

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

In the Matter of)	
)	
FBS Wireless Corporation.)	File No. EB-02-PA-140
WFBS(AM))	
Berwick, Pennsylvania)	NAL/Acct. No. 200232400007
)	
)	FRN 0006-7296-02

FORFEITURE ORDER

Adopted: October 16, 2003

Released: October 20, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of twenty thousand dollars (\$20,000) to FBS Wireless Corporation (“FBS”) for repeated violation of Sections 17.4(a), 17.51(a) and 73.49 of the Commission’s Rules (“Rules”)¹ and deny FBS’s request for a hearing upon the forfeiture. The noted violations involve FBS’s failure to register and light the antenna structure for station WFBS(AM) and to enclose that antenna structure within an effective locked fence.

2. On August 12, 2002, the Commission’s Philadelphia, Pennsylvania, Field Office (“Philadelphia Office”) released a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) to FBS for a forfeiture in the amount of twenty thousand dollars (\$20,000).² FBS filed its response to the *NAL* on September 16, 2002, and supplemented that response on February 3, 2003.

II. BACKGROUND

3. FBS is the licensee of WFBS(AM), Berwick, Pennsylvania, and owns that station’s antenna structure. On March 19, 2002, an agent from the Philadelphia Office inspected WFBS’s antenna structure. The station’s license then specified that the station’s antenna structure must exhibit red obstruction lighting at night. When the agent asked Kevin Fennessey, the president of FBS, to demonstrate the antenna structure’s red obstruction lighting, Mr. Fennessey responded that the red obstruction lighting had not been operational since FBS acquired the station in February 2000. The agent also observed that the gate to the fence surrounding the antenna structure was unlocked. In addition, the agent determined that the antenna structure was not registered.

¹ 47 C.F.R. § 17.21(a).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232400007 (Enf. Bur., Philadelphia Office, released August 12, 2002).

4. When the agent reinspected the antenna structure on April 24, 2002, he found that the antenna structure was still unregistered and that the gate to the fence surrounding the antenna structure was still unlocked. A recent check of the FCC's Antenna Structure Registration data base indicates that FBS registered the antenna structure on September 16, 2003.

5. On May 20, 2002, the Philadelphia Office issued a Notice of Violation ("NOV") to FBS for various violations of the Rules, including Sections 17.4(a), 17.51(a) and 73.49 -- failure to register and light the antenna structure for the station and to enclose it within an effective locked fence. In its response to the NOV, filed on June 4, 2002, FBS admitted that its antenna structure was unregistered and that the red obstruction lighting had been extinguished for approximately 10 years. However, FBS also stated that the height of the antenna "was in dispute" and "had been represented to us as 198 feet, not requiring . . . illumination" In addition, FBS asserted that it had corrected the fencing violation.

6. On August 12, 2002, the Philadelphia Office issued a *NAL* for a forfeiture in the amount of \$20,000 to FBS for willful and repeated violation of Sections 17.4(a), 17.51(a) and 73.49 of the Rules. In its response, filed September 16, 2002, FBS seeks cancellation of the proposed monetary forfeiture. FBS contends that there were no willful or repeated violations and that FBS "has diligently . . . worked hard to remedy what the Enforcement Bureau contends that we are in violation of." FBS also contends that it has financial difficulties but does not provide any financial information. Additionally, FBS requests an administrative hearing on the proposed forfeiture.

7. With a supplementary response, filed February 3, 2003, FBS provided a copy of No Hazard determination issued by the FAA on December 11, 2002 (four months after the *NAL*), which indicates that the height of the antenna structure is 200 feet and that "marking and lighting are not necessary for aviation safety." In its letter of February 20, 2003, the Philadelphia Office requested that FBS measure the antenna structure to determine whether it exceeds 200 feet above the ground. On March 3, 2003, FBS, through its contractor, D&L Communications Services, measured the antenna structure's height as 199.5 feet. This measurement, however, did not include the concrete base of the antenna structure. The FCC agent estimates that the concrete base adds approximately 3 feet to the height of the antenna structure.

