

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

In the Matter of)	
)	
Dalrymple Realty Corporation)	File No.: EB-FIELDNER-13-00009887
)	NAL/Acct. No.: 201432400006
Owner of Antenna Structure Number 1006946)	FRN: 00-0341-1279
Elmira, New York)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 9, 2014

Released: June 9, 2014

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

I. INTRODUCTION

1. We propose a penalty of \$10,000 against Dalrymple Realty Corporation (Dalrymple) for apparently failing to clean or repaint its antenna structure in Elmira, New York, as often as necessary to maintain good daytime visibility. Although FCC agents observed that white obstruction lighting was installed on the antenna structure for daytime visibility, the lighting was not operational on the day of the agents' inspection. Dalrymple informed the agents that the white obstruction lighting had been in place in lieu of painting for approximately ten years.

2. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Dalrymple, owner of antenna structure number 1006946 (Antenna Structure), located in Elmira, New York, apparently willfully and repeatedly violated Section 303(q) of the Communications Act, as amended (Act)¹, and Section 17.50 of the Commission's rules (Rules) by failing to clean or repaint the Antenna Structure as often as necessary to maintain good visibility. We conclude that Dalrymple is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

3. The Antenna Structure has an overall height above ground level of 97.5 meters and, according to its Antenna Structure Registration (ASR), was required to conform to the painting and lighting requirements of FAA Advisory Circular 70/7460-1F, FAA Chapters 3, 4, 5 and 9.² These requirements specify that the Antenna Structure must be painted and must display red obstruction lighting during the nighttime.

4. On July 11, 2013, at 4:52 p.m., an agent from the Philadelphia Office inspected the Antenna Structure and observed that the paint on the Antenna Structure was severely faded and flaking. The agent also observed that, although the ASR specified that the Antenna Structure must be painted, the Antenna Structure had a dual lighting system consisting of a white medium intensity strobe light at the top level for daytime visibility and red obstruction lights at the mid-level and top level for nighttime visibility. At the time of the inspection, however, the white medium intensity obstruction lighting on the Antenna

¹ 47 U.S.C. § 303(q).

² See 47 C.F.R. § 17.21(a) (requiring antenna structures more than 60.96 meters in height above the ground to be painted and lighted). See also Antenna Structure Registration database for antenna structure number 1006946.

Structure was not operating.³ The agent contacted the FAA and was informed that a Notice to Airmen (NOTAM) had not been issued for the Antenna Structure.⁴

5. Later that day, the agent spoke to a representative from T&K Communications, the entity that maintains the Antenna Structure for Dalrymple. The representative reported to the agent that the white obstruction lighting had been in place for daytime use in lieu of painting for approximately ten years. The T&K representative also informed the agent that Sound Communications, a tenant on the Antenna Structure, was monitoring the obstruction lighting on behalf of Dalrymple. The agent subsequently spoke to the station engineer for Sound Communications, who reported that Sound Communications made visual observations on a “casual” basis and that they were not aware of an outage of the white obstruction lighting.

6. In response to a Notice of Violation issued by the Philadelphia Office on July 24, 2013,⁵ Dalrymple reported that the white obstruction lighting outage was repaired on July 14, 2013, the remote monitoring system was installed, and an application was filed with the FAA requesting approval to use the white obstruction lighting during the daytime in lieu of paint.⁶ Dalrymple subsequently submitted FCC Form 854 notifying the FCC that the FAA approved a dual lighting system for the Antenna Structure.⁷

III. DISCUSSION

7. 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.⁸ 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.⁹ 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,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ The Commission may also assess a forfeiture for

³ The agent did not observe the Antenna Structure during the nighttime hours.

⁴ See 47 C.F.R. § 17.48 (requiring tower owners to notify the FAA immediately of any known outages of tower lighting lasting more than 30 minutes).

⁵ *Dalrymple Realty Corporation*, Notice of Violation, V2013324000033 (July 24, 2013) (on file in EB-FIELDNER-13-00009887).

⁶ Letter from David J. Dalrymple, Vice President, Dalrymple Realty Corporation, to David Dombrowski, District Director, Philadelphia Office, Northeast Region, Enforcement Bureau (August 12, 2013) (on file in EB-FIELDNER-13-00009887).

⁷ See Antenna Structure Registration Database, File No. A0904623, submitted May 8, 2014.

