dmonishments may be appropriate in cases where the violation at issue is deemed minor”⁵ and that downward forfeiture adjustment may be warranted for minor violations including “purely technical violations that cause no interference or consumer harm.”⁶

In this case, the evidence demonstrates that Cumulus prepared its 2018 EEO report and simply failed to upload that report to the stations’ online public inspection files and station website.⁷ The entire NAL, then, turns on a purely ministerial error – the failure to timely

³ NAL at ¶ 6, citing *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709 (1999).

⁴ *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, ¶ 31 (1997).

⁵ Federal Communications Commission Enforcement Bureau, *Enforcement Overview* (April 2020) at 13.

⁶ *Id.* at 18; see also 47 C.F.R. 1.80

⁷ Letter from Mark N. Lipp to Marlene H. Dortch at 3, File No. EB-IHD-20-00031125 (Aug. 20, 2020) (Cumulus Letter).

upload the reports – that generated no public complaint and created no consumer harm. Indeed, the NAL does not even suggest a member of the public visited the stations’ online public files during the relevant time period. Cumulus itself, not any member of the public (let alone the Commission), discovered the oversight when it proceeded to file its subsequent EEO report and promptly corrected it. As Cumulus has explained to the Commission, Cumulus experienced a change in personnel and the violation occurred during the first year in which stations were required to upload their annual EEO reports.⁸ These are precisely the sort of circumstances – a harmless oversight that led to a temporary failure to comply with an administrative requirement – that would warrant an admonishment at most. We urge the Commission to take these factors into consideration and to eliminate the proposed forfeiture.

B. Prior Cumulus Violations Do Not Warrant an Upward Adjustment of the Forfeiture in This Case

The NAL also proposes an upward adjustment of the base forfeiture in this case based on Cumulus’s prior history of rule violations.⁹ But the oldest of these violations occurred in 2003, and several of the violations cited are more than 10 years old. As a general matter, it is unclear why violations from a decade or more ago should be held against a licensee under any circumstances given normal personnel turnover and advancement and the probability that many or most licensees will eventually experience some degree of human error. If the Commission considers it relevant that a licensee violated a rule ten or even nineteen years ago, the Commission would be holding licensees to an unreasonable standard of compliance.

Branding a licensee with an eternal scarlet letter seems particularly unfair where a station has been the subject of an assignment of license or a licensee has been the subject of

⁸ *Id.*

⁹ NAL at ¶13, n. 35.

a transfer of control in the intervening years. Here, the majority of the violations the NAL cites predate Cumulus's 2018 transfer of control. Under these circumstances an upward adjustment of the base forfeiture seems unwarranted.

C. The Commission Unlawfully Equates Failure to Upload with Failure to Analyze

The NAL concludes that Cumulus violated section 73.2080(c)(3) of the Commission's rules by failing to analyze the stations' EEO program based on only two facts. First, according to the NAL, Cumulus's failure to upload the annual EEO reports to the stations' online public inspection files and websites "deprived the public of its right to participate in monitoring and providing input on Cumulus' EEO programs at the Stations, thus preventing the Stations from fulfilling their obligation to analyze their EEO recruitment program."¹⁰ Second, the NAL concludes that because Cumulus failed to recognize that "it had not reviewed and uploaded its 2018 Annual Report to the Stations' public inspection files and websites," Cumulus could not have adequately analyzed the stations' EEO programs.¹¹ Neither one of these assumptions withstands the most elementary scrutiny.

First, while public input may be a component of a licensee's analysis of its EEO program, as discussed above there was no public complaint regarding the failure to upload the annual reports. There is no reason to believe there would have been any public input with respect to the stations' annual EEO reports had they been timely uploaded and thus no reason to impute to Cumulus a failure to analyze based on a lack of public input. Indeed, the Commission does not point to a single instance in this or any other circumstance where the public has viewed a station's annual EEO reports for this purpose.

¹⁰ NAL at ¶ 8.

¹¹ *Id.* at ¶ 9.

Second, there is no logical basis for the conclusion that Cumulus's administrative failure to upload its *completed* annual EEO report necessarily means that Cumulus failed to analyze its EEO programs. The NAL appears to assume that analysis of Cumulus's EEO programs would have somehow inevitably led to Cumulus's discovery that it had failed to upload the stations' EEO reports, and that Cumulus's failure to discover therefore proves Cumulus's failure to analyze. But it is entirely unclear why that would be the case. It is obviously possible for a station or a cluster of stations to analyze its EEO program without reference to the stations' online EEO reports, let alone reference to whether those reports were uploaded to the stations' online public files and websites. The NAL conflates substantive analysis of an EEO program with ministerial compliance and then accepts this conflation as conclusive. We urge the Commission to rethink this conclusion.

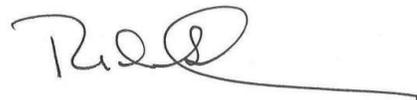
III. CONCLUSION

NAB urges the Commission to rethink its proposed forfeiture in this matter. The violation in question – the failure to upload a report that the licensee had actually completed – should be treated as a minor violation and subject to admonishment. In the event the Commission insists on imposing a forfeiture for a simple administrative error that generated no public complaint and caused no substantive harm, we urge the Commission to exercise its discretion to reduce the forfeiture amount rather than impose upward adjustments.

Respectfully submitted,

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March 28, 2022