

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

In the Matter of)	
)	
Western Wireless Corporation)	File No. EB-02-TS-659
and)	NAL/Acct. No. 200332100004
WWC Holding Co., Inc.,)	FRN 0003764719
Licensee of Cellular Radio Station KNKN343,)	
CMA583 – North Dakota 4 –)	
McKenzie RSA)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 6, 2003

Released: May 12, 2003

By the Commission: Chairman Powell issuing a separate statement.

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Western Wireless Corporation and its wholly owned subsidiary, WWC Holding Co., Inc. (“WWC”), cellular radio licensee in CMA583 North Dakota 4 – McKenzie RSA (collectively “Western”), apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (“Act”),¹ by operating radio transmitting equipment from an unauthorized location in Medora, North Dakota (“Medora Site” or “Medora Tower”). Specifically, Western unlawfully constructed and continues to operate a facility that has a significant environmental effect without obtaining Commission authorization following preparation of an Environmental Impact Statement (“EIS”).² We conclude, pursuant to Section 503(b) of the Act, that Western is apparently liable for a forfeiture in the amount of two hundred thousand dollars (\$200,000).³

2. Western’s unlawful operation here stems from its failure to comply with the Commission’s environmental rules. Continued unlawful operation may result in additional enforcement action, e.g., increased forfeitures, initiation of a license revocation proceeding, or both. In this regard, we order Western to provide a sworn statement within 30 days regarding its plan to cease operation from the Medora Site or bring that site into compliance with our environmental rules. We also remind Western of its obligation to file an Environmental Assessment (“EA”) if any of its actions in response to this NAL or subsequent orders may have a significant effect on the environment.

II. BACKGROUND

3. Under the Commission’s rules implementing the National Environmental Policy Act of 1969, as amended, (“NEPA”),⁴ licensees are required to assess proposed facilities to determine whether the facilities may significantly affect the environment as defined in Section 1.1307 of the Commission’s

¹ 47 U.S.C. § 301.

² See 47 C.F.R. § 1.1305.

³ 47 U.S.C. § 503(b).

⁴ 42 U.S.C. §§ 4321-4335.

Rules (“Rules”).⁵ The rules provide that licensees must prepare and submit to the Commission an EA for an action that may have a significant environmental effect.⁶ This includes actions for which no pre-construction authorization is otherwise required.⁷ In light of the Commission’s obligations under the National Historic Preservation Act of 1966, as amended (“NHPA”),⁸ Section 1.1307(a)(4) of the Rules requires that a licensee must prepare and submit to the Commission an EA if a planned facility may affect one or more properties listed, or eligible for listing, in the National Register of Historic Places (“NRHP”) (“Historic Properties”).⁹ If the Commission finds after submission of an EA that a proposed action will not have a significant environmental effect, it will issue a finding of no significant impact (“FONSI”) and process the application.¹⁰ If a proposed action will have a significant environmental effect and the applicant does not choose to amend its application,¹¹ the Commission will not grant the application unless the Commission first completes an EIS.¹²

4. In August 1999, Western constructed a 180-foot monopole tower on a bluff overlooking Medora, North Dakota, for use by WWC in connection with its operation of Station KNKN343 in CMA583 - North Dakota 4 – McKenzie. In November 1999, the State Historical Society of North Dakota (“Historical Society”), which is the State Historic Preservation Officer (“SHPO”) for North Dakota, submitted a letter to the Wireless Telecommunications Bureau (“WTB”) regarding the tower.¹³ The letter states that Western’s tower adversely affects properties which are listed in the National Register of Historic Places and/or the State Register of Historic Places.¹⁴ The letter indicates that the tower affects the following nearby properties through a visual intrusion into their setting: the Chateau de Mores State Historic Site, the de Mores Packing Plant State Historic Site, the Theodore Roosevelt Maltese Cross Cabin, the Peaceful Valley Ranch, and various other historic properties in and around Medora. Several of the Historic Properties are within one quarter mile of the tower¹⁵ and the tower is in open view from all of these sites.¹⁶

⁵ 47 C.F.R. § 1.1307.

⁶ 47 C.F.R. §§ 1.1308 and 1.1311.

