

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

In the Matter of)	
)	
Barnacle Broadcasting Company, Ltd)	File No. EB-02-AT- 410
)	
Owner of Antenna Structure # 1063961)	NAL/Acct. No. 200332480014
In Port Royal, South Carolina)	
Atlanta, Georgia)	FRN 0006-1527-55

FORFEITURE ORDER

Adopted: July 22, 2004

Released: July 26, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) to Barnacle Broadcasting Company, Ltd (“Barnacle”) for willful violation of Section 17.51 of the Commission’s Rules (“Rules”).¹ The violation involves Barnacle’s failure to exhibit all red obstruction lighting from sunset to sunrise on its antenna structure # 1063961 registered in Port Royal, South Carolina.

2. On January 21, 2003, the Atlanta Office issued a *Notice of Apparent Liability* (“*NAL*”) to Barnacle for a forfeiture in the amount of ten thousand dollars (\$10,000) citing willful and repeated violation of Section 17.51 of the Commission’s Rules.² Barnacle filed its response to the *NAL* on February 27, 2003.

II. BACKGROUND

3. On November 25, 2002, in response to a report of an unlighted tower, a Commission field agent from the Commission’s Atlanta Field Office (“Atlanta Office”) inspected Barnacle’s antenna structure and determined that none of the red obstruction lights were lighted during evening hours. The FAA had no record of any report of a lighting outage for this structure. The agent determined that Barnacle was the owner of the 382 meter (1253 feet) tall antenna structure, ASR # 1063961. This violation resulted in the Atlanta Office’s issuance of an *NAL* to Barnacle on January 21, 2003.

4. Barnacle replied to the *NAL* admitting that it owns the instant structure. However, Barnacle asserted multiple reasons why the forfeiture should be reduced or cancelled. Barnacle stated that it did not know of the light outage, therefore the violation was not willful. Further, Barnacle asserts that it was not repeated because a NOTAM was issued on the second day. Barnacle also contended: it had no prior offenses; it was not a licensee, or applicant for a license, now or at the time of the violation;

¹ 47 C.F.R. § 17.51.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480014 (Enf. Bur., Atlanta Office, released January 21, 2003).

it never received notice from the Commission of its obligations under 303(q) of the Act or Part 17 of the Rules; the structure is in an area prone to lightning damage; and it acted promptly to repair the structure upon notification by the Commission Agent.

5. Finally, Barnacle requested cancellation of the forfeiture asserting an inability to pay the forfeiture. Barnacle, however, submitted only a Balance Sheet, Mortgage Note and Income Statement for 2002 created by the President of Barnacle as documentation in support of its request.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ Section 1.80 of the Rules,⁴ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Policy Statement*”). In examining Barnacle’s response, Section 503(b) 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 such other matters as justice may require.⁵

7. Section 17.51 of the Rules requires that all red obstruction lighting be exhibited from sunset to sunrise unless otherwise specified. Further, Section 17.47 of the Commission’s Rules⁶ requires that the owner of a registered antenna structure observe the lights at least once each 24 hours either visually or by observing an automatic indicator; or alternatively provide and maintain an automatic alarm system designed to detect any failure of the lights and to notify the owner of the failure. Barnacle states its structure is registered and that it did not meet the owner’s obligations; rather, it chose to rely upon others to inform it of any light outage. Barnacle does not provide any evidence that its choice met the requirements of Section 17.47.

8. Barnacle states that those upon whom it relied did not inform Barnacle of the lighting outage but provides no evidence that there was a procedure in place for these others to monitor the lights and notify Barnacle in the event the lights were out. Further, Barnacle contends that because it was unaware of the light outage, the violation was not willful. Barnacle cites the Review Board holding in *David R. Price*, 70 RR 2d 803 (Rev. Bd. 1992) for the erroneous proposition that the definition of willful requires actual notice of a violation by the licensee in order to be willful. We disagree. The Review Board holding in *Price* is based upon an entirely different set of facts in which the licensee’s towers were not lighted because the licensee had not paid its electric bill. Additionally, in *Price*, the Review Board noted that Price misconstrued the definition of willful, when he argued that his failure to light the towers can not be willful if complying with the lighting requirements is impossible citing Section 312(f)(1) of the Act⁷ which states:

The 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

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 47 C.F.R. § 17.47.

⁷ 47 U.S.C. § 312(f)(1).

any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Further, in *Southern California Broadcasting Co.*⁸, the Commission held that Section 312(f)(1) of the Act also applies to Section 503(b). Accordingly, Barnacle need not have had actual knowledge that the lights were out to be found to have committed a “willful” violation. Barnacle neither mentions *Southern California*, nor attempts to distinguish it. Nor does Barnacle mention or distinguish *Eure Family Limited Partnership*, 16 FCC Rcd 21302 (Enf. Bur. 2001), *recon. denied*, 17 FCC Rcd 7402 (Enf. Bur. 2002), *review denied*, 17 FCC Rcd 21861, 21863-21864 (2002), which is apposite to the instant case.⁹ Based on the FCC agent’s observations during his November 25 investigation, and Commission precedent, we find that Barnacle willfully¹⁰ violated Section 17.51 of the Rules. Because we conclude that Barnacle’s violation was willful, we need not address whether it was repeated.¹¹

9. We also reject Barnacle’s assertions that, under Section 303(q) of the Act,¹² as a non-licensee antenna structure owner, it was not responsible for following Commission Rules and that the Commission had an obligation to inform it as to its duties as owner of the antenna structure. The notification to tower owners for this rule was given through publication in the Federal Register upon promulgation of Section 17.51 of the Commission’s Rules.¹³ Further, and more to the point, Barnacle’s President registered the antenna structure with the FCC on April 28, 1999, and included the FAA study number 98-ASO-4417-06, which provides the lighting and painting requirements necessary for an antenna structure to be deemed no hazard to air navigation. In other words, Barnacle provided the FAA lighting and painting requirements to the FCC, thus making clear he had notice of such requirements.

