

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Sound Communications, LLC	)	File No.: EB-FIELDNER-13-00009899
Owner of Antenna Structure Number 1053420	)	NAL/Acct. No.: 201432400005
Licensee of AM Station WENY	)	FRN: 0019815109
Southport, New York	)	Facility ID No.: 71510

**FORFEITURE ORDER**

**Adopted: June 16, 2015**

**Released: June 16, 2015**

By the Regional Director, Northeast Region, Enforcement Bureau:

**I. INTRODUCTION**

1. We impose a penalty of \$7,000 against Sound Communications, LLC (Sound Communications) for failing to enclose its antenna structure for AM Station WENY within an effective locked fence. The Commission’s fencing rules protect the public by limiting access to areas with a high potential for radio frequency exposure. Sound Communications does not deny that its antenna structure was not properly enclosed, but argues that the proposed penalty must be cancelled because its violation was neither willful nor repeated. However, Sound Communications admits that it left its antenna structure fencing gate unlocked and the gate remained unlocked for several days. As a result, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$7,000 forfeiture the Enforcement Bureau previously proposed.

**II. BACKGROUND**

2. On July 11, 2013, an agent from the Philadelphia Office of the Enforcement Bureau (Bureau) observed that the padlock for the antenna fencing gate for AM Station WENY was unlocked, allowing unrestricted access to the antenna structure.<sup>1</sup> In response to a Notice of Violation,<sup>2</sup> Sound Communications stated that its station engineer deliberately left the fencing gate unlocked on July 5, 2013, to allow personnel from a tower repair company to access the site in order to finalize a bid for a tower repair project.<sup>3</sup>

3. On June 2, 2014, the Bureau issued the *NAL* proposing a \$7,000 forfeiture against Sound Communications for apparently willfully and repeatedly violating Section 73.49 of the Commission’s rules (Rules) by failing to enclose its antenna structure for AM Station WENY within an effective locked fence or other enclosure.<sup>4</sup> In its *NAL Response*, Sound Communications again admits that it left the

<sup>1</sup> *Sound Commc’ns, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5840, 5840, para. 3 (Enf. Bur. 2014) (*NAL*). In addition, there was no perimeter fence around the property where the antenna structure was located. *Id.* The *NAL* includes a more complete discussion of the facts and history of this case and is incorporated herein by reference.

<sup>2</sup> *See Sound Commc’ns, LLC*, Notice of Violation, V201332400035 (July 30, 2013) (on file in EB-FIELDNER-13-00009899).

<sup>3</sup> *NAL*, 29 FCC Rcd at 5841, para. 5 (citing Letter from Alisa R. Lahey, Drinker Biddle & Reath LLP, Counsel for Sound Communications LLC, to Philadelphia Office, Northeast Region, Enforcement Bureau (Aug. 16, 2013) (on file in EB-FIELDNER-13-00009899)).

<sup>4</sup> *Id.* at 5842, paras. 7–8; 47 C.F.R. § 73.49.

fencing gate unlocked on July 5, 2013 to permit a repair company to access the site and did not relock the gate until after being contacted by a Bureau agent on July 12, 2013.<sup>5</sup> However, Sound Communications argues that the proposed forfeiture should be vacated because its failure to lock the gate was not “willful,” but rather the result of its “inadvertent error to have incorrectly assumed that the tower crew would lock the fence around the Tower following departure.”<sup>6</sup> Sound Communications also argues that its failure to lock the fencing gate was not “repeated” because it took immediate action to lock the fencing gate after receiving notice from the Bureau agent on July 12, 2013.<sup>7</sup>

### III. DISCUSSION

4. The Bureau proposed a forfeiture in this case in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),<sup>8</sup> Section 1.80 of the Rules,<sup>9</sup> and the Commission’s *Forfeiture Policy Statement*.<sup>10</sup> When we assess forfeitures, Section 503(b)(2)(E) of the Act 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.”<sup>11</sup> As discussed below, we have fully considered Sound Communication’s *NAL Response*, but find none of its arguments persuasive. We therefore affirm the \$7,000 forfeiture proposed in the *NAL*.

5. We affirm the *NAL*’s finding that Sound Communications failure to enclose its antenna structure within an effective locked fence was willful.<sup>12</sup> As Sound Communication’s acknowledges in its *NAL Response*, the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>13</sup> Consequently, “[i]t is not necessary that the violation be intentional. All that is necessary is that the licensee knew it was doing the act in question.”<sup>14</sup> Sound Communications does not dispute that it consciously and deliberately left its fencing gate unlocked

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<sup>5</sup> Sound Communications, LLC, Response to Notice of Apparent Liability for Forfeiture at 1–2 (July 1, 2014) (on file in EB-FIELDNER-13-00009899) (*NAL Response*).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> 47 U.S.C. § 503(b).