8. After the measurement, FBS applied for a new No Hazard determination. On August 11, 2003, the FAA issued a new No Hazard determination on the basis of a tower height of 202 feet. The new No Hazard determination indicates that no painting or lighting is now required for FBS's antenna structure.

III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ Section 1.80 of the Rules,⁴ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). In examining FBS's response, Section 503(b) of the Act requires that the Commission take

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

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.⁵

10. Section 17.4(a) of the Rules requires the registration of antenna structures which require notice to the Federal Aviation Administration. As provided in Section 17.7(a) of the Rules,⁶ FAA notification is required for towers whose height above ground level exceeds 200 feet. The March 3, 2003, measurement establishes that the height of FBS's antenna structure is approximately 202 1/2 feet above the ground. FBS concedes that its antenna structure was not registered. We find that FBS's antenna structure was unregistered from the time FBS acquired it in February 2000 until September 16, 2003. Accordingly, we find that FBS repeatedly⁷ violated Section 17.4(a).⁸

11. As indicated above, FBS's license required red obstruction lighting for the antenna structure. Section 17.51(a) of the Rules requires that red obstruction lighting be exhibited between sunset and sunrise. FBS concedes that the antenna structure's red obstruction lighting has not functioned for at least ten years. The FAA's August 11, 2003, No Hazard determination was not in effect until that date (subsequent to the issuance of the *NAL*). We, therefore, find that FBS repeatedly violated Section 17.51(a).

12. Section 73.49 of the Rules requires the owner of an antenna structure to enclose it within an effective locked fence. On the basis of the agent's investigation and FBS's admission, we find that FBS repeatedly violated Section 73.49.

13. FBS also argues that it did not "willfully" violate the Rules. Section 503(b) of the Act gives the Commission authority to assess a forfeiture penalty against any person if the Commission determines that the person has "willfully or repeatedly" failed to comply with the provisions of the Act or with any rule, regulation or order issued by the Commission. In view of our determination that the violations are repeated, it is unnecessary to determine whether they are also willful.

14. FBS states that it has financial difficulties but has submitted no financial documentation. As stated in the *NAL*, the Commission will not consider reducing or canceling a forfeiture on the basis of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period;

⁵ 47 U.S.C. § 503(b)(2)(D).

⁶ 47 C.F.R. § 17.7(a).

⁷ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

⁸ On July 23, 2003, the Wireless Telecommunications Bureau released a Public Notice, DA-03-2411, granting a 60 day amnesty period to the owners of certain unregistered antenna structures identified during an audit. FBS's antenna structure is not among those identified during the audit and, therefore, FBS is not entitled to an amnesty period to register its tower.

(2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.

15. No mitigation is warranted on the basis of FBS's correction of the fencing violation and removal of the lighting requirements. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), "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."⁹

16. We have examined FBS's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that FBS repeatedly violated Sections 17.4(a), 17.51(a) and 73.49 of the Rules and find no basis for cancellation or reduction of the proposed \$20,000 monetary forfeiture.

17. FBS seeks an administrative hearing upon the monetary forfeiture. Section 1.80(g) of the Rules provides in pertinent part that the procedure for issuing a *Notice of Opportunity for Hearing* in a forfeiture matter "will ordinarily be followed only when a hearing is being held for some reason other than the assessment of a forfeiture . . . and a forfeiture is to be considered as an alternative or in addition to any other Commission action. However, these procedures may be followed whenever the Commission, in its discretion, determines that they will better serve the ends of justice." FBS has provided no information that warrants a hearing and we find that a hearing would not better serve the ends of justice.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁰ **FBS IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for failure to register and light its antenna structure and to enclose it with an effective locked fence, in repeated violation of Sections 17.4(a), 17.51(a) and 73.49 of the Rules.

19. **IT IS FURTHER ORDERED**, pursuant to Sections 0.111, 0.311 and 1.80(g) of the Rules, that FBS's request for an administrative hearing **IS DENIED**.

20. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹¹ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232400007 and FRN

⁹ See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

¹⁰ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹¹ 47 U.S.C. § 504(a).

0006-7296-02. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹²

21. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to FBS Wireless Corporation, 114 Market Street, 2nd Floor, Berwick, PA 18603.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹² See 47 C.F.R. § 1.1914.