

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

In the matter of
TOWER PROPERTIES OF FLORIDA, INC.
Owner of Antenna Structure Registration No. 1029137
in Gainesville, Florida
Gainesville, Florida
File Number EB-02-TP-329
NAL/Acct. No. 200232700024
FRN: 0006-1541-40

FORFEITURE ORDER

Adopted: December 15, 2003

Released: December 17, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000), to Tower Properties of Florida, Inc. ("Tower Properties"), owner of antenna structure number 1029137 located in Gainesville, Florida, for willful and repeated violation of Section 17.50 of the Commission's Rules ("Rules").

2. On September 20, 2002, the District Director of the Commission's Tampa, Florida Field Office ("Tampa Office") issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of ten thousand dollars (\$10,000) to Tower Properties for the noted violation. Tower Properties filed a response to the NAL on October 21, 2002 and supplemented its response on October 30, 2002.

II. BACKGROUND

3. On June 4, 2002, an agent from the Tampa Office inspected antenna structure registration number 1029137 and observed that unpainted cables attached to the structure precluded good visibility of the antenna structure in violation of Section 17.50 of the Rules. The agent spoke with Mr. Harvey Budd, President of Tower Properties, who confirmed that Tower Properties was the registered owner of the instant tower.

4. On July 1, 2002, two agents from the Tampa Office re-inspected the transmitter site for tower number 1029137 and observed that the cables remained unpainted and continued to preclude good visibility of the antenna structure.

1 47 C.F.R. § 17.50.

5. On September 20, 2002, the District Director of the Tampa Office issued a *NAL* for a \$10,000.00 forfeiture to Tower Properties for failure to maintain good visibility of the required antenna structure obstruction marking in willful and repeated violation of Section 17.50 of the Rules. Tower Properties filed a response to the *NAL* on October 21, 2002, and supplemented its response on October 30, 2003.

### III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>2</sup> Section 1.80 of the Rules,<sup>3</sup> 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). In examining Tower Properties’ response, Section 503(b) 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>4</sup>

7. Section 17.50 of the Rules provides that antenna structures requiring painting under the rules shall be cleaned or repainted as often as necessary to maintain good visibility. The ASR for this tower explicitly requires that the structure be lighted and painted in accordance with FAA Advisory Circular AC 70/7460-1J. This Advisory Circular, which is incorporated by reference to our rules in Section 17.23 of the Rules,<sup>5</sup> explicitly states that “[a]lternate bands of aviation orange and white are normally displayed on ... coaxial cable, conduits, and other cables attached to the face of a tower.”<sup>6</sup> Further, per Section 17.23 of the Rules, “the specifications, standards, and general requirements stated in [this Circular] are mandatory.”

8. Thus, any cables attached to the face of Tower Properties’ tower are required to be painted to ensure visibility pursuant to Section 17.50 of the Rules.<sup>7</sup> On June 4, and July 1, 2002 agents from the Tampa Office found that the antenna structure had black cabling obscuring the visibility of the required orange and white paint on the structure. Based on the foregoing, we find Tower Properties to be in willful and repeated violation of Section 17.50 of the Rules.<sup>8</sup>

9. In its response to the *NAL*, Tower Properties presented multiple arguments in support of its position that the forfeiture should be cancelled or substantially reduced. First, Tower Properties points out that the tower is being used by multiple entities (WGFL, TV; 2 FM stations, “a beeper company,” and a low power television station), some of which use the unpainted cables for their transmission lines. To the extent that Tower Properties is arguing that its tower tenants are primarily responsible for this

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<sup>2</sup> 47 U.S.C. § 503(b).

<sup>3</sup> 47 C.F.R. § 1.80.

<sup>4</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>5</sup> 47 C.F.R. § 17.23. This section requires conformity with the Circular for each new or altered structure to be registered on or after January 1, 1996. The Tower Properties tower was constructed after 1996.

<sup>6</sup> FAA Advisory Circular AC 70/7460-1J, Obstruction Marking and Lighting, Chapter 3. Marking Guidelines, Paragraph 33(c)(1)(g).

<sup>7</sup> See *Pinnacle Towers, Inc.*, 18 FCC Rcd. 16365 (Enf. Bur. 2003).

<sup>8</sup> A party “willfully” violates the Commission’s rules when it knows it is taking the action in question, irrespective of any intent to violate the Commission’s rules, and repeated means more than once. See *Southern California Broadcasting Co.*, 6 FCC Rcd. 4387, 4387-88, ¶ 5 (1991). See also *Liability of Hale Broadcasting Corp.*, 79 FCC 2d 169, 171, ¶ 5 (1980); *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

violation, we disagree. The Commission requires the tower owner to be responsible for painting the tower.<sup>9</sup> Tower Properties as the tower owner is, therefore, accountable for the installation of the unpainted cables and the continuing violations of Section 17.50.