⁷ 47 C.F.R. § 1.1312. *See also* 47 C.F.R. § 22.165(c).

⁸ 16 U.S.C. §§ 470 *et seq.* In particular, Section 106 of the NHPA (16 U.S.C. § 470f) requires Federal agencies, such as the Commission “. . . prior to the issuance of any license . . . [to] take into account the effect of the undertaking on any district, site, building, structure or object that [qualifies as a Historic Property].”

⁹ 47 C.F.R. § 1.1307(a)(4).

¹⁰ 47 C.F.R. § 1.1308(d).

¹¹ *See* 47 C.F.R. §§ 1.1308(c), 1.1309.

¹² *See* 47 C.F.R. §§ 1.1305, 1.1314, 1.1315, 1.1317.

¹³ Letter from Michael E. Simonson, Review & Compliance Coordinator, State Historical Society of North Dakota, to Frank Stilwell, Commercial Wireless Division, Wireless Telecommunications Bureau (November 15, 1999) (“November 15, 1999 Letter”).

¹⁴ While the Commission’s historic preservation rules do not expressly refer to properties listed on state or local registers of historic properties, such local registers are important sources of information. Where such locally-listed properties are found in the area of potential effects (“APE”), they should be evaluated for NRHP eligibility.

¹⁵ Letter from Michael E. Simonson, Review & Compliance Coordinator, State Historical Society of North Dakota, to Frank Stilwell, Commercial Wireless Division, Wireless Telecommunications Bureau (January 31, 2000). *See also* Letter from Michael Deuel Sullivan, Esq., to Kathy Harvey, Technical and Public Safety Division, Enforcement Bureau (February 3, 2003) (“Western February 2003 Letter”) (stating that the nearest historic site to the tower is approximately one quarter of a mile away)

¹⁶ *See, e.g.*, Letter from Noel R. Poe, Superintendent, National Park Service, U.S. Department of the Interior, to Dan Abeyta, Commercial Wireless Division, Wireless Telecommunications Bureau (March 15, 2001).

5. In December 1999, WTB informed Western Wireless that Western's tower "may have an adverse effect on historic properties" ¹⁷ The Bureau also informed Western that "until the requirements of the Commission's environmental rules are met, "construction *and operation*" of the facilities "may be in violation of the Commission's environmental rules" and "[a] company violating these rules may be subject to forfeitures" ¹⁸ The Bureau also directed Western to meet with the SHPO.

6. Western continued to operate at the site. For several years, WTB worked with Western and the Historical Society to attempt to resolve the matter informally. These efforts having proved unsuccessful, WTB referred the matter to the Enforcement Bureau ("EB") for possible enforcement action. ¹⁹ On October 17, 2002, EB sent a letter of inquiry ("LOI") to Western, requesting information concerning Western's efforts to assess whether the tower might have a significant effect on the environment and why it did not submit an EA and undergo environmental review prior to constructing the tower. ²⁰ Western submitted a response to the LOI on November 1, 2002. ²¹ In its response to the LOI, Western states that it complied in good faith with the Commission's rules prior to constructing its tower. Western claims that it is now able to provide "high-quality" cellular service to Medora and portions of I-94 adjacent to Medora. Western argues that prior to construction of the tower, the Governor of North Dakota requested that Western provide cellular service in Medora for the Western States Governors' Conference. According to Western, the lack of cellular coverage highlighted the need for cellular service in Medora, and with the support of the Mayor of Medora, it sought ways to improve cellular coverage in the area. Prior to the submission of a permit application for the current tower, argues Western, it worked with the City and consulted with the National Park Service to develop a set of three alternative sites for a possible tower. Western contends that the City selected the third alternative, which is the current location, and that this land was made available by the Theodore Roosevelt Medora Foundation, a local historic preservation group. Western indicates also that the City selected the tower location as the alternative farthest from any historic properties without being located within the national park, and that according to Western's engineer, the nearest historic site to the tower is approximately ¼ mile away. Western states that it submitted a "City of Historic Medora Zoning – Development Permit and Application Form" ("Application") for consideration by the City Council proposing a cellular communications facility. Western also indicates that it submitted a scale drawing of the tower and tower site with its application.

