

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

In the Matter of)	
)	
Barinowski Investment Company, L.P.)	File No. EB-02-AT-322
Owner of Antenna Structure # 1062662 near)	NAL/Acct. No. 200232480030
Savannah, Georgia)	FRN 0006-1664-09
Grovetown, Georgia)	

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 2005

Released: January 26, 2005

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we grant in part and deny in part the December 23, 2003 petition for reconsideration filed by Barinowski Investment Company, L.P. (“Barinowski”), owner of an antenna structure, antenna structure registration (“ASR”) number 1062662, near Savannah, Georgia. Barinowski seeks reconsideration of a December 3, 2003 *Forfeiture Order*,¹ in which the Enforcement Bureau (“Bureau”) imposed a monetary forfeiture in the amount of eight thousand dollars (\$8,000) for willful violation of Section 17.50 of the Commission’s Rules (“Rules”).² In this *Order*, based on Barinowski’s history of overall compliance, we reduce the forfeiture amount to six thousand, four hundred dollars (\$6,400). The noted violation involved Barinowski’s failure to clean and repaint its antenna structure to maintain good visibility.

II. BACKGROUND

2. On August 28, 2002, a Commission agent from the Atlanta, Georgia District Office (“Atlanta Office”) inspected Barinowski’s antenna structure located near Savannah, Georgia. At the time of the inspection, black cabling on the outside of all three sides of the structure covered the painted metal tower, significantly reducing the visibility of the structure. On September 12, 2002, during a telephone interview with an agent from the Atlanta Office, a Barinowski representative stated that Barinowski owned ASR number 1062662, that it was aware that the cables adversely affected the visibility of the antenna structure, and that it had contracted to have the tower repainted as soon as an additional tenant was added to the structure. On September 30, 2002, the District Director of the Atlanta Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) for \$10,000 to Barinowski for apparent willful violation of Section 17.50 of the Rules.³ The NAL specifically noted that Barinowski failed to repaint the antenna structure in accordance with the painting specifications associated with it.

¹ *Barinowski Investment Company, L.P.*, 18 FCC Rcd 25067 (Enf. Bur. 2003).

² 47 C.F.R. § 17.50.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232480030 (Enf. Bur., Atlanta Office, released September 30, 2002).

3. On October 7, 2002, Barinowski submitted a response to the *NAL* in which it requested cancellation of the forfeiture. In support of its request, Barinowski stated that it had been advised by its consultant, prior to any contact with the Commission agent, to paint the antenna structure as a preventive measure. Further, Barinowski stated that it had already arranged for the tower to be painted and had prepaid the contractor on May 31, 2002 to expedite the painting.⁴ Finally, Barinowski stated that it believed that the antenna structure was not in violation and that the painting, which occurred on October 4, 2002, prevented a future violation.

4. On December 3, 2003, the Bureau issued a *Forfeiture Order* to Barinowski in which it imposed an \$8,000 forfeiture for failure to clean and repaint its antenna structure to maintain good visibility. The *Forfeiture Order* found that consistent with FAA Advisory Circular AC 70/7460-1J⁵ and pursuant to Section 17.23 of the Rules,⁶ the cables attached to Barinowski's antenna structure were required to be painted but they were not, thus, reducing the visibility of the antenna structure. However, finding that Barinowski had made good faith efforts to comply with Section 17.50 of the Rules prior to being informed of the violation, the *Forfeiture Order* reduced the forfeiture amount from \$10,000 to \$8,000.⁷

5. On December 23, 2003, Barinowski filed a petition for reconsideration of the *Forfeiture Order* in which it requested rescission of the forfeiture. In support of its request, Barinowski makes several arguments. First, Barinowski restates the same argument that it made in its response to the *NAL*. Basically, Barinowski reiterates that it had been informed by its consultant, prior to the inspection, that its tower should be painted as a preventive measure and that it had already contracted to have the tower repainted. Further, Barinowski explains that the repainting was scheduled to take place as soon as an additional tenant, which had signed a contract to immediately become a tenant on the tower, was actually added to the structure. Barinowski adds that this approach was taken in order to avoid painting the tower, having the tenant immediately thereafter added to the structure, and then having to repaint the tower a second time. Barinowski asserts that this approach was reasonable and in keeping with standards of practice in the tower business. Next, Barinowski argues that in assessing the forfeiture, the Commission failed to follow the requirements of its own rules and regulations. Finally, Barinowski claims that the Bureau failed to consider the Section 503(b) factors in determining the forfeiture amount.