10. Next, Tower Properties challenges the agent's observation by asserting that June 4, 2002, was a very hazy day, making observation of the tower difficult. This argument ignores the subsequent identical violation observations made on July 1, 2002 by two Commission field agents that the tower structure paint was obscured by multiple black cables. It is therefore without merit.

11. Tower Properties sets forth its efforts, after notification of its violations, to have the tower painted as a mitigating factor in its favor.<sup>10</sup> We disagree. Tower Properties' remedial efforts are not a mitigating factor.<sup>11</sup> Accordingly, Tower's argument that various unforeseen and unavoidable circumstances caused a delay in compliance until September 7, 2002, has no bearing on the subject forfeiture. Tower further argues that the Commission field agent discussed painting the tower, but never mentioned that the transmission lines needed painting and that even though the field agent promised to telephone and inform them of any violation found in the inspection, no telephone call was ever received. The failure to so inform, Tower contends, caused it to delay the immediate painting of the cable or transmission lines until the tower could be painted. We disagree. There is no requirement that the Commission issue a Notice of Violation ("NOV") or provide a violator an opportunity to cure a violation prior to issuance of a *NAL*.<sup>12</sup> Moreover, in light of the rules discussed above, when the agent told Tower its tower needed painting, Tower should have understood such painting included the transmission lines as well.

12. Further, we do not consider the violation to be a mere "technical" violation as argued by Tower Properties. The Commission has consistently stressed that it expects full compliance with the antenna structure rules because of the potential danger to air navigation.<sup>13</sup> Therefore, Tower Properties' failure to clean or repaint its antenna structure as often as necessary to maintain good visibility is a serious violation warranting a forfeiture assessment.<sup>14</sup>

13. Tower Properties contends, citing Section 17.21(a) of the Rules, that in light of fact that some of the cables stop below 200 feet in height, no violation has occurred. Tower Properties argues the forfeiture should be dismissed or reduced because painting and lighting is only required for the portion of covered structures that exceeds 200 feet. We disagree. Section 17.21(a) states that where a tower exceeds 200 feet in height, it is required to be painted. In no way does it suggest that any portion of the

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<sup>9</sup> See *Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structure*, 11 FCC Rcd. 4272, 4290 (1995).

<sup>10</sup> The Commission received Tower Properties response to the *NAL* on October 21, 2002, and its supplemental filing by its attorney on October 30, 2002. The supplemental filing contains a letter and color photographs of the tower, presumably after our issuance of the *NAL* on September 20, 2002, and after its contractor's painting of the tower on September 7, 2002.

<sup>11</sup> See *AT & T Wireless Services, Inc.*, 17 FCC Rcd. 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd. 6099 (1994); *Station KGV L, Inc.* 42 FCC 2d 258, 259 (1973).

<sup>12</sup> See 47 C.F.R. § 1.89; *AT&T Wireless Services, Inc.*, at 21871 n.20; *WOYK, Inc.*, 18 FCC Rcd. 15181, 15182, fn.8 (Enf. Bur. 2003); *Access.1 Communications Corp.-NY*, 18 FCC Rcd. 22289 (Enf. Bur. 2003).

<sup>13</sup> See *Spectra Site Communications, Inc.* 17 FCC Rcd. 7884, 7888 (2002).

<sup>14</sup> See *AT&T Wireless Services, Inc.*, at 21871.

tower, including any attached cables, below 200 feet need not be painted and Tower Properties cited no case supporting this argument.

14. After reviewing the record in the case, we find that cables attached to Tower Properties' tower obstructed good visibility of the tower in violation of Section 17.50 of the Rules and was willful and repeated. Accordingly, cancellation of the \$10,000 forfeiture for this violation is not warranted. However, we do find that Tower Properties' has a history of overall compliance, and we reduce the forfeiture amount from \$10,000 to \$8,000.00.

#### IV. ORDERING CLAUSES

15. 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,<sup>15</sup> Tower Properties of Florida, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willfully and repeatedly violating Section 17.50 of the Rules.

16. 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.<sup>16</sup> 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. 200232700024 and FRN 0006-1541-40. 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.<sup>17</sup>

17. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Tower Properties of Florida, Inc., 4190 NW 93<sup>rd</sup> Ave., Gainesville, FL32653 and its counsel, Aaron P. Shainis, Esq. Shainis & Peltzman, Chartered, Suite 240, 1850 M Street, N.W., Washington, D.C. 20036.

#### FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

<sup>15</sup> 47 C.F.R. §§ 0.111, 0.311, 0.180(f)(4).

<sup>16</sup> 47 U.S.C. § 504(a).

<sup>17</sup> See 47 C.F.R. § 1.1914.