

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

In the Matter of)	
)	
Birach Broadcasting Corporation)	File No.: EB-09-DT-0386; EB-FIELDNER-12-
)	00004564
Licensee of Station WCXI(AM))	NAL/Acct. No.: 201232360005
Fenton, Michigan)	FRN: 0003766847
)	Facility ID #: 10475

FORFEITURE ORDER

Adopted: February 9, 2015

Released: February 9, 2015

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. We impose a penalty of \$17,000 against Birach Broadcasting Corporation (Birach), licensee of AM Station WCXI in Fenton, Michigan (Station), for failing to enclose the Station's antenna structure within an effective locked fence and for failing to maintain and make available the issue/program lists in the Station's public inspection file.¹ Birach does not deny that the antenna structure was not properly enclosed and that the program lists were not available for inspection, but argues that it does not own the tower site and that the program lists were at the station just improperly organized. After reviewing Birach's response to the *NAL*, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$17,000 forfeiture the Bureau previously proposed.

II. BACKGROUND

2. In response to an interference complaint, an agent from the Enforcement Bureau's Detroit Office (Detroit Office) conducted an inspection of the Station's main studio with the station manager.² The agent reviewed the materials in the Station's public inspection file and found that the file did not contain any quarterly issue/program lists for the current license term. On a separate date, the agent returned to inspect the Station's two-tower array and observed that a portion of the fence had separated, resulting in a gap that allowed unrestricted access to the Antenna Structure and that there was no perimeter property fence surrounding the property.

3. On June 1, 2012, the Bureau issued the *NAL* proposing a \$17,000 forfeiture against Birach for its apparent willful and repeated violation of Sections 73.49, 73.3526(e)(12), and 73.3526(c)(1) of the Commission's rules (Rules),³ by failing to enclose the Station's antenna structure within an effective locked

¹ 47 C.F.R. §§ 73.49 and 73.3526(e)(12).

² The *NAL* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference. *Birach Broadcasting Corporation NAL*, Notice of Apparent Liability for Forfeiture, 27 FCC Red 5827, 5827-28, paras. 2-4 (Enf. Bur. 2012).

³ 47 C.F.R. §§ 73.49, 73.3526(e)(12), 73.3526(c)(1).

fence and failing to maintain and make available the issue/program lists in the Station's public inspection file.

4. On June 29, 2012, Birach filed a response to the *NAL*.⁴ Birach makes a number of arguments as to why the *NAL* should be cancelled or reduced, specifically stating that it does not own the towers used by the Station and therefore should "not be fined for something that is not [its] responsibility."⁵ Birach further states that while the program lists were not immediately available for inspection due to confusion over the proper preparation of the lists, they were in the Station and were subsequently properly reassembled and placed in the public inspection file.⁶ Birach also argues that a downward adjustment or cancellation is warranted because remedial action to address the violations has been made.⁷

III. DISCUSSION

5. The Bureau proposed a forfeiture in this case in accordance with Section 503(b) of the Act,⁸ Section 1.80 of the Rules,⁹ and the Commission's *Forfeiture Policy Statement*.¹⁰ When we assess forfeitures, Section 503(b)(2)(E) requires that we 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."¹¹ As discussed below, we have fully considered Birach's response to the *NAL*, but we find none of the arguments persuasive. We therefore affirm the \$17,000 forfeiture proposed in the *NAL*.

A. Responsibility to Enclose the Antenna Structure within an Effective Locked Fence Lies with the AM Licensee

6. Birach requests reduction or cancellation of the proposed forfeiture arguing that it does not own the towers used by the Station.¹² We decline to grant Birach's request to reduce or cancel the forfeiture. When adopting Section 73.49 of the Rules, the Commission stated that the AM antenna structure fencing requirement "is necessary to protect the general public."¹³ We have also warned that "[f]ailure to maintain an effective locked fence in accordance with Section 73.49 of the Rules constitutes a serious public safety issue because it exposes the public to hazardous electrical charge."¹⁴ Section 73.1 of the Rules states that "[t]his subpart contains those rules which apply exclusively to the AM broadcast

⁴ See Birach Broadcasting Corporation Response to Notice of Apparent Liability (June 29, 2012) (on file in EB-FIELDNER-12-00004564) (NAL Response).

⁵ See NAL Response at 2 (Birach notes that the towers and associated real estate are owned by Guy B. Pickhaver, not Birach).

⁶ NAL Response at 3.

⁷ *Id.*

⁸ 47 U.S.C. § 503(b).

⁹ 47 C.F.R. § 1.80.

¹⁰ *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*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹¹ 47 U.S.C. § 503(b)(2)(E).

¹² NAL Response at 2.

¹³ Review of Technical and Operational Regulations, 51 Fed. Reg. 2707 (Jan. 21, 1986).

