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

In the Matter of	)	File No. EB-08-SE-1075
	)	NAL/Acct. No. 200932100011
Midcontinent Communications, Inc.	)	FRN 0009713678
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: January 19, 2009 **Released: January 19, 2009**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture and Order* ("*NAL*"), we find that Midcontinent Communications, Inc. ("Midcontinent") apparently willfully violated a Commission Order and Section 76.939 of the Commission's Rules ("Rules") in failing to respond fully to an Enforcement Bureau Letter of Inquiry.[1] We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),[2] that Midcontinent is apparently liable for a forfeiture in the amount of twenty-five thousand dollars ($25,000). We also order Midcontinent to respond fully to the LOI within ten (10) days of release of this *NAL*. If Midcontinent again fails to submit a complete response, it will be subject to further enforcement action.

II. BACKGROUND

2. In response to consumer complaints against Midcontinent, on October 30, 2008, the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI") regarding the company's migration of analog programming to digital tiers.[3] The LOI sought information concerning instances in which Midcontinent had migrated analog channels to a digital tier, including the channels affected, whether and how the company notified customers of the change, whether, in light of the change in service, the company permitted customers to change their service tier without charge, and the rates charged customers before and after the channel migration. The LOI also asked about Midcontinent's charges for digital set-top boxes as well as information regarding Midcontinent's subscriber rates and the rates it pays to video programmers.

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[1] 47 C.F.R. § 76.939.

[2] 47 U.S.C. § 503(b).

[3] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to J.G. Harrington, Esq., Counsel for Midcontinent Communications, Inc., Dow Lohnes PLLC (Oct. 30, 2008) ("LOI").

3. In its response to the LOI,[4] Midcontinent states that it made a good faith effort to respond to the Bureau's LOI.[5] Midcontinent admits, however, that it did not respond fully to the LOI.[6] For example, Midcontinent fails to answer Question 1.d. which requests information about the number of overall subscribers in each affected cable system at the time of the analog-to-digital channel change. In its response to Question 7, which seeks information about oral complaints from subscribers, Midcontinent fails to identify the number of inquiries or comments it received from subscribers regarding the analog-to-digital migration of channels.[7] Midcontinent claims that the two week time period allowed in which to respond to these questions was inadequate.

4. More troubling, Midcontinent refuses to answer Question 8.b., which asks it to provide the per-subscriber fees it pays to video programming distributors for those channels subject of the inquiry. Midcontinent alleges that the disclosure of the requested information would subject it to potential liability for breach of contract, injunction, damages and termination of contract rights.[8] While Midcontinent acknowledges that the Bureau issued a Protective Order[9] with respect to this information, Midcontinent states that the Protective Order fails to protect or indemnify Midcontinent from this potential liability.[10] Moreover, Midcontinent states that the Bureau failed to explain or justify the demand for information concerning programming contracts and decisions, and that the Bureau failed to demonstrate that the request is rationally related to the alleged complaint or that the request is within the Commission's jurisdiction.[11]

III. DISCUSSION

A. Failure to Respond Fully to the LOI

5. We find that Midcontinent's failure to fully respond to the Bureau's inquiry constitutes an apparent willful[12] violation of a Commission order and Section 76.939 of the Rules. The Bureau directed Midcontinent to provide certain information related to the movement of analog channels to digital tiers. This information was necessary to enable the Commission to perform its enforcement function and evaluate whether Midcontinent violated Commission rules. Midcontinent received the LOI but has failed to provide a full and complete response.

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[4] Letter from J. Christopher Redding, Counsel for Midcontinent Communications, Inc., Dow Lohnes PLLC to Nissa Laughner, Attorney Advisor, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 13, 2008) ("LOI Response"). We note that Midcontinent seeks confidential treatment of certain portions of its LOI Response. *See* Letter from J. Christopher Redding, Counsel for Midcontinent Communications, Inc., Dow Lohnes PLLC to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 13, 2008). We do not rule on Midcontinent's request for confidentiality at this time.

[5] *Id.* at 2.

[6] *Id.* at 2-3.

[7] *Id.* at 15.

[8] *Id.* at 16.

[9] *Midcontinent Communications, Inc.*, Protective Order, DA 08-2495 (Enf. Bur. rel. Nov. 13, 2008).

[10] LOI Response at 16.

[11] *Id.*

[12] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) ("*Southern California Broadcasting*").