7. Western claims that in reviewing zoning applications such as Western's, the City Council is charged with examining the possible effects of any proposed construction upon the historical integrity of the City. Western states that, under the City's Zoning Articles, the City Council is directed "to regulate all facets of construction to preserve the historical integrity of the City of Medora," and "to prevent

¹⁷ Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau, to Grant Hoovestos, Western Wireless Corporation (December 14, 1999).

¹⁸ *Id.* (emphasis added). In February 2000, WTB again informed Western that if the situation was not resolved, it "may be subject to enforcement action by the Commission."

¹⁹ Because the Commission has historically focused its environmental enforcement efforts on the kind of informal resolution attempted by WTB in this case, WTB and other licensing Bureaus have primary responsibility for environmental enforcement. 47 C.F.R. § 0.111(a)(11) Note. The rules also provide for referral of such matters from the licensing bureaus to EB upon mutual agreement of the Bureaus. *Id.*, § 0.111(a)(14). We take this opportunity to state our strong support for an enforcement-oriented approach in the protection of the environment. We direct referrals to EB of violations by licensees or tower owners where appropriate and continued strong enforcement action by EB where such action is appropriate.

²⁰ Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Jim Blundell, Director of External Affairs, Western Wireless Corporation (October 17, 2002).

²¹ Letter from Michael Deuel Sullivan, Esq., to Kathy Harvey, Technical and Public Safety Division, Enforcement Bureau (November 1, 2002) ("Western November 2002 Letter")

structures which detract from the aesthetic harmony, style, form, color, proportion, texture or materials of the district.”²² Further, Western claims that the Zoning Articles state that “[i]n order to protect the City’s historical integrity, the entire City and the areas under its zoning jurisdiction are hereby zoned as a Historical Integrity District.”²³ Western states that this includes the site where it constructed its tower. Western indicates that its zoning application was placed on public notice, the community was given five days in which to file comments against the proposed tower construction, and no comments were received. Western states that subsequently, the Zoning Board unanimously approved its application on June 1, 1999.

8. Western asserts that it applies the criteria set forth in the Commission’s rules to determine whether a proposed action may have a significant effect on the environment. Western also states that one of these criteria states that an EA is required if a proposed facility “‘may affect’ a historical property of national significance.”²⁴ Western adds that although the rule does not explicitly prescribe how licensees must make this assessment, a note following the rules suggests that “‘inquiries *also may be made* to the appropriate State Historic Preservation Officer,” and thus such inquiry is one option available to licensees.²⁵ Western contends that in light of the foregoing, and particularly the city’s review and approval, it believed the tower to be categorically excluded from FCC environmental processing on historic preservation grounds.²⁶ Western states that after its tower was constructed, it learned that the Historical Society had raised concerns with the Commission regarding the effect of the tower on properties listed or eligible for listing in the NRHP. Western claims that when it became aware of such concerns it undertook an extensive effort to obtain public comment and offered various mitigation measures, but that none of these proposals has been satisfactory to all parties. Western also states that it remains willing to prepare an EA upon Commission request.²⁷

9. On January 14, 2003, the Enforcement Bureau sent a second LOI to Western, requesting it to explain under what authority it believes it may provide service from its tower in Medora. In addition, Western was directed to explain what steps it took to comply with Section 1.1307(a)(4) of the Rules and what efforts it made to determine whether the Chateau de Mores, the de Mores Packing Plant, the Theodore Roosevelt Maltese Cross Cabin and the Peaceful Valley Ranch are listed, or are eligible for listing, in the NRHP.²⁸ Western submitted a response to the second LOI on February 3, 2003.²⁹ Western indicates that under Section 22.165(c) of the Rules, a licensee may operate “additional transmitters at additional locations on the same channel or channel block as its existing system” without prior Commission approval if certain conditions are met.

10. Western contends that although its five year build out period in the McKenzie RSA expired before construction of the Medora Tower, the service area boundary of that site remained within Western’s authorized Cellular Geographic Service Area (“CGSA”). Also, Western argues that its

²² Chapter 6, Article 1, Introduction.

²³ Chapter 6, Article 3, § 6.0301.