¹⁴ *Greenwood Acres Baptist Church*, Memorandum Opinion and Order, 22 FCC Rcd 1442, 1445, para. 10 (Enf. Bur. 2007); see *Pilgrim Commc'ns, Inc.*, Forfeiture Order, 19 FCC Rcd. 12251, 12252, para. 6 (Enf. Bur. 2004) ("Effective base fencing is an important safety requirement to prevent physical contact with the . . . antenna structure.").

service.”¹⁵ This means that the fencing requirements contained in Section 73.49 of the Rules applies to AM licensees, not antenna structure owners.¹⁶ Part 17 of the Rules sets out the requirements for antenna structure owners.¹⁷ In this instance, the responsibility for complying with the fencing requirements of Section 73.49 of the Rules applies to Birach, not the antenna structure owner.¹⁸

B. Good Faith Penalty Reductions Apply to Corrective Actions Begun Prior to Notification of a Violation

7. Birach requests reduction of the proposed forfeiture, arguing that even though it does not own the towers, it made good faith efforts to repair the fence and have the lists reassembled and placed in the public inspection file immediately after receiving notice of the violations from the Detroit Office.¹⁹ While the Commission will generally reduce an assessed forfeiture based on the good faith corrective efforts of a violator, those corrective efforts must be taken *prior* to notification of the violation.²⁰ As the Commission has repeatedly stated, “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.”²¹ Consequently, we have reduced proposed forfeitures when a licensee demonstrates that it contracted to resolve a violation prior to inspection.²² Birach has presented no evidence that it undertook efforts to include the lists in its public inspection file prior to being contacted by the Detroit Office during the inspection. We therefore decline to reduce the proposed forfeiture.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,²³ and Section 1.80 of the Rules,²⁴ Birach Broadcasting Corporation, **IS LIABLE FOR A MONETARY**

¹⁵ 47 C.F.R. § 73.1.

¹⁶ 47 C.F.R. § 73.49.

¹⁷ See 47 C.F.R. §§ 17.1 *et seq.*

¹⁸ See *WSMN Broadcasting, LLC*, 21 FCC Rcd 11251 (Enf. Bur. 2006) (“responsibility for complying with Section 73.49 of the Rules does not shift to the antenna structure owner in cases where the licensee and the antenna structure owner are different entities . . . the licensee always remains the party responsible for complying with the AM fencing requirements.”)

¹⁹ NAL Response at 2-3.

²⁰ See, e.g., *Sutro Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15274, 15277, para. 10 (2004) (stating that the Commission will generally reduce a forfeiture “based on the good faith corrective efforts of a violator when those corrective efforts were taken prior to Commission notification of the violation”); *Catholic Radio Network of Loveland, Inc.*, Forfeiture Order, 29 FCC Rcd 121, 122–23, para. 5 (Enf. Bur. 2014) (“The Commission will generally reduce an assessed forfeiture based on the good faith corrective efforts of a violator when those corrective efforts were taken *prior* to Commission notification of the violation.”) (emphasis in original); *Argos Net, Inc.*, Forfeiture Order, 28 FCC Rcd 1126, 1127, para. 4 (Enf. Bur. 2013) (“[C]orrective action taken after notification or inspection by the Commission does not mitigate the violation . . .”).

²¹ See, e.g., *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099, 6099, para. 7 (1994) (citations omitted); *Exec. Broad. Corp.*, 3 FCC 2d 699, 700, para. 6 (1966) (“The fact that prompt corrective action was taken . . . does not excuse the prior violations.”).

²² See, e.g., *Bold Gold Media WBS, L.P.*, Forfeiture Order, 29 FCC Rcd 6016 (Enf. Bur. 2014) (reducing proposed forfeiture where licensee contracted to acquire required Emergency Alert System equipment prior to inspection).

²³ 47 U.S.C. § 503(b).

²⁴ 47 C.F.R. § 1.80.

FORFEITURE in the amount of seventeen thousand dollars (\$17,000) for violations of Sections 73.49, 73.3526(c)(1) and 73.3526(e)(12) of the Rules.²⁵

9. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release of this Forfeiture Order.²⁶ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁷

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 Broadcasting Corporation, shall send electronic notification of payment to NER-Response@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁸ When completing the 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 that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with completed Form 159) must be mailed to the 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, SW, Room 1-A625, Washington, D.C. 20554.²⁹ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

12. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Birach Broadcasting Corporation at 21700 Northwestern Highway, Tower 14, Southfield, Michigan 48075, and to John C. Trent, Counsel for Birach

²⁵ 47 U.S.C. § 503(b); 47 C.F.R. §§ 1.80, 73.49, 73.3526(c)(1), 73.3526(e)12.

²⁶ *Id.*

²⁷ 47 U.S.C. § 504(a).

²⁸ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁹ *See* 47 C.F.R. § 1.1914.

Broadcasting Corporation, at Law Offices of Putbrese Hunsaker & Trent, P.C., 200 South Church Street,
Woodstock, Virginia 22664.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt
Regional Director, Northeast Region
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