

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

In the Matter of)	
)	
Aquila, Inc.)	File Number EB-04-KC-019
Owner of Antenna Structure No. 1045708)	NAL/Acct. No. 200432560004
In Lee's Summit, Missouri)	FRN: 0002-5060-53
Kansas City, Missouri)	

FORFEITURE ORDER

Adopted: November 9, 2004

Released: November 15, 2004

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Aquila, Inc. ("Aquila") for repeated violation of Section 17.51 of the Commission's Rules ("Rules").¹ The noted violation involves Aquila's failure to exhibit lighting from sunset to sunrise on its Lee's Summit, Missouri antenna structure.

2. On March 5, 2004, the Commission's District Director of the Kansas City, Missouri Office ("Kansas City Office") issued a *Notice of Apparent Liability for Forfeiture* ("NAL"),² finding Aquila apparently liable for a forfeiture in the amount of \$10,000 for repeated violation of Section 17.51 of the Rules. On April 5, 2004, Aquila filed a response ("Response").

II. BACKGROUND

3. On February 3, 2004, an agent from the Kansas City Office observed an antenna structure in Lee's Summit, Missouri, at approximately 6:00 PM that was painted but had no operational lighting. On February 4, 2004, the agent observed the structure's posted Antenna Structure Registration ("ASR") No. 1045708 and ascertained that the antenna structure belonged to Aquila. The tower's height is 67 meters above ground level and located at N38° 56' 17" and W94° 23' 49". The structure's ASR requires it to be painted and have red lighting exhibited from sunset to sunrise. The Federal Aviation Administration ("FAA") had no light outage reported for any structure in Lee's Summit, Missouri as of February 4, 2004.

4. On February 5, 2004, at approximately 6:45 PM the agent again observed the structure with no operational lighting. The agent confirmed that the FAA had no record of receiving a notice on that date of a tower outage for tower No. 1045708 in Lee's Summit, Missouri. The agent reported the outage to the FAA on February 5, 2004.

¹ 47 C.F.R. § 17.51.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432560004 (Enf. Bur., Kansas City Office, rel. Mar. 5, 2004).

5. On February 6, 2004, the agent interviewed Mr. Larry Baldwin, a representative of Aquila, in a telephone conversation. Mr. Baldwin confirmed that Aquila owned the tower.³ Mr. Baldwin stated that the structure had an automatic alarm system. He stated further that he was not aware of the light outage and that no alarm alerting Aquila to the light outage had been received. Following the initial contact with the agent, Mr. Baldwin telephoned the agent several hours later and stated that the light outage was due to a bad photo cell in the alarm system. Mr. Baldwin explained that when the photo cell is operative, the alarm system checks for current in the light wiring, but, does not do so when the photo cell is off or non-functional. Thus, the alarm system does not alert if there is a malfunctioning photo cell. The agent asked Mr. Baldwin how long the system had been inoperative and Mr. Baldwin replied less than a week.⁴ Mr. Baldwin was informed in the conversation that the agent had notified the FAA regarding the outage on February 5, 2004.

6. On March 5, 2004, the Kansas City Office issued an *NAL* for the Section 17.51 violation. In its April 5, 2004 response to the *NAL*, Aquila states, that within three hours of learning of the outage from the Commission's agent the tower-light controller was repaired and the lights were functioning correctly. Further, Aquila claims that the antenna structure's lights are monitored automatically on a 24-hour-a-day, seven-day-a-week basis and that alarms are transmitted to tower operators on a real time basis. Aquila claims that due to a malfunctioning photocell, the alarm did not indicate the lighting outage.

7. Aquila argues that its good faith actions and its tower compliance program warrant a reduction or cancellation of the forfeiture. Citing *Tidewater Communications, Inc.*⁵ ("*Tidewater*") in support, Aquila submits its lack of intent to violate the rules, its immediate corrective actions, the lack of public harm, its tower compliance program and its long history of overall compliance.

III. DISCUSSION

8. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("*Act*"),⁶ Section 1.80 of the Rules,⁷ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁸ In examining Aquila'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.⁹

9. Pursuant to Section 17.51 of the Rules, a tower is required to exhibit all red obstruction lighting from sunset to sunrise unless otherwise specified.¹⁰ Aquila was required to exhibit red

³ Aquila in its April 5, 2004 response confirms that the prior name of the company was Utilicorp United, Inc., but revised to Aquila in March 2002. At the time of the inspections, the ASR remained in the Utilicorp United, Inc. name.

⁴ According to the *NAL*, the agent heard Mr. Baldwin state that the staff had noticed the light outage 2 or 3 days prior to the call. Mr. Baldwin, in his declaration denies making any such statement.

⁵ *Tidewater Communications, Inc.*, 18 FCC Rcd 5524 (Enf. Bur. 2003).

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

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

⁹ 47 U.S.C. § 503(b)(2)(D).

¹⁰ Pursuant to Section 17.47(a)(1) of the Rules, an owner is required to observe the antenna structure's lights at least once every 24 hours either visually or by observing a properly maintained automatic indicator that registers any failure of the lights; or, pursuant to Section 17.47(a)(2) of the Rules, an owner is required to provide a properly

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obstruction lighting and failed to do so from February 3 through February 5, 2004. Accordingly, Aquila repeatedly violated Section 17.51 of the Rules.

