

**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	)	
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER**

**Adopted: June 18, 2014**

**Released: June 19, 2014**

By the District Director, Denver Office, Western Region, Enforcement Bureau:

**I. INTRODUCTION**

1. We propose a penalty of \$10,000 against Duhamel Broadcasting Enterprises (Duhamel), for failing to ensure that its antenna structure was properly illuminated. Although Duhamel believed that the structure did not require lighting because of its position in a three-tower array, the Federal Aviation Administration (FAA) notified Duhamel officially that lighting was required for the antenna structure. Given that public safety is at risk when antenna structures are not properly illuminated, Duhamel's failure to light the structure after the FAA notification warrants a significant penalty.

2. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Duhamel, owner of antenna structure number 1042912 in Rapid City, South Dakota (Antenna Structure), apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act), and Sections 17.23 and 17.48(a) of the Commission's rules (Rules),<sup>1</sup> by failing to exhibit required lighting on the Antenna Structure during nighttime hours and for failure to notify the FAA immediately that the Antenna Structure was not lit. We conclude that Duhamel is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

**II. BACKGROUND**

3. The Antenna Structure is 93.8 meters in overall height above ground level and is required to be lighted at nighttime.<sup>2</sup> Specifically, the structure is required to be painted and exhibit red lights at nighttime.

4. On August 2, 2013, an agent from the Enforcement Bureau's Denver Office (Denver Office) inspected the Antenna Structure during nighttime hours and observed that it was not lit and that a Notice to Airmen (NOTAM) had not been issued to warn pilots of the outage.<sup>3</sup> On August 8, 2013, the agent contacted Duhamel, informing its representative that the Antenna Structure was required to be lit and

<sup>1</sup> 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.23, 17.48(a).

<sup>2</sup> See Antenna Structure Registration (ASR) database for antenna structure number 1042912. The relevant FAA recommendations for the Antenna Structure include Chapters 3, 4, 5, and 13 of FAA Circular Number 70/7460-1J. Chapter 5 requires red obstruction lighting.

<sup>3</sup> See 47 C.F.R. § 17.48 (requiring antenna structure owners to notify the FAA immediately of any known outages of antenna structure lighting lasting more than 30 minutes). The agent requested a NOTAM be issued for the Antenna Structure immediately.

that a nighttime observation of the structure found the structure to be unlit. Duhamel told the agent that the Antenna Structure lights were intentionally turned off in 2005 and that it had not been lit since that time. After that conversation, Duhamel turned on the lights on the structure.

5. On September 12, 2013, the Denver Office issued Duhamel a Notice of Violation (NOV) for failing to exhibit required lights on the Antenna Structure during nighttime.<sup>4</sup> On October 25, 2013, Duhamel submitted a response to the NOV acknowledging that the Antenna Structure lighting was extinguished, explaining that it had received an informal opinion from an FAA representative in 2005 that extinguishing the red lighting on the Antenna Structure “likely would not be objectionable” given its position as the center tower in a three-tower array.<sup>5</sup> Duhamel also stated that it would file a request with the FAA to have the lighting requirement removed for the Antenna Structure.<sup>6</sup> In response to Duhamel’s request, the FAA issued a study requiring the Antenna Structure “to be marked/lighted utilizing Red lights and paint.”<sup>7</sup>

### III. DISCUSSION

6. Section 503(b) of the 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>11</sup> The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.<sup>12</sup> The term “repeated” means the commission or omission of such act more than once or for more than one day.<sup>13</sup>

---

<sup>4</sup> *Duhamel Broadcasting Enterprises*, Notice of Violation, V201332800064 (September 12, 2013) (on file in EB-FIELDWR-13-00010468).

<sup>5</sup> See Letter from Duhamel Broadcasting Enterprises, to Denver Office at 2 (October 25, 2013) (on file in EB-FIELDWR-13-00010468) (NOV Response). Duhamel explains that after informal discussions with the FAA representative it filed a “Notice of Proposed Construction or Alteration” with the FAA requesting the lighting requirement for the Antenna Structure be removed. *Id.* In response to this request, the FAA issued a Determination of No Hazard to Air Navigation in Aeronautical Study No. 2005-AGL-2629-OE on June 2, 2005, which retained the requirement of paint and red lighting on the Antenna Structure (2005 FAA Study).

<sup>6</sup> NOV Response at 2.

<sup>7</sup> See Aeronautical Study No. 2013-AGL-10569-OE, issued Jan. 27, 2014 (2013 FAA Study).

<sup>8</sup> 47 U.S.C. § 503(b).

<sup>9</sup> 47 U.S.C. § 312(f)(1).

<sup>10</sup> H.R. Rep. No. 97-765, 97<sup>th</sup> 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 . . .”).

<sup>11</sup> See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

<sup>12</sup> 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

(continued....)