III. DISCUSSION

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934 as amended ("Act"),⁸ Section 1.80 of the Rules,⁹ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.¹⁰ In examining Barinowski's petition, 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 any other

⁴ Barinowski included a copy of an invoice for painting of the antenna structure, which was dated May 31, 2002.

⁵ FAA Advisory Circular AC 70/7460-1J, Obstruction Marking and Lighting, Chapter 3, Marking Guidelines, Paragraph 33(c)(1)(g).

⁶ 47 C.F.R. § 17.23.

⁷ See *Access.1 Communications Corp. – NY*, 18 FCC Rcd 3412 (Enf. Bur. 2003) (good faith reduction given where tower owner identified the need to repaint the tower, scheduled the tower for repainting, and repainted the tower prior to any notice of inspections or issuance of the *NAL*).

⁸ 47 U.S.C. § 503(b).

⁹ 47 C.F.R. § 1.80.

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

such matters as justice may require.¹¹

7. Barinowski contracted on May 31, 2002, prior to the inspection, to have its tower painted. Because Barinowski made a business decision to wait until a new tenant moved onto the tower, its tower was not painted until October 4, 2002. As we stated in the *Forfeiture Order*, although we do not believe that waiting four months to remedy such a serious safety hazard is an exercise of good faith sufficient to justify canceling the forfeiture, we do believe that identifying the need to repaint the tower, and prepaying for the future painting of the tower prior to any notice of inspection or issuance of the *NAL* merits a reduction of the proposed forfeiture.¹² Consequently, we reduced the forfeiture from \$10,000 to \$8,000. We have already considered the good faith exhibited by Barinowski and reduced the forfeiture amount accordingly. Barinowski has not presented any new information regarding the circumstances of the painting of its tower which would cause us to change our position.

8. Next, Barinowski argues that in assessing the forfeiture, the Commission failed to follow the requirements of its rules and regulations. Barinowski cites to Section 1.80(d) of the Commission's Rules¹³ and asserts that no forfeiture penalty should have been imposed against it without it first being issued a citation reciting the violation charged, being given an opportunity to request a personal interview to discuss any concerns regarding the tower, and subsequently engaging in the same conduct of the type described in the citation, because it is not an applicant for, nor does it hold any license, permit, certificate, or other authorization issued by the Commission in connection with any service regulated by the Commission on its tower. We do not believe that the provisions of Section 1.80(d) of the Rules apply to Barinowski. Although Barinowski may not hold any Commission authorization with regard to the subject antenna structure, Barinowski is a Commission licensee, holding Commission authorizations for several broadcast facilities.¹⁴ As such, Section 1.80(d) does not apply to Barinowski. Moreover, even if Barinowski were not a Commission licensee, the notice provisions of Section 1.80(d) still would not apply to Barinowski because Section 1.80(d) permits the imposition of a forfeiture penalty in the case of a non-licensee tower owner charged with violating Part 17 of the Rules.¹⁵

9. Finally, Barinowski claims that the Bureau failed to consider the Section 503(b) factors in determining the forfeiture amount. Section 503(b) of the Communications Act of 1934, as amended,¹⁶ requires that, when determining a forfeiture penalty, the Bureau take into account the nature, circumstances, extent and gravity of the violations 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. Barinowski claims to have a history of overall compliance with the Commission's rules. Barinowski further asserts that, based on such an exemplary and meritorious history of overall compliance with the Commission's tower registration and painting rules and policies, forfeitures have not been imposed pursuant to Section 17.50 of the Rules against the first violation of a tower owner.¹⁷ In support of this

¹¹ 47 U.S.C. § 503(b)(2)(D).

¹² 18 FCC Rcd at 25069.

¹³ 47 C.F.R. § 1.80(d).

¹⁴ Commission records indicate that Barinowski Investment Company is the licensee of the following broadcast stations: WBLR(AM), Batesburg, South Carolina; WKTM(FM), Soperton, Georgia; WLGP(FM), Harkers Island, South Carolina; WLPP(FM), Ocilla, Georgia; WQRX(AM), Valley Head, Alabama; WWGF(FM), Donalsonville, Georgia; WZIQ(FM), Smithville, Georgia; WZQZ(AM), Trion, Georgia.

¹⁵ See 47 C.F.R. § 1.80(d). See also 47 U.S.C. § 503(b)(5); 47 U.S.C. § 303(q); *Pinnacle Towers, Inc.*, 18 FCC Rcd 16365 (Enf. Bur. 2003) (forfeiture imposed against non-licensee tower owner for violating Section 17.50 of the Rules).

¹⁶ 47 U.S.C. § 503(b).