6. The Commission has broad investigatory authority under Sections 4(i), 4(j), and 403 of the Act, its Rules, and relevant precedent. Section 4(i) authorizes the Commission to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[13] Section 4(j) states that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[14] Section 403 grants the Commission "full authority and power to institute an inquiry, on its own motion ... relating to the enforcement of any of the provisions of this Act."[15] Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.[16] In carrying out this obligation, a cable operator also must provide truthful and accurate statements to the Commission or its staff in any investigatory or adjudicatory matter within the Commission's jurisdiction.[17] Lastly, numerous FCC decisions have reaffirmed the Commission's authority to investigate potential misconduct and punish those that disregard FCC inquiries.[18] The Commission delegated this authority to the Enforcement Bureau in Section 0.111(a)(16) of the Rules.[19]

7. We reject Midcontinent's contentions that it was not obligated to respond fully and completely to the Bureau's inquiry, because it believes the Commission lacks the authority to seek the information in the LOI.[20] As stated above, the Commission has broad investigatory authority, and Midcontinent is obligated to respond to our inquiries, even if it believes them to be outside the Commission's authority.[21]

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[13] 47 U.S.C. § 154(i).

[14] 47 U.S.C. § 154(j).

[15] 47 U.S.C. § 403.

[16] 47 C.F.R. § 76.939 ("Cable operators shall comply with ... the Commission's requests for information, orders, and decisions.").

[17] *See* 47 C.F.R. § 1.17.

[18] *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7599-7600 ¶¶ 23-28 (2002) (ordering $100,000 forfeiture for egregious and intentional failure to certify the response to a Bureau inquiry) ("*SBC Forfeiture Order*"); *Digital Antenna, Inc.,* Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7600, 7602 (Spectr. Enf. Div., Enf. Bur. 2008) (proposing $11,000 forfeiture for failure to provide a complete response to an LOI); *BigZoo.Com Corporation*, Forfeiture Order, 20 FCC Rcd 3954 (Enf. Bur. 2005) (ordering $20,000 forfeiture for failure to respond to an LOI).

[19] 47 C.F.R. §0.111(a)(16) (granting the Enforcement Bureau authority to "[i]dentify and analyze complaint information, conduct investigations, conduct external audits and collect information, including pursuant to sections 218, 220, 308(b), 403 and 409(e) through (k) of the Communications Act, in connection with complaints, on its own initiative or upon request of another Bureau or Office."). *See also* 47 C.F.R. §§0.111(a)(13) (Enforcement Bureau has authority to "[r]esolve complaints regarding multichannel video and cable television service under part 76 of the Commission's rules"); 0.311 (general delegated authority for Enforcement Bureau).

[20] *See* LOI Response at 16.

[21] *See SBC Forfeiture Order*, 17 FCC Rcd at 7591 ¶ 5. *See also* 47 U.S.C. §408 (Commission orders "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); 47 U.S.C. § 416(c) ("It shall be the duty of every person, its agent and employees ... to observe and comply with such orders so long as the same shall remain in effect"); *Peninsula Communications, Inc.,* Forfeiture Order, 17 FCC Rcd 2832, 2834 ¶ 5 (2002) (subsequent history omitted) (a regulatee "cannot ignore a Commission order simply because it believes such order to be unlawful"); *World Communications Forfeiture Order,* 19 FCC Rcd at 2719-2720 (issuing forfeiture against regulatee who failed to respond to an LOI because it believed the LOI to be beyond the Commission's jurisdiction).

8. Midcontinent alleges that it could not have responded fully to the LOI because the amount of time allowed for the preparation of the company's LOI response was too brief.[22] Certain complaints received by the Commission regarding the migration of analog programming to a digital tier, however, allege that cable operators are falsely linking the programming changes with the digital television transition. Because of the strong public interest in avoiding confusion about the transition and the rapidly approaching transition date, the Bureau determined that two weeks was an appropriate deadline for the cable operators' responses and we conclude that two weeks was a reasonable deadline. Midcontinent does not dispute that this decision was within our discretion. Thus, Midcontinent was obligated to provide the requested information by our deadline. Moreover, we note that since it submitted its LOI response and while this matter remains under investigation by the Bureau, Midcontinent has neither contacted the Bureau about its response nor provided any supplemental information.

9. Finally, we reject Midcontinent's contention that the confidential nature of some of the information responsive to the Bureau's LOI absolved Midcontinent of its obligation to respond.[23] In addition to requesting confidential treatment of such material pursuant to the Commission's well-established, long-standing rules regarding the treatment of material routinely considered confidential,[24] the Bureau issued a Protective Order in this investigation specifically to address any concerns regarding the potentially confidential nature of certain information. Thus, Midcontinent had the option, as set forth by the Commission's General Counsel in his letter directed to Midcontinent,[25] of providing the information under that Protective Order.[26] We find therefore that Midcontinent's failure to fully respond to the Bureau's inquiry constitutes an apparent willful[27] violation of a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

10. We conclude under applicable standards set forth in the Act, that Midcontinent is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[28] To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[29] The Commission will then issue a forfeiture if it

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[22] *See* LOI response at 2-3.

