

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

In the Matter of	)	
	)	
Duhamel Broadcasting Enterprises	)	File No.: EB-FIELDWR-13-00010468
	)	NAL/Acct. No.: 201432800004
Owner of Antenna Structure Number 1042912	)	FRN: 0002433340
Rapid City, South Dakota	)	

**FORFEITURE ORDER**

**Adopted: January 8, 2015**

**Released: January 9, 2015**

By the Regional Director, Western Region, Enforcement Bureau:

**I. INTRODUCTION**

1. We impose a penalty of \$8,000 against Duhamel Broadcasting Enterprises (Duhamel) for failing to ensure that its antenna structure was properly illuminated and notify the Federal Aviation Administration (FAA) of a known light outage. Duhamel seeks cancellation or reduction of the proposed forfeiture because it mistakenly believed that the FAA granted its request to extinguish the lights on the center antenna structure in its three-tower array and took immediate action to resolve the outage. We find that Duhamel's mistaken interpretation of the FAA's determination, even if inadvertent, does not excuse the violations or justify a forfeiture reduction or cancellation. However, we find that a forfeiture reduction is warranted based on Duhamel's history of compliance with the Commission's rules.

2. Specifically, we issue a monetary forfeiture to Duhamel, owner of antenna structure number 1042912 in Rapid City, South Dakota (Antenna Structure), for willfully and repeatedly violating Section 303(q) of the Communications Act of 1934, as amended (Act),<sup>1</sup> and Sections 17.23 and 17.48(a) of the Commission's rules (Rules).<sup>2</sup>

**II. BACKGROUND**

3. On June 19, 2014, the Enforcement Bureau's Denver Office issued a Notice of Apparent Liability for Forfeiture and Order (*NAL*) proposing a \$10,000 forfeiture against Duhamel for failing to exhibit the Antenna Structure's required red obstruction lighting and notify the FAA of a known lighting outage on the Antenna Structure.<sup>3</sup> In its *NAL Response*, Duhamel acknowledges that the lights on the Antenna Structure were not illuminated, but explains that it previously sought permission from the FAA and state authorities to extinguish the lights on the center tower while maintaining lighting on the two end

<sup>1</sup> 47 U.S.C. § 303(q).

<sup>2</sup> 47 C.F.R. §§ 17.23, 17.48(a). The Commission recently amended Sections 17.23 and 17.48 of the Rules. *See 2004 and 2006 Biennial Regulatory Review – Streamlining and Other Revisions of Parts 1 and 17 of the Commission's Rules Governing Construction, Marking and Lighting of Antenna Structures*, Report and Order, 29 FCC Rcd 9787 (2014). The Rules cited to in this Forfeiture Order, however, were the Rules in effect at the time of the violations.

<sup>3</sup> *Duhamel Broadcasting Enterprises*, Notice of Apparent Liability for Forfeiture and Order, 29 FCC Rcd 7327 (Enf. Bur. 2014) (*NAL*). A recitation of the facts of this case can be found in the *NAL* and is incorporated herein by reference.

structures of the tower array.<sup>4</sup> Duhamel argues that it understood the FAA's requirement that "the structure should be marked/and/or lighted . . ."<sup>5</sup> to apply only to the two end structures of the tower array, given that the FAA did not specifically deny Duhamel's request to extinguish the lights on the Antenna Structure.<sup>6</sup> Duhamel contends that this "good faith misunderstanding," combined with its immediate efforts to remedy the violation warrant a forfeiture cancellation or reduction.

### III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>7</sup> Section 1.80 of the Rules,<sup>8</sup> and the *Forfeiture Policy Statement*.<sup>9</sup> In examining Duhamel's *NAL Response*, Section 503(b)(2)(E) of the Act requires that the Commission 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 other such matters as justice may require.<sup>10</sup> As discussed below, we have fully considered Duhamel's *NAL Response* in light of these statutory factors and find that reduction of the proposed forfeiture is warranted.