¹⁷ See Petition for Reconsideration at page 5.

proposition, Barinowski cites to *Nextmedia Operating, Inc.*¹⁸ Barinowski further claims that forfeitures have not been assessed under similar facts and circumstances where the issue was whether an otherwise properly painted tower was only partially obstructed by unpainted cables, and where the tower owner promptly corrected the problem.¹⁹ In support, Barinowski cites to *Pinnacle Towers, Inc.*²⁰ and *Midwest Tower Partners, LLC*.²¹ Barinowski concludes that its case for rescission is even stronger than the cases that it has cited because it contracted for its antenna structure to be painted before it became aware of the Commission's concerns.

10. The Bureau considered the factors enumerated in Section 503(b) and, because of Barinowski's good faith efforts, reduced the forfeiture amount. Moreover, we believe that Barinowski has misinterpreted our decisions in the *Nextmedia*, *Pinnacle*, and *Midwest* cases. In *Nextmedia*, the Commission's Buffalo, New York Office had issued a *NAL* to *Nextmedia* for its violation of Sections 17.47(a)(1), 17.48(a), and 17.51(a) of the Rules.²² The violations involved *Nextmedia*'s failure to make an observation of its antenna structure's lights at least once each 24 hours, failure to notify the Federal Aviation Administration that the obstruction lighting was improperly functioning, and failure to exhibit obstruction lighting from sunrise to sunset. The Bureau cancelled the forfeiture because we specifically found that *Nextmedia* did not willfully violate Section 17.47(a)(1) or 17.48(a) of the Rules and because of *Nextmedia*'s good faith efforts to comply with the lighting requirements of Section 17.51(a) of the Rules, as well as its history of overall compliance. We did not cancel the forfeiture in *Nextmedia* because, as Barinowski asserts, "forfeitures have not been imposed pursuant to Section 17.50 of the Rules against a first violation by a tower owner."

11. In the remaining cases, *Pinnacle* and *Midwest*, our cancellations of the forfeitures were based upon our specific conclusions that the evidence did not support a finding that the attached cables obstructed good visibility of the subject towers, not because the towers were only partially obstructed by unpainted cables and the tower owners had promptly corrected the problem. We have made no such finding regarding the good visibility of Barinowski's antenna structure, and find no factual basis to make such a finding. To the contrary, in the *Forfeiture Order*, we specifically found that the condition of Barinowski's tower violated Section 17.50 of the Rules. Additionally, Barinowski's consultant had recommended painting the tower prior to our inspection, yet the tower remained unpainted. Finally, Barinowski has not presented any evidence that would make us change our finding below. While we granted Barinowski a reduction based upon good faith, we did not cancel the forfeiture because we believed then and continue to believe that waiting more than four months after recognizing that it's tower's visibility was impaired by the unpainted cables to remedy such a serious safety hazard precludes cancellation of the forfeiture. Moreover, contrary to Barinowski's assertion, the Bureau has imposed forfeitures against tower owners for violations of Section 17.50 of the Rules who have histories of overall compliance.²³ However, we do find that Barinowski has a history of overall compliance with the Commission's Rules that justifies a further reduction of the forfeiture amount to \$6,400, but not cancellation.

¹⁸ 18 FCC Rcd 21023 (Enf. Bur. 2003).

¹⁹ See Petition for Reconsideration at page 6.

²⁰ 18 FCC Rcd 6419 (Enf. Bur. 2003).

²¹ 18 FCC Rcd 12921 (Enf. Bur. 2003).

²² 47 C.F.R. §§ 17.47(a)(1), 17.48(a) and 17.51(a).

²³ See *Fun Media Group, Inc.*, 19 FCC Rcd 10230 (Enf. Bur. 2004); *Tower Properties of Florida, Inc.*, 18 FCC Rcd 26094 (Enf. Bur. 2003).

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended²⁴ and Section 1.106 of the Rules,²⁵ the petition for reconsideration filed by Barinowski Investment Company, L.P. on December 23, 2003 **IS GRANTED TO THE EXTENT INDICATED HEREIN.**

13. 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.²⁶ 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, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. 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. 20554.²⁷

14. **IT IS FURTHER ORDERED THAT** this *Order* shall be sent by first class mail and certified mail, return receipt requested, to Barinowski Investment Company, LP, 2278 Wortham Lane, Grovetown, Georgia 30813 and to its counsel, Jeffrey D. Southmayd, Esq., 1220 19th Street, NW, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²⁴ 47 U.S.C. § 405.

²⁵ 47 C.F.R. § 1.106.

²⁶ 47 U.S.C. § 504(a).

²⁷ See 47 C.F.R. § 1.1914.