10. Moreover, Barnacle, as a former licensee was responsible for knowing both its obligations under the Act and the Commission’s Rules,¹⁴ and that Part 17 of the Rules applied to licensees, permittees and tower owners. The Commission’s Rules¹⁵ hold Barnacle responsible for compliance and do not excuse ignorance of those requirements.¹⁶ Barnacle, as a former licensee, cannot now conveniently disavow knowledge after his license terminated. As a current tower owner, Barnacle is responsible for both knowing the Commission’s Rules and complying with them.¹⁷ In the instant case, Barnacle, as a

⁸ See, *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁹ In *Eure, supra*, the licensee attempts to assign blame for an unlit tower to an agent with whom Eure contracted to receive notice of a tower light outage. The Commission specifically declined to relieve the licensee of its obligations under the rules due to an agent’s failure to perform its duties.

¹⁰ 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,’ ... 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., supra*.

¹¹ 47 U.S.C. § 312 (a)(4) provides administrative sanctions “for willful *or* repeated violation of, or willful *or* repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.” (Emphasis added).

¹² 47 U.S.C. § 303(q) provides in pertinent part, that a tower owner is responsible for maintaining required tower painting and licensing when the owner is neither a Commission licensee or permittee.

¹³ See 61 FR 4364, Feb. 6, 1996.

¹⁴ 47 C.F.R. §§ 0.1, *et. seq.*

¹⁵ See note 6, *supra*.

¹⁶ See *Eure Family Limited Partnership, supra*.

¹⁷ *Id.*

licensee, was subject to the very rules, Section 303(q) of the Act and Section 17.51 of the Rules, of which he now claims to have had no notice. Accordingly, Barnacle's argument that its violation was mitigated because it was not informed by the Commission of its obligation to comply with Section 303(q) of the Act and Part 17 of the Commission Rules is without merit.¹⁸

11. Nor can Barnacle's remedial efforts to establish a system to assure compliance result in a cancellation or reduction of the forfeiture. Barnacle's remedial efforts to correct the violation, after the violation was discovered by the Commission are not a mitigating factor. See *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994), "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations." See also *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

12. Barnacle's request for reduction of the forfeiture based upon its inability to pay was not accompanied by its tax returns or other satisfactory documentation. The *NAL* gave Barnacle specific requirements about what documents it needed to submit that would support a claim of inability to pay.¹⁹ Barnacle provided no reliable information regarding its revenues. The Commission generally relies on gross revenues as the best evidence of inability to pay.²⁰ Accordingly, we are not persuaded by Barnacle's financial hardship claim and thus, we find that there is no basis to reduce the assessed forfeiture amount due to inability to pay.

13. We have examined Barnacle's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Barnacle failed to exhibit all red obstruction lighting on its tower from sunset to sunrise in willful violation of Section 17.51 of the Rules. We have also reviewed the Commission's database regarding prior violations and find that Barnacle has no record with the Commission of a prior violation. Considering the prior record of Barnacle Broadcasting Company, Ltd, we agree that the forfeiture amount should be reduced. Accordingly, we reduce the \$10,000 forfeiture proposed by the *Notice of Apparent Liability* to \$8,000 on the basis of a history of overall compliance with Commission Rules.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²¹ Barnacle Broadcasting Company, Ltd **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willful violation of Section 17.51 of the Rules.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²² Payment may be made by mailing a check or similar instrument, payable to the order of the

¹⁸ Further, we note that Barnacle's President states that he was "generally aware" of the obligations of 303(q) and Part 17 from the period when Barnacle held an FM station license.

¹⁹ *NAL*, supra, ¶ 12. These include 3 years tax returns; financial documents prepared to generally accepted accounting practices; or other reliable and objective documentation that accurately reflects petitioner's current financial status.

²⁰ See *Forfeiture Policy Statement*, 12 FCC Rcd, at 17106-07, ¶ 43. See also *PJB Communications of Virginia, Inc.* 7 FCC Rcd 2088, 2089, ¶ 8 (1992).

²¹ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²² 47 U.S.C. § 504(a).

Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332480014 and FRN 0006-1527-55. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.²³

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Mr. Pegram Harrison, President, Barnacle Broadcasting Company, Ltd., 3 Yonah Drive, Atlanta, GA 30309 and its Counsel, Benjamin J. Lambiotte, GARVEY SCHUBERT BARER, 1000 Potomac Street, N.W., Fifth Floor, Washington, D.C. 20007.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²³ See 47 C.F.R. § 1.1914.