<sup>9</sup> 47 C.F.R. § 1.80.

<sup>10</sup> *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).

<sup>11</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>12</sup> *NAL*, 29 FCC Rcd at 5842, para. 7.

<sup>13</sup> *NAL Response* at 2; 47 U.S.C. § 312(f)(1).

<sup>14</sup> *PJB Commc’ns of Va., Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2088, para. 5 (1992). *See, e.g., Tidewater Commc’ns, LLC*, Order on Review, 25 FCC Rcd 1675, 1676, para. 5 (2010) (“To be willful, the violator must consciously commit or omit certain actions and need not be aware that such actions violate the Rules.”); *Assist Wireless, LLC*, Forfeiture Order, DA 15-650, para. 7 (Enf. Bur. June 2, 2015) (“In the context of a forfeiture action, the term ‘willful’ means that the violator knew it was taking (or not taking) the action in question, irrespective of any intent to violate the law. Thus, a willfulness determination does not require a finding that the rule violation was intentional.”); *Am. Samoa Telecomms. Auth.*, Forfeiture Order, 27 FCC Rcd 13174, 13180, para. 8 (Enf. Bur. 2012) (same); *Princess K Fishing Corp.*, Forfeiture Order, 24 FCC Rcd 2606, 2608–09, para. 9 (Enf. Bur. 2009) (finding licensee does not need to demonstrate a *mens rea* to commit a violation in order to find such violation willful).

on July 5, 2013.<sup>15</sup> Such a failure to lock the fencing gate for an antenna structure violates Section 73.49 of the Rules.<sup>16</sup>

6. Although Sound Communications states that the unlocked fence resulted from its “inadvertent error” in assuming that the repair crew would lock the fencing gate after completing its work,<sup>17</sup> we have repeatedly held that “[i]nadvertent mistakes are not mitigating circumstances that can serve to justify a forfeiture reduction.”<sup>18</sup> The fact that Sound Communication incorrectly concluded that the repair crew would lock the fencing gate does not absolve it of liability for its violation.<sup>19</sup> Similarly, the fact that the fencing gate was left unlocked by a third party does not diminish Sound Communications’s liability for the violation.<sup>20</sup> Even in cases where an antenna structure fencing violation resulted from extreme weather and other “acts of God” outside of the tower owner’s control, we have still assessed penalties.<sup>21</sup> The Commission may cancel a proposed penalty shows that antenna fencing was unlocked or damaged “just prior” to the Commission inspection, but Sound Communications concedes that it left the fence unlocked and did not check to see if the gate was relocked following the repair crew’s visit for approximately a week.<sup>22</sup>

7. Even if we were to accept Sound Communication’s argument that its conduct was not willful, it was nevertheless repeated, which provides an independent basis for assessing the forfeiture.<sup>23</sup>

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<sup>15</sup> *NAL Response* at 1–2 (“On July 5, Station personnel left the padlocked gate around the Tower unlocked so as to allow the repair company access to the site during their visit.”).

<sup>16</sup> *E.g., Equity Commc’ns LP*, Forfeiture Order, 29 FCC Rcd 11124, 11126, para. 11 (Enf. Bur. 2014) (imposing forfeiture where unlocked fencing gate allowed unrestricted access to antenna structure).

<sup>17</sup> *NAL Response* at 1–2.

<sup>18</sup> *W. Slope Commc’ns, LLC*, Forfeiture Order, 29 FCC Rcd 10470, 10471, para. 6 (Enf. Bur. 2014). *See, e.g., Steckline Commc’ns, Inc.*, Forfeiture Order, 29 FCC Rcd 1082, 1084, para. 5 (Enf. Bur. 2014) (“[I]nadvertent mistakes neither excuse a rule violation nor mitigate a forfeiture liability.”); *Emigrant Storage LLC*, Forfeiture Order, 27 FCC Rcd 8917, 8919, para. 6 (Enf. Bur. 2012) (“[I]t is well established that administrative oversight or inadvertence is not a mitigating factor.”).

<sup>19</sup> *See Tidewater Commc’ns*, 25 FCC Rcd at 1676, para. 5 (finding fact that employee came to an incorrect conclusion regarding the lighting status of an antenna structure did not excuse the violation and that even a “mistake” can be willful if a party “consciously and deliberately made a determination” resulting in a violation).

<sup>20</sup> *See Steckline Commc’ns*, 29 FCC Rcd at 1084, para. 5 (finding violations willful even in the event of third-party tampering with station equipment because the party continued to operate the station at variance from authorized parameters).