²⁴ Western November 2002 Letter at 3. More precisely, Section 1.1307(a)(4) of the Rules, 47 C.F.R. § 1.1307(a)(4), requires an EA where a proposed facility “‘may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or eligible for listing in the National Register of Historic Places.’”

²⁵ Western November 2002 Letter at 3. *See also* 47 C.F.R. § 1.1307(a)(4) note (emphasis added).

²⁶ Western November 2002 Letter at 3. *See also* 47 C.F.R. §§ 1.1306(a), 1.1307(a)(4).

²⁷ Western November 2002 Letter . 47 C.F.R. § 1.1307(c) and (d).

²⁸ Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Jim Blundell, Director of External Affairs, Western Wireless Corporation (January 14, 2003).

²⁹ Western February 2003 Letter.

environmental review under Sections 1.1301 through 1.1319 of the Rules indicated that construction and operation of the Medora site would not have a significant environmental effect. Western also states that it relied on the City Council's approval process to determine whether its tower would affect historic properties listed or eligible for listing in the NRHP. Western claims, that with the exception of the Peaceful Valley Ranch, the historic properties listed in the Commission's second LOI, as well as several other historic properties, are located in areas under the City's zoning jurisdiction. Western claims that potential impacts on the Peaceful Valley Ranch, located approximately five miles from the tower, had not previously been raised as an issue by any parties.³⁰ Western notes that a complete listing of properties in the NRHP is available online, but argues that the focus of its review has been whether its tower affected any of these sites. Finally, Western summarizes the information it provided in response to the first LOI.

III. DISCUSSION

11. Section 22.165 of the Rules states in part that "a [Public Mobile Services] licensee may operate additional transmitters at additional locations on the same channel or channel block as its existing system without obtaining prior Commission approval" if certain conditions are met.³¹ One of the conditions that must be met is that the "additional transmitters must not have a significant environmental effect" under Sections 1.1301 through 1.1319 of the Rules.³² Similarly, under Section 1.947(a) of the Rules, "[a]ll major modifications [of wireless licenses], as defined in § 1.929 of [the Rules] . . . , require prior Commission approval."³³ Section 1.929(a) classifies the following as a "major" modification for all services: "[a]pplication or amendment requesting authorization for a facility that would have a significant environmental effect as defined by §§ 1.1301 through 1.1319 of the rules"³⁴

12. Under Section 1.1312(b) of the Rules, an EA must be submitted to and ruled on by the Commission prior to the initiation of construction if a proposed facility that is not otherwise subject to pre-construction authorization "may have a significant environmental impact."³⁵ Section 1.1307(a)(4) specifies as one criterion of potential significant environmental effect "[f]acilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places."³⁶ Where approval of an application requiring an EA would have a significant environmental effect and a FONSI therefore cannot be issued, Section 1.1305 of the Rules requires the preparation of a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) (collectively referred to as EISs) prior to Commission action.³⁷

13. Here, Western's construction of the Medora Tower not only *may have* had a significant environmental effect but, in fact, *did* have and continues to have such an effect. It is undisputed that Western constructed its tower near, and in plain view of, sites that are listed, or eligible for listing, in the NRHP, including the Chateau de Mores State Historic Site, the de Mores Packing Plant State Historic Site, and the Theodore Roosevelt Maltese Cross Cabin. It is also undisputed that the Historical Society

³⁰ We note that in the Historical Society's November 1999 letter to the Wireless Telecommunications Bureau, it asserted that Western's tower adversely affected the Peaceful Valley Ranch.

³¹ 47 C.F.R. § 22.165.

³² 47 C.F.R. §§ 1.1301-1.1319, 22.165(c).

³³ 47 C.F.R. § 1.929.

³⁴ 47 C.F.R. §§ 1.1301-1.1319.

³⁵ 47 C.F.R. § 1.1312(b); *see also* 47 C.F.R. §§ 1.1307(a) (EA required where facility "may significantly affect the environment), 1.1308, 1.1311.

³⁶ 47 C.F.R. § 1.1307(a)(4).