**A. Failure to Exhibit Required Lighting on the Antenna Structure and Notify the FAA of the Light Outage**

7. 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.<sup>14</sup> Section 17.23 of the Rules requires that “[u]nless otherwise specified by the Commission, each new or altered antenna structure . . . must conform to the FAA’s painting and lighting recommendations set forth on the structure’s FAA determination of ‘no hazard.’”<sup>15</sup> Section 17.48(a) of the Rules states that owners of antenna structures “[s]hall report immediately by telephone or telegraph to the nearest Flight Service Station or office of the Federal Aviation Administration any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected with 30 minutes.”<sup>16</sup>

8. The evidence in this case is sufficient to establish that Duhamel violated Section 303(q) of the Act and Sections 17.23 and 17.48(a) of the Rules. The Antenna Structure is required to be lit during nighttime hours.<sup>17</sup> On August 2, 2013, an agent from the Denver Office inspected the Antenna Structure during nighttime hours and observed that it was not lit and that a NOTAM had not been issued to warn pilots of the outage. On August 8, 2013, Duhamel informed the agent that the Antenna Structure’s lights were turned off in 2005, and that the Antenna Structure had not been lit since that time. In its NOV Response, Duhamel acknowledges that the Antenna Structure was not lit, explaining that it had relied upon its understanding of an oral conversation with an FAA representative that extinguishing the red lighting on the Antenna Structure “likely would not be objectionable.”<sup>18</sup> Duhamel filed a request with the FAA to eliminate the lighting requirement in 2005, but the request was denied.<sup>19</sup> After receipt of the NOV, Duhamel again filed for the requested lighting change, but the FAA again denied the request.<sup>20</sup> Based on the evidence before us, we find that Duhamel apparently 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 lighting on the Antenna Structure during nighttime hours and notify the FAA immediately of the lighting outage.

---

(...continued from previous page)  
repeated signal leakage).

<sup>13</sup> 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, para. 9.

<sup>14</sup> 47 U.S.C. § 303(q).

<sup>15</sup> 47 C.F.R. § 17.23.

<sup>16</sup> 47 C.F.R. § 17.48(a).

<sup>17</sup> *See supra* note 2.

<sup>18</sup> NOV Response at 2.

<sup>19</sup> 2005 FAA Study.

<sup>20</sup> 2013 FAA Study at 3 (“Based on this evaluation, we are unable to accommodate your request. In order to meet shielding criteria there must be at least one shielding structure of the same and/or greater height situated on at least ‘THREE SIDES’ of the shielded structure at a horizontal distance of not more than 500 feet. The structure should continue to be marked/lighted in accordance with FAA Advisory circular 70/7460-1K Change 2, utilizing paint/red lights - Chapters 3(Marked),4,5(Red), & 12.”).

## 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 failing to comply with prescribed lighting is \$10,000.<sup>21</sup> 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.<sup>22</sup> Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Duhamel is apparently liable for a total forfeiture in the amount of \$10,000.

10. We direct Duhamel to submit a written statement, pursuant to Section 1.16 of the Rules,<sup>23</sup> signed under penalty of perjury by an officer or director of Duhamel, stating that it has updated the ASR database for the Antenna Structure to reflect the requirements set forth in the 2013 FAA Study.<sup>24</sup> This statement must be provided to the Denver Office at the address listed in paragraph 13 within thirty (30) days of the release date of this NAL. Failure to update the registration in the ASR database for the Antenna Structure may result in additional enforcement action.

## IV. ORDERING CLAUSES

11. 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, Duhamel Broadcasting Enterprises 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 Communications Act of 1934, as amended, and Sections 17.23 and 17.48(a) of the Commission's Rules.<sup>25</sup>

12. **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 and Order, Duhamel Broadcasting Enterprises **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. **IT IS FURTHER ORDERED** that Duhamel Broadcasting Enterprises **SHALL SUBMIT** a written statement, as described in paragraph 10 above, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Denver District Director, Denver Office, One Denver Federal Center, Building 1A, PO Box 25446, Lakewood, CO 80225. Duhamel Broadcasting Enterprises shall also e-mail the written statement to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov).

14. 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. Duhamel shall also send electronic notification on the date said payment is made to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov). Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>26</sup> When

---

<sup>21</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*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

<sup>22</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>23</sup> 47 C.F.R. § 1.16.

<sup>24</sup> *See supra* note 7.

<sup>25</sup> 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.23, 17.48(a).

<sup>26</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

15. 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>27</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).

16. 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 Commission’s Rules.<sup>28</sup> Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver Director Office, One Denver Federal Center, Building 1A, PO Box 25446, Lakewood, CO 80225, and include the NAL/Acct. No. referenced in the caption. Duhamel Broadcasting Enterprises also shall e-mail the written response to [WR-Response@fcc.gov](mailto:WR-Response@fcc.gov).

17. 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.

---

<sup>27</sup> See 47 C.F.R. § 1.1914.

<sup>28</sup> 47 C.F.R. §§ 1.16, 1.80(f)(3).

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and first class mail 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, DC, 20037-1122.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears  
District Director  
Denver Office  
Western Region  
Enforcement Bureau