10. Aquila asserts that *Tidewater*¹¹ is controlling in the instant case. We disagree. In *Tidewater* the licensee provided a sworn declaration describing the station's compliance program, the antenna structure inspection routine, and noted that its internal inspection was two days prior to the outage and found no malfunctions. Mr. Baldwin's sworn declaration addressed none of the *Tidewater* factors. Accordingly, we find that *Tidewater* is inapposite.

11. While Aquila does not contest that the antenna structure lights were unlit from February 3 through 5, 2004, it argues that its violation of Section 17.51 of the Commission's Rules was not willful. However, we need not address the issue of willfulness because the *NAL* did not allege willfulness and Aquila admits the repeated¹² nature of the violation.¹³

12. Finally, we reject Aquila's mitigation arguments which seek to reduce the proposed \$10,000 forfeiture. The base forfeiture amount for violation of Section 17.51 is \$10,000.¹⁴ Aquila presents no showing of factors sufficient to warrant a forfeiture reduction. To the extent that Aquila seeks a reduction based on good faith, good faith occurs when a licensee notices a violation and attempts to remedy it before the Commission conducts its inspection,¹⁵ or, it provides evidence of an established compliance program in place, prior to the Commission's involvement.¹⁶ Aquila meets neither standard. Aquila fails to demonstrate that it discovered the violation and attempted to remedy it before the Commission inspection. Additionally, Aquila failed to provide a sworn statement with substantiating documentation from a person having personal knowledge of an actual inspection program, the inspection frequency and the nature of the inspections of the automatic alarm system. Further Aquila's assertion of a lack of public harm can not mitigate its violation.¹⁷ Nor does Aquila's quick remedial action taken to

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maintained automatic alarm system designed to detect any failure of the lights and to provide indication of such failure to the owner. Aquila's alarm falls under the requirements of Section 17.47(a)(2).

¹¹ *Tidewater Communications, Inc.*, *supra*

¹² As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The Conference Report for *Section 312(f)(2)* indicates that Congress intended to apply this definition to *Section 503* of the Act as well as *Section 312*. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

¹³ 47 U.S.C. § 503(b)(1)(B) authorizes imposition of a forfeiture for any person who "willfully *or repeatedly* failed to comply with any of the provisions of this Act or any rule, regulation, or order issued by the Commission under this Act..." (Emphasis added).

¹⁴ See 47 C.F.R. § 1.80(b)(4), *Note to Paragraph (b)(4): Guidelines for Assessing Forfeitures*.

¹⁵ See *Radio One Licenses, Inc.*, 18 FCC Rcd 15964, 15965 ¶ 4 (2003), recon. denied., 18 FCC Rcd 25481 (2003); *Petracom of Texarkana, LLC*, DA04-1242 ¶¶ 5-6 (Enf. Bur. 2004); *Barinowski Investment, Co.*, 18 FCC Rcd 25067, 25069 ¶ 7 (Enf. Bur. 2003); *Max Media of Montana, LLC*, 18 FCC Rcd 21375, 21378 ¶ 11 (Enf. Bur. 2003); *Rotifeco, Inc.*, 18 FCC Rcd 14629, 14631 ¶ 7 (Enf. Bur. 2003).

¹⁶ See *Tidewater Communications, Inc.*, *supra*.

¹⁷ See *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); See also *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2088 (1992) (Licensees have a duty to operate in accordance with Commission rules, and cannot absolve themselves of the failure to do so by simply claiming that there was no harm done to the public. There is an independent public interest in licensees complying with the rules.) *AGM-Nevada, LLC*, 18 FCC Rcd 1476 (Enf. Bur. 2003); *Time Warner Entertainment – Advance/Newhouse Subsidiary*, 19 FCC Rcd 10,412 (Enf. Bur. 2004).

correct the violation after being put on notice by the agent mitigate the violation.¹⁸ Moreover, Aquila admits in its April 5, 2004 response that it was issued a *Notice of Violation* in November 2001 regarding painting requirements for its Fayetteville, Missouri tower and thus does not have a history of overall compliance with the Commission's Rules.¹⁹ Consequently, in this case, we will impose the originally proposed forfeiture of \$10,000.

IV. ORDERING CLAUSES

13. 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,²⁰ Aquila Communications, Inc, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of ten thousand dollars (\$10,000) for failure to exhibit obstruction lighting on its antenna structure in repeated violation of Section 17.51 of the Rules.

14. 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.²¹ 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/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, and P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²²

15. IT IS FURTHER ORDERED that, a copy of this *Order* shall be sent by Certified Mail - Return Receipt Requested - to Aquila, Inc., 20 West 9th, Kansas City, MO 64104 and to its counsel, Darryl K. Uffelmann, Esq., Senior Corporate Counsel, at the above address.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau

¹⁸ See *AT&T Wireless Services, Inc.* 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

¹⁹ See *Entravision Communicatons Corporation*, DA 04-2486 (E.B released August 10, 2004).

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

²¹ 47 U.S.C. § 504(a).

²² See 47 C.F.R. § 1.1914.