³⁷ 47 C.F.R. § 1.1305; *see also* 47 C.F.R. §§ 1.1308(i), 1.1314, 1.1315, 1.1317.

did not conclude prior to construction that the tower would not have an adverse effect on Historic Properties. Therefore, we conclude that construction of the tower *may have* had a significant environmental effect under Section 1.1307(a)(4) of the Rules.³⁸ Our conclusion is supported by the fact that the Historical Society, which is the relevant SHPO, concluded after the fact that the tower *has* an adverse effect on historic properties. Consequently, at a minimum, Commission approval following the filing of an EA was required prior to construction and operation. As a result, contrary to Western's assertion, it was required to prepare and submit to the Commission an EA, and receive Commission authorization, prior to the construction of its tower and operation from that location.³⁹

14. Moreover, in this instance not only was Western required to file an EA and obtain Commission authorization prior to construction, but because the constructed tower actually has significant environmental effects, it was required to await completion of an EIS.⁴⁰ Based on the Historical Society's recommendation, other documents in the record, and our independent assessment, we find that the Medora Tower has an adverse effect on at least four sites listed in the NRHP – Saint Mary's Church, the Medora Doll House, the Old Billings County Courthouse, and the de Mores Packing Plant Ruins – and on at least one eligible site, the Maltese Cross Cabin. With respect to each of these sites, all of which are located within approximately one half mile or less of the tower, the tower on the bluff presents a modern intrusion that looms over these Historic Properties, thus introducing an obtrusive incongruous element into a setting that otherwise retains largely the same feel that it had at the time the structures were built. Hence, under Section 800.5(a)(1) of the ACHP Regulations, 36 C.F.R. § 800.5(a)(1),⁴¹ the tower has an adverse effect on Historic Properties.

15. In view of our finding that Western's Medora tower not only may have, but has had and continues to have, a significant environmental effect, we reject Western's argument that it has authority under Section 22.165 of the Rules⁴² to operate its tower. Specifically, Section 22.165 provides that licensees may operate additional transmitters for existing systems only if, *inter alia*, the additional transmitters do not have a significant environmental effect.⁴³ Thus, under Section 22.165, a licensee may not operate additional transmitters without prior Commission approval if its action may have a significant environmental effect. Because Western's tower, in fact, has a significant environmental effect, it could not have met the Commission's requirements for authorization without prior approval under Section

³⁸ 47 C.F.R. § 1.1307(a)(4).

³⁹ 47 C.F.R. §§ 1.1307(a)(4), 1.1308, 1.1311.

⁴⁰ Where construction of a facility is deemed a Commission action and that facility has an unmitigated adverse effect on one or more Historic Properties, the Commission has for some time viewed such a facility as having a significant effect on the environment. For example, in its 1974 Report and Order implementing NEPA, the Commission determined that the following "classes of facilities" would be classified as "major" under NEPA: those "[f]acilities which will affect districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology or culture which are listed in the National Register of Historic Places or are eligible for listing." Implementation of the National Environmental Policy Act of 1969, 49 FCC2d 1313, 1319-1320 (1974) *recon. granted in part and otherwise denied*, 56 FCC2d 635 (1975).

⁴¹ An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. Section 800.5(a)(1) of the ACHP Regulations, 36 C.F.R. § 800.5(a)(1). *See also* 36 C.F.R. 800.5(a)(2)(v) "Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historical features."

⁴² 47 C.F.R. § 22.165.

⁴³ 47 C.F.R. 22.165(c).

22.165 of the Rules. In addition, Western has violated Section 1.947(a) of the Rules,⁴⁴ which required Western to secure prior Commission approval of its construction of the Medora Tower because that tower “would have a significant environmental effect” and is, therefore, a major modification of Western’s license under Section 1.929(a)(4) of the Rules.⁴⁵ Thus, Western constructed the Medora Tower and continues to operate at this site without Commission approval. Accordingly, we conclude that Western apparently willfully and repeatedly violated Section 301 of the Act by operating radio transmitting equipment from an unauthorized location. We note that this violation has continued into the one-year limitations period for a forfeiture.⁴⁶