[23] *Id.* at 16.

[24] *See* LOI Attachment, *Request for Confidential Treatment*, referencing the Commission's Rules at 47 C.F.R. § 0.459.

[25] *See* Berry Letter at 2.

[26] *See Midcontinent Communications, Inc.*, Protective Order, DA 08-2495 (Enf. Bur. rel. Nov. 13, 2008).

[27] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) ("*Southern California Broadcasting*").

[28] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[29] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[30] We conclude under this standard that Midcontinent is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules.

11. Under Section 503(b)(2)(A) of the Act,[31] we may assess a cable operator a forfeiture of up to $37,500 for each violation, or for each day of a continuing violation up to a maximum of $375,000 for a single act or failure to act. In exercising such authority, we are required to 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 such other matters as justice may require."[32]

12. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture amount of four thousand dollars ($4,000) for failure to respond to Commission communications.[33] We find that Midcontinent's failure to respond fully to the LOI in the circumstances presented here warrants a significant increase to this base amount. Misconduct of this type exhibits contempt for the Commission's authority and threatens to compromise the Commission's ability to adequately investigate violations of its rules. Prompt and full responses to Bureau inquiry letters are essential to the Commission's enforcement function. In this case, Midcontinent's apparent violations have delayed our investigation and inhibited our ability to examine allegations raised in consumer complaints and also potentially touching on an area of critical importance -- the DTV transition. We further note that Midcontinent failed to provide a full and complete LOI response even after receiving a specific warning from the Commission's General Counsel that such actions could be subject to enforcement penalties.[34]

13. Based on these facts, we therefore propose a twenty-five thousand dollar ($25,000) forfeiture against Midcontinent for failing to respond fully to Commission communications. This forfeiture amount is consistent with precedent in similar cases, where companies failed to provide complete responses to Bureau inquiries concerning compliance with the Commission's Rules despite evidence that the LOIs had been received.[35]

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[30] *See SBC Forfeiture Order*, 17 FCC Rcd at 7591.

[31] 47 U.S.C. § 503(b)(2)(A). The Commission has amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), three times to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 23 FCC Rcd 9845 (2008) (adjusting the maximum statutory amounts for broadcasters and cable operators from $32,500/$325,000 to $37,500/$375,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts for broadcasters and cable operators from $27,500/$300,000 to $32,500/$325,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts for broadcasters and cable operators from $25,000/$250,000 to $27,500/$300,000). The most recent inflation adjustment took effect September 2, 2008 and applies to violations that occur after that date. *See* 73 Fed. Reg. 44663-5. Midcontinent's apparent violations occurred after September 2, 2008 and are therefore subject to the higher forfeiture limits.

[32] 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

[33] *See* 47 C.F.R. § 1.80(b)(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 (1997), *recon. denied,* 15 FCC Rcd 303 (1999).

[34] *See* Berry Letter at 2.

[35] *See supra* note 17.

14. We also direct Midcontinent to respond fully to the October 30, 2008 LOI within ten (10) days of the release of this Notice of Apparent Liability for Forfeiture and Order. Failure to do so may constitute an additional violation subjecting Midcontinent to further penalties, including potentially higher monetary forfeitures.[36]

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commissions Rules, Midcontinent Communications, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars ($25,000) for its willful violation of a Commission Order and Section 76.939 of the Rules.

16. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Midcontinent **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

17. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 403 of the Communications Act of 1934, as amended, 47 U.S.C. §151, 154(i), 154(j), 403, Midcontinent shall fully respond to the October 30, 2008 Letter of Inquiry sent by the Enforcement Bureau in the manner described by that Letter of Inquiry within ten (10) days of the release of this Notice of Apparent Liability and Order.

18. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Midcontinent will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and nissa.laughner@fcc.gov.

19. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Nissa Laughner, Esq., Spectrum Enforcement Division, FCC, at nissa.laughner@fcc.gov.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3)

[36] We do not decide in this *NAL* whether the failure to respond to an LOI constitutes a continuing violation.

some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail return receipt requested to counsel for Midcontinent Communications, Inc., J. Christopher Redding, Esq., Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington, D.C. 20036-6802.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau