

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

In the Matter of)	
)	
Omaha Dirt and Wire LLC)	File No.: EB-FIELDSCR-13-00010381
Owner of Antenna Structure No. 1027702)	NAL/Acct. No.: 201432560003
Omaha, NE)	FRN: 0016289670
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 22, 2014

Released: January 22, 2014

By the District Director, Kansas City Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Omaha Dirt and Wire LLC (ODW), owner of antenna structure 1027702 in Omaha, NE (the Antenna Structure), apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act),¹ and Section 17.50 of the Commission's rules (Rules),² by failing to clean or repaint the tower as often as necessary to maintain good visibility. We conclude that ODW is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. The Antenna Structure is 64.6 meters above ground in overall height and is required to be painted.³ On August 1, 2013, an agent with the Enforcement Bureau's Kansas City Office (Kansas City Office) inspected the Antenna Structure at approximately 11 A.M. C.S.T. and observed that the white paint was severely faded with large areas of rust showing in all of the white bands and the aviation orange paint was severely faded.⁴ The paint on the Antenna Structure had deteriorated to such a degree that the structure's visibility from several hundred feet was significantly impaired. On August 14, 2013, the Kansas City Office issued a Notice of Violation (*NOV*) to ODW for, among other things, failing to repaint the Antenna Structure.⁵ On September 13, 2013, ODW responded to the *NOV*, stating that the Antenna Structure had been fully repainted.⁶ ODW stated that upon its own inspection prior to the repainting, the

¹ 47 U.S.C. § 303(q).

² 47 C.F.R. § 17.50.

³ See Antenna Structure Registration database for antenna structure number 1027702. See also 47 C.F.R. § 17.21(a) (requiring antenna structures to be painted and lighted when they exceed 60.96 meters in height above ground).

⁴ The agent photographed areas of the Antenna Structure showing significant rust in the white bands and faded aviation orange paint using a digital zoom camera and image stabilizer. (photographs on file in EB-FIELDSCR-13-00010381).

⁵ *Omaha Dirt and Wire LLC*, Notice of Violation, NOV No. 201332560031 (Aug. 14, 2013).

⁶ Letter from Susan A. Marshall, Counsel for Omaha Dirt and Wire LLC, to Ronald D. Ramage, District Director, Kansas City Office, South Central Region, Enforcement Bureau (Sept. 13, 2013) (*LOI Response*). Agents from the Kansas City Office confirmed that the Antenna Structure was repainted by comparing photographs of the structure taken by Google Earth on March 27, 2012 and September 21, 2013. The paint on the more recent photograph is

(continued...)

“white band had many areas where dark color (possibly rust or lack of paint) were showing through. . . . I will agree with the agent that the Tower was certainly at, or possibly past, the need for repainting. . . . I am not sure that the tower was in violation, but, on close inspection, it certainly was close.”⁷

III. DISCUSSION

3. 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 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

4. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.¹⁴ 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.”¹⁵ At the time of inspection on August 1, 2013, the overall condition of the paint

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exponentially more vivid than the paint on the previous photograph. (photographs on file in EB-FIELDSCR-13-00010381).

⁷ *LOI Response* at 2.

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 (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 47 U.S.C. § 303(q).

¹⁵ 47 C.F.R. § 17.50.

on the Antenna Structure did not provide good visibility. The agent noted, and ODW admitted, the presence of a large number of dark areas in the white bands due to rust or missing paint. In addition, the aviation orange sections of paint were severely faded. The condition of the paint was so deteriorated that the agent concluded the Antenna Structure had not been clearly visible for more than one day, as a result of ODW's decision not to repaint the Antenna Structure until after the agent's inspection. Based on the evidence before us, we find that ODW 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

5. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed marking is \$10,000.¹⁶ 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.¹⁷ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that ODW is apparently liable for a total forfeiture in the amount of \$10,000.

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Rules, Omaha Dirt and Wire LLC 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 Rules.¹⁸

7. **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, Omaha Dirt and Wire LLC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

8. 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. Omaha Dirt and Wire LLC shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁹ 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

¹⁶ *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.

¹⁷ 47 U.S.C. § 503(b)(2)(E).

¹⁸ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.50.

¹⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

9. 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. 20554.²⁰ 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.

10. 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.²¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Kansas City Office, 520 NE Colbern Rd., 2nd Floor, Lees Summit, MO, 64086, and include the NAL/Acct. No. referenced in the caption. Omaha Dirt and Wire LLC also shall e-mail the written response to SCR-Response@fcc.gov.

11. 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.

²⁰ See 47 C.F.R. § 1.1914.

²¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

12. **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 Omaha Dirt and Wire LLC at P.O. Box 11060 Jackson, WY 83002 and to its counsel, Susan A. Marshall, Fletcher, Heald and Hildreth, at 1300 North 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Ronald D. Ramage
District Director
Kansas City Office
South Central Region
Enforcement Bureau