16. The fact that the City Council and others may have considered historic preservation issues, or that Western may have worked cooperatively with the WTB and others to try to resolve the problem after construction and operation of the Medora tower, has no bearing on the underlying violation in this case, which occurred before any such cooperative efforts and has continued since. In particular, we note that the Zoning Board’s approval of Western’s application is irrelevant to whether the tower has a significant environmental effect under the Commission’s rules. Section 1.1311(c) of the Rules states that an EA should be accompanied with evidence of site approval obtained from local or Federal land use authorities, thus recognizing that such zoning approval does not preclude the need for an EA (or, in appropriate cases, an EIS).⁴⁷ Further, Section 1.1311(e) provides that an EA need not be submitted if another Federal Government agency has responsibility for deciding whether a proposed facility will have a significant environmental effect, thus recognizing that state or local environmental review does not replace the need for FCC or other federal environmental review.⁴⁸

17. Similarly, our finding that Western is in violation of the Act and is apparently liable for forfeiture is not affected by Western’s claim that it offered to file a post-construction EA with the Commission and that Commission staff discouraged such a filing. The rules require Western to file an EA *before* construction of a facility, such as the Medora Tower, that may significantly affect the environment.⁴⁹ Accordingly, a post-construction EA would not in itself end Western’s violation of those rules. Moreover, because this tower, in fact, does have a significant impact on the environment, the filing of an EA for the existing tower would not have led to a FONSI that could have ended the violation. Finally, even if Western would have benefited from the filing of an EA but chose not to do so in reliance on the staff, such reliance was at Western’s risk.⁵⁰

18. Because the Medora Tower has a significant environmental effect under the Commission’s rules, Western was required to obtain Commission approval following preparation of an EIS prior to construction of, and operation at, the site. Moreover, because the construction may have had a significant environmental effect, Western was required to file an EA and obtain a FONSI prior to construction and operation. Thus, Western did not have authority to operate its tower under Sections

⁴⁴ 47 C.F.R. § 1.947(a).

⁴⁵ 47 C.F.R. § 1.929(a)(4).

⁴⁶ 47 U.S.C. § 503(b)(6)(B).

⁴⁷ 47 C.F.R. § 1.1311(c).

⁴⁸ 47 C.F.R. § 1.1311 (e). With respect to Western’s “consultation” with the National Park Service, the National Park Service has indicated that, at the time, it was unaware that the FCC had rules relating to the location of communications towers. Letter from Noel R. Poe, Superintendent, National Park Service, U.S. Department of the Interior, to RaeAnn Kelsch, Manager of External Affairs, Western Wireless Corporation (July 6, 2000). The National Park Service also notes: “It is not the National Park Service, TRMF [Theodore Roosevelt Medora Foundation], nor the City’s responsibility to know and abide by FCC Regulations. That responsibility rests solely with WW [Western].” *Id.*

⁴⁹ *See* 47 C.F.R. § 1.1308(a).

⁵⁰ *See Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1991).

22.165 or 1.947 of the Rules,⁵¹ and its continued unauthorized operation of its tower violates Section 301 of the Act.

Forfeiture Amount

19. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁵² The term “willful” as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.⁵³ The term “repeated” means that the violation occurred on more than one day.⁵⁴ Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each violation by a common carrier, or each day of a continuing violation, up to a statutory maximum of \$1,200,000 for a single act or failure to act.⁵⁵ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “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.”⁵⁶

20. *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines (“Forfeiture Policy Statement”)*⁵⁷ and Section 1.80 of the Rules sets a base forfeiture amount of \$4,000 for operation at an unauthorized location. However, a significant upward adjustment is justified in this case since Western’s violation continued for three and a half years after WTB informed Western that the tower “may have” a significant environmental effect, and continues to this date. Western’s tower has had and continues to have a significant environmental effect on Historic Properties.⁵⁸ We therefore consider this to be a very serious instance of a Section 301 violation for which a sizable increase in the base forfeiture amount under the upward adjustment criteria contained in Section 1.80 and the *Forfeiture Policy Statement* is warranted.⁵⁹ Accordingly, applying the *Forfeiture Policy Statement* and statutory factors to the instant case, we conclude that Western is apparently liable for a \$200,000 forfeiture.

21. It is important that Western not be permitted to continue to benefit from its failure to

⁵¹ 47 C.F.R. §§ 22.165, 1.947.