<sup>21</sup> *See, e.g., Steckline Commc’ns, Inc.*, Forfeiture Order, 29 FCC Rcd 11625, 11626–27, para. 5. (Enf. Bur. 2014) (imposing \$5,600 forfeiture for antenna structure fencing violations allegedly caused by “wind storms”); *Alaska Integrated Media, Inc.*, Forfeiture Order, 29 FCC Rcd. 13578, 13579–80, para. 6 (Enf. Bur. 2014) (imposing \$5,600 forfeiture for antenna structure fencing violations allegedly caused by weather damage); *JMK Commc’ns, Inc.*, Forfeiture Order, 28 FCC Rcd 6215, 6216–17, para. 6 (Enf. Bur. 2013) (imposing \$7,000 forfeiture for antenna structure fencing violations that purportedly resulted from an “unforeseeable natural disaster” that caused “extensive flooding”); *see also Catholic, Apostolic & Roman Catholic Church in Puerto Rico*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 342, 343–44, para. 5 (Enf. Bur. 2014) (proposing \$7,000 forfeiture for antenna structure fencing violations that purportedly resulted from “heavy storms”).

<sup>22</sup> *See, e.g., Vernon Broad., Inc.*, Memorandum Opinion and Order, 60 Rad. Reg. 2d 1275 (1986) (cancelling a \$1,000 AM tower fencing violation where the evidence indicated that the fencing was vandalized just prior to inspection).

<sup>23</sup> *See Infinity Broad. Corp. of Fla.*, Order on Review, 24 FCC Rcd 4270, 4279, para. 25 (2009) (where there is no dispute that a licensee has repeatedly violated the Rules, the imposition of a forfeiture does not require a showing of willfulness). *See* 47 U.S.C. § 503(b) (“Any person who is determined by the Commission . . . to have willfully *or* repeatedly failed to comply . . . shall be liable to the United States for a forfeiture penalty.”) (emphasis added).

The Act defines the term “repeated” as the commission or omission an act “more than once or, if such commission or omission is continuous, for more than one day.”<sup>24</sup> As Sound Communication’s recognizes in its *NAL Response*, it unlocked the fencing gate on July 5, 2013, and it remained unlocked until July 12, 2013.<sup>25</sup> A violator does not need to be aware of a violation in order to find the violation repeated.<sup>26</sup> To the extent Sound Communications is suggesting that it deserves a forfeiture reduction in light of its timely efforts to correct the violation, we note that the Commission will generally reduce an assessed forfeiture based on the good faith corrective efforts of a violator only when those corrective efforts are taken *prior* to Commission notification of the violation.<sup>27</sup> The Commission has made it clear that “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.”<sup>28</sup> As a result, we affirm the *NAL*’s finding that Sound Communications failure to enclose its antenna structure within an effective locked fence was repeated.<sup>29</sup>

8. Based on the record before us and taking into account applicable statutory factors and the Commission’s *Forfeiture Policy Statement*, we find that Sound Communications is liable for a total forfeiture of \$7,000.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,<sup>30</sup> and Section 1.80 of the Rules,<sup>31</sup> Sound Communications **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willfully and repeatedly violating Section 73.49 of the Rules.<sup>32</sup>

10. 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.<sup>33</sup> 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.<sup>34</sup>

11. 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. Sound

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<sup>24</sup> 47 U.S.C. § 312(f)(2). See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

<sup>25</sup> *NAL Response* at 1–2.

<sup>26</sup> See, e.g., *Catholic Radio Network of Loveland, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 988, 989, para. 4 (Enf. Bur. 2015) (finding violation repeated even when party was purportedly unaware of overpower station operation due to faulty equipment).

<sup>27</sup> See, e.g., *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 . . .”).

<sup>28</sup> See, e.g., *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099, 6099, para. 7 (1994).

<sup>29</sup> *NAL*, 29 FCC Rcd at 5842, para. 7.

<sup>30</sup> 47 U.S.C. § 503(b).

<sup>31</sup> 47 C.F.R. § 1.80.

<sup>32</sup> 47 C.F.R. § 73.49.

<sup>33</sup> 47 C.F.R. § 1.80.

<sup>34</sup> 47 U.S.C. § 504(a).

Communications, LLC, shall send electronic notification of payment to [NER-Response@fcc.gov](mailto: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.<sup>35</sup> 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.

12. 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, DC 20554.<sup>36</sup> 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](mailto:ARINQUIRIES@fcc.gov).

13. **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 Sound Communications, LLC at 15 Woodland Way, Painted Post, New York 14870 and to Mark B. Denbo, Esq., Counsel for Sound Communications, LLC, at Smithwick & Belenduik, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, DC 20016.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt  
Regional Director  
Northeast Region  
Enforcement Bureau

<sup>35</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>36</sup> See 47 C.F.R. § 1.1914.