

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

In the Matter of)	
)	
Birach Broadcasting Corporation)	File No.: EB-FIELDNER-12-00005058
)	NAL/Acct. No.: 201432400002
Licensee of Station WTOR)	FRN: 0003766847
Youngstown, New York)	Facility ID No.: 74121
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 23, 2014

Released: January 23, 2014

By the District Director, Philadelphia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Birach Broadcasting Corporation (Birach), licensee of AM Station WTOR in Youngstown, New York, apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules),¹ by failing to enclose the Station's antenna structures within an effective locked fence or other enclosure. We conclude that Birach is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. On October 18, 2012, an agent of the Enforcement Bureau's Philadelphia Office (Philadelphia Office) conducted an inspection of Station WTOR's three tower array, which consisted of antenna structure numbers 1024149 (Middle Tower), 1024150 (North Tower), and 1024151 (South Tower). At the time of the inspection, the agent observed that almost half of the fence surrounding the North Tower was lying on the ground. When the agent tried to lift the fencing for the North Tower off the ground, the agent found that it was very difficult because the grass had grown through and around the fence. The agent also found that the gate and fencing support posts for the Middle Tower had been removed and were lying on the ground. The condition of the fences resulted in unrestricted access to the bases of those antenna structures, both of which had radio frequency potential at their bases. In addition, the level of deterioration observed by the agent indicated that the fences had been in that condition for a significant period of time. The agent further noted that there was no fence around the perimeter of the property.

3. On November 7, 2012, the agent received a letter from Birach stating that it had repaired the fences surrounding the Middle Tower and the North Tower. The agent conducted a follow-up inspection on November 16, 2012, and confirmed that Birach had repaired the fences.

4. On December 6, 2012, the Philadelphia Office issued a Notice of Violation to Birach based on the October 18, 2012, inspection for, among other violations, failing to enclose the Station WTOR's antenna structures within an effective locked fence or other enclosure, in violation of Section 73.49 of the Rules.² On December 19, 2012, Birach filed a response to the *NOV* stating that the fences

¹ 47 C.F.R. § 73.49.

² See *Birach Broadcasting Corporation*, Notice of Violation, V201332400009 (Dec. 6, 2012) (NOV).

collapsed when the station engineer was clearing the site of weeds and brush on October 16, 2012, and that the repairs took place on October 20, 2012.

III. DISCUSSION

5. Section 503(b) of the Communications Act of 1934, as amended (Act) provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly 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.³ 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.⁴ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁵ and the Commission has so interpreted the term in the Section 503(b) context.⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁷ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁸

A. Failure to Enclose the Antenna Structure within an Effective Locked Fence

6. The evidence in this case is sufficient to establish that Birach violated Section 73.49 of the Rules. Section 73.49 of the Rules requires that antenna structures having radio frequency potential at the base must be enclosed within effective locked fences or other enclosures.⁹ The Rules further provide that individual tower fences need not be installed if the towers are contained within a protective property fence.¹⁰ The WTOR antenna structures have radio frequency potential at their bases and therefore must be enclosed within an effective locked fence. On October 18, 2012, when the Station was in operation, an agent from the Philadelphia Office observed that fencing surrounding two of the three antenna structures in the WTOR array was missing, thereby allowing ready access to the bases. The agents also observed that there was no fence around the perimeter of the property. Based on the agent’s observation during the

³ 47 U.S.C. § 503(b).

⁴ 47 U.S.C. § 312(f)(1).

⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

⁶ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁷ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) 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.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 9.

⁹ 47 C.F.R. § 73.49.

¹⁰ *Id.*

inspection on October 18, 2012, the fencing appeared to have been in a state of disrepair for an extended period of time. At a minimum, by Birach's own admission, the fencing was in a state of disrepair from October 16, 2012, when the fencing was damaged by the station engineer during maintenance work, to October 20, 2012, when Birach reports the fencing was repaired. Based on the evidence before us, we find that Birach apparently willfully and repeatedly violated Section 73.49 of the Rules by failing to enclose the Station WTOR's antenna structures within effective locked fences.¹¹

B. Proposed Forfeiture Amount

7. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for an AM fencing violation is \$7,000.¹² In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include 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 other such matters as justice may require.¹³ After consideration of these factors, we find that a \$3,000 upward adjustment in the base forfeiture amount is warranted. Birach previously received a *Notice of Apparent Liability for Forfeiture* for, *inter alia*, failure to enclose an antenna structure within an effective locked fence.¹⁴ The fact that Birach previously committed a similar violation demonstrates a disregard for the Commission's rules.¹⁵ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Birach is apparently liable for a total forfeiture in the amount of \$10,000.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Birach Broadcasting Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 73.49 of the Rules.¹⁶

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Birach

¹¹ On November 7, 2012, the Philadelphia Office received a letter from the WTOR station engineer stating that the fences around the three towers in the WTOR array had been sufficiently repaired. On November 16, 2012, the agent inspected the WTOR antenna array and found that the fences had been repaired and access to the base of all three towers in the WTOR antenna array was restricted.

¹² *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) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹³ 47 U.S.C. § 503(b)(2)(E).

¹⁴ See *Birach Broadcasting Corporation*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 5827 (Enf. Bur. 2012).

¹⁵ Although no forfeiture has been paid in the 2012 proceeding, the "underlying facts of [the] prior violation . . . show[] a pattern of non-complaint behavior" by Birach. See *Forfeiture Policy Statement*, 12 FCC Rcd at 17103, para. 34 ("[U]sing the underlying facts of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding does not cause the prejudice that Congress sought to avoid in Section [47 U.S.C.] 504(c)."); see also *Equity Communications LP*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8031, para. 7 (Enf. Bur. 2012) (using the underlying facts from a prior NAL to support an upward adjustment in the proposed forfeiture amount for an AM fencing violation from \$7,000 to \$10,000).

¹⁶ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 73.49.

Broadcasting Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Birach shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁷ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

11. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁸ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.¹⁹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047 and include the NAL/Account number referenced in the caption. Birach also shall e-mail the written response to NER-Response@fcc.gov.

13. 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.

¹⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹⁸ See 47 C.F.R. § 1.1914.

¹⁹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

14. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to Birach Broadcasting Corporation at 21700 Northwestern Highway, Suite 1190, Tower 14, Southfield, Michigan 48075, and to John C. Trent, Counsel for Birach Broadcasting Corporation, at Putbresi Hunsaker & Trent, P.C., 200 South Church Street, Woodstock, Virginia 22664.

FEDERAL COMMUNICATIONS COMMISSION

David C. Dombrowski
District Director
Philadelphia Office
Northeast Region
Enforcement Bureau