⁵² 47 U.S.C. § 503(b).

⁵³ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means 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....” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁵⁴ Section 312(f)(2) of the Act 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.” 47 U.S.C. § 312(f)(2).

⁵⁵ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2).

⁵⁶ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 (1997); 47 C.F.R. § 1.80(b)(4).

⁵⁷ 12 FCC Rcd 17087 (1997), *recon denied*, 15 FCC Rcd 303 (1999).

⁵⁸ In addition, Western failed to obtain prior Commission approval for a facility that may have an adverse effect on one or more Historic Properties.

⁵⁹ 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17117, Appendix A, Section II.

comply with the environmental rules. Accordingly, Western is hereby directed to file, within 30 days of the release of this *NAL*, a sworn statement describing its plans to cease operation at its Medora Tower site or bring that site into compliance with our environmental rules. The statement must be filed either with Western's response to this *NAL*, or separately if it does not respond (e.g., if it pays the proposed forfeiture). Failure to cease operation will constitute an apparent further continuing violation that will subject Western to possible increased enforcement action, e.g., higher forfeitures and/or potential revocation of its underlying license for the community. We note that simply applying for authorization or applying for Special Temporary Authority ("STA"), or proposing a remedial plan would not bring Western into compliance and would not insulate Western from further enforcement action for operation prior to receipt of authorization. Finally, should Western plan any changes to its facilities or service in the Medora area in response to this *NAL* or subsequent Commission orders, we remind Western of its obligation under Section 1.1308(a) of the Rules⁶⁰ to file an EA if any of those changes may significantly affect the environment under Section 1.1307(a) of the Rules.⁶¹

IV. CONCLUSION

22. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules,⁶² Western Wireless Corporation, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of two hundred thousand dollars (\$200,000) for willfully and repeatedly violating Section 301 of the Act.

23. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Western Wireless Corporation SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

24. IT IS FURTHER ORDERED THAT, within 30 days of the release of this *Notice of Apparent Liability for Forfeiture*, Western file a sworn statement in accordance with paragraph 21 above.

25. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) and the *NAL*/Acct. No. referenced in the caption.

26. The response, if any, and the statement referenced in paragraph 21 above, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau - Technical and Public Safety Division and must include the *NAL*/Acct. No. referenced in the caption.

27. 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 ("GAAP"); or (3) 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.

28. Requests for payment of the full amount of this Notice of Apparent Liability under an

⁶⁰ 47 C.F.R. § 1.1308(a).

⁶¹ 47 C.F.R. § 1.1307(a).

⁶² 47 C.F.R. § 1.80.

installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁶³

29. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Enforcement Bureau – Technical and Public Safety Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC’s Office of Communications Business Opportunities (“OCBO”) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

30. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail, Return Receipt Requested to Mr. Jim Blundell, Director of External Affairs, Western Wireless Corporation, 3650 131st Avenue, SE, #400, Bellevue, WA 98006, and to its counsel, Michael Deuel Sullivan, Esq., Wilkinson Barker Knauer LLP, 2300 N Street, NW, Suite 700, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶³ See 47 C.F.R. § 1.1914.

October 2002

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	
<p>Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 C.F.R. §121.104 and 13 C.F.R. § 121.106, respectively.</p>	
<i>International Services</i>	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	

Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<i>Mass Media Services</i>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
<i>Wireless and Commercial Mobile Services</i>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer

Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHz Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Western Wireless Corporation and WWC Holding Co., Inc., Licensee of Cellular Radio Station KNKN343, CMA583 – North Dakota 4 – McKenzie RSA; Notice of Apparent Liability for Forfeiture

I recently announced a comprehensive, proactive approach for addressing the Commission's responsibilities in the communications tower-siting area. Enforcement action, where necessary, will be an integral part of this approach as demonstrated by our action today.

As I described in the Action Plan, the siting of communications towers places a number of worthy, but competing, federal interests in tension -- widespread deployment of advanced telecommunications networks, the protection of birds and endangered species, aviation safety, and the preservation of historic and cultural sites, to name a few. Balancing these interests requires cooperation from a number of interested parties -- including state and federal agencies, Indian tribes, environmental groups, and the communications and tower industries.