⁸ 47 U.S.C. § 503(b).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ 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 . . .”).

¹¹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388

violations that are merely repeated, and not willful.¹² The term “repeated” means the commission or omission of such act more than once or for more than one day.¹³

A. Failure to Maintain the Antenna Structure’s Paint to Ensure Good Visibility

8. The evidence in this case is sufficient to establish that Dalrymple violated Section 303(q) of the Act and Section 17.50 of the Rules.¹⁴ Section 303(q) of the Act states that antenna structure owners must maintain the painting and lighting of antenna structures as prescribed by the Commission.¹⁵ Section 17.50 of the Rules states that “Antenna structures requiring painting under this part shall be cleaned or repainted as often as necessary to maintain good visibility.”¹⁶ At the time of the inspection on July 11, 2013, the ASR database specified that the Antenna Structure must be painted for daytime visibility. The Agent observed that the overall condition of the paint on the Antenna Structure did not provide good visibility. The Agent later learned that Dalrymple had not painted the Antenna Structure since white obstruction lighting had been installed approximately ten years prior to the inspection on July 11, 2013. Based on the evidence before us, we find that Dalrymple apparently willfully and repeatedly violated Section 303(q) of the Act and Section 17.50 of the Rules by failing to clean and repaint the antenna structure as often as necessary to maintain good visibility.

B. Proposed Forfeiture and Reporting Requirement

9. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failure to comply with antenna structure marking and/or lighting is \$10,000.¹⁷ 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

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(1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹² 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).

¹³ 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.

¹⁴ Because the Antenna Structure’s ASR and the FAA “no hazard” determination at the time of inspection specified that the Antenna Structure must be painted, we conclude that it is appropriate here to consider the condition of the paint on the Antenna Structure, and not the white obstruction lighting, to determine Dalrymple’s compliance with our Rules. We note that, even if the Antenna Structure’s ASR and the FAA “no hazard” determination had specified white obstruction lighting, the proposed forfeiture would have been the same. That is, if the Antenna Structure’s ASR specified white obstruction lighting, we would have found Dalrymple apparently liable for a forfeiture in the amount of \$10,000 for willfully and repeatedly violating (1) Section 17.51(b) of the Rules, 47 C.F.R. § 17.51(b), for failing to exhibit continuously all medium intensity obstruction lighting, and (2) Section 17.47(a) of the Rules, 47 C.F.R. § 17.47(a), for failing to make daily observations of the lighting or install and maintain an automatic monitoring system. See e.g. *ACS Wireless, Inc.*, 2013 WL 5934048 (Enf. Bur. 2013).

¹⁵ 47 U.S.C. § 303(q).

¹⁶ 47 C.F.R. § 17.50.

¹⁷ *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.

to pay, and other such matters as justice may require.¹⁸ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Dalrymple is apparently liable for a total forfeiture in the amount of \$10,000.¹⁹

IV. ORDERING CLAUSES

10. 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, Dalrymple Realty Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 303(q) of the Act and Section 17.50 of the Commission's rules.²⁰

11. **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, Dalrymple Realty Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

12. 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. Dalrymple 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.²¹ 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.

¹⁸ 47 U.S.C. § 503(b)(2)(E).

¹⁹ We note that, while we consider the duration of the violation a serious aggravating factor, the harm from that extended violation is mitigated by the fact that the lighting has been in place for virtually the entire time and we therefore decline to impose here an upward adjustment to the base forfeiture amount. *Cf. e.g., Mt. Rushmore Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8263 (Enf. Bur. 2012) (imposed upward adjustment of \$4,000 for violation with base forfeiture of \$4,000 due to the ten-year duration of the violation).

²⁰ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.47(a), and 17.57.

²¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

13. 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. 20554.²² 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.

14. 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.²³ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, One Oxford Valley Building, Suite 404, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047 and include the NAL/Acct. No. referenced in the caption. Dalrymple also shall e-mail the written response to NER-Response@fcc.gov.

15. 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 principles (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.

16. **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 Dalrymple Realty Corporation at 2105 South Broadway, Pine City, New York, 14871.

FEDERAL COMMUNICATIONS COMMISSION

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

²² See 47 C.F.R. § 1.1914.

²³ 47 C.F.R. §§ 1.16, 1.80(f)(3).