5. Duhamel does not deny any of the facts in the *NAL* and we therefore affirm the *NAL*'s findings that Duhamel willfully and repeatedly violated Section 303(q) of the Act and Sections 17.23 and 17.48(a) of the Rules by failing to exhibit required red obstruction lighting on the Antenna Structure during nighttime hours and immediately notify the FAA of the light outage.<sup>11</sup> In its *NAL Response*, Duhamel requests reduction or cancellation of the proposed forfeiture because Duhamel mistakenly believed that the FAA granted its request to extinguish the lights on the Antenna Structure while maintaining lighting on the two end structures of its tower array.<sup>12</sup> As explained in the *NAL*, however, even if Duhamel received incorrect guidance orally from an FAA representative that the proposed extinguishment would be unobjectionable, the FAA formally denied its request to keep the Antenna Structure unlit in both 2005 and 2013.<sup>13</sup> Each time, the FAA's determination stated that lighting and marking must be maintained on "the structure," meaning the Antenna Structure. Duhamel's incorrect assumption that the lighting requirement only applied to the two end structures of its tower array, even if inadvertent, does not present mitigating circumstances that justify a forfeiture reduction.<sup>14</sup> As a

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<sup>4</sup> See Response of Duhamel Broadcasting Enterprises to Denver Office, Western Region, Enforcement Bureau (Jul. 21, 2014) (on file in EB-FIELDWR-13-00010468) (*NAL Response*).

<sup>5</sup> See FAA Aeronautical Study No. 2005-AGL-2629-OE (issued June 2, 2005) (on file in EB-FIELDWR-13-00010468).

<sup>6</sup> *NAL Response* at 1–4.

<sup>7</sup> 47 U.S.C. § 503(b).

<sup>8</sup> 47 C.F.R. § 1.80.

<sup>9</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), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

<sup>10</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>11</sup> See *NAL supra* note 3.

<sup>12</sup> *NAL Response* at 1–4.

<sup>13</sup> See *NAL*, 29 FCC Rcd at 7329, para. 8.

<sup>14</sup> See, e.g., *S. Cal. Broad.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387, para. 3 (1991) ("[I]nadvertence . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance"); *W. Slope Commc'ns, LLC*, Forfeiture Order, 29 FCC Rcd 10470, 10471, para. 6 (Enf. Bur. 2014) ("Inadvertent mistakes are not mitigating circumstances that can serve to justify a forfeiture reduction."); *Emigrant Storage LLC*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8917, 8920, para. 9 (Enf. Bur. 2012) (declining to downwardly adjust a forfeiture where the violation resulted from oversight and a change in personnel).

Commission licensee, Duhamel is charged with knowledge of the full range of its obligations under the Rules.<sup>15</sup>

6. Duhamel also states that it “immediately took steps to restore the lighting as appropriate, demonstrating its intent and efforts to ensure compliance and safety.”<sup>16</sup> The Commission has determined 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>17</sup> Consequently, we decline to reduce the proposed forfeiture based on Duhamel’s corrective efforts undertaken *after* being notified of the violation by the Denver Office. We note, however, that Duhamel has a history of compliance with the Rules. Therefore, after consideration of the entire record and the factors listed above, we find that a forfeiture in the amount of \$8,000 is warranted.<sup>18</sup>

#### IV. ORDERING CLAUSES

7. 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(f)(4) of the Rules, Duhamel Broadcasting Enterprises **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for violations of Section 303(q) of the Act and Sections 17.23 and 17.48(a) of the Rules.<sup>19</sup>

8. 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 date of this Forfeiture Order.<sup>20</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>21</sup> Duhamel Broadcasting Enterprises shall send electronic notification of payment to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov) on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>22</sup> 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.

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<sup>15</sup> *Discussion Radio, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 7433, 7437, para. 12 (2004); *W. Slope Commc’ns*, 29 FCC Rcd at 10471, para. 6.

<sup>16</sup> *NAL Response* at 4.

<sup>17</sup> See, e.g., *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099, 6099, para. 7 (1994) (citations omitted); *Exec. Broad. Corp.*, Memorandum Opinion and Order, 3 FCC 2d 699, 700, para. 6 (1966) (“The fact that prompt corrective action was taken . . . does not excuse the prior violations.”).

<sup>18</sup> See, e.g., *Centro Colegial Cristiano, Inc.*, Forfeiture Order, 28 FCC Rcd 14734 (Enf. Bur. 2013) (proposed forfeiture reduced based on history of compliance with the Rules).

<sup>19</sup> 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 17.23, 17.48(a).

<sup>20</sup> 47 C.F.R. § 1.80.

<sup>21</sup> 47 U.S.C. § 504(a).

<sup>22</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- 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.<sup>23</sup> 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](mailto:ARINQUIRIES@fcc.gov).

10. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Duhamel Broadcasting Enterprises, 518 St. Joseph Street, Rapid City, SD 57701, and its counsel, Lauren Lynch Flick, Esquire, Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW, Washington, D.C., 20037-1122.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch  
Regional Director, Western Region  
Enforcement Bureau

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<sup>23</sup> See 47 C.F.R. § 1.1914.