

2 FCC
Recd 7/36

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

In the Matter of

Nineteen Forfeitures Assessed Against)	NAL Acct. Nos. 315KI0013;
Licensees Renting Antenna Space)	315KI0015; 315KI0017; 315KI0020;
on Two Towers in Alice, Texas ¹)	315KI0021; 315KI0022; 315KI0023;
)	315KI0025; 315KI0027; 315KI0031;
)	315KI0032; 315KI0035; 315KI0037;
)	315KI0039; 315KI0040; 315KI0042;
)	315KI0043; 315KI0045; 315KI0053

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1997

Released: June 12, 1997

By the Chief, Compliance and Information Bureau:²

I. Introduction

1. The Compliance and Information Bureau, Federal Communications Commission (FCC), has before it a petition for reconsideration filed by Bowen-Smith Corporation (Bowen-

¹The nineteen licensees are: Mobilfone Service, Inc., Station KQZ772, NAL No. 315KI0013; Triple "S" Mobile Phone Inc., Station KPA315, NAL No. 315KI0015; BJ Service Company USA, Station WNQS274, NAL No. 315KI0017; Circle C Vacuum Service, Station KNDF299, NAL No. 315KI0020; Smith International, Station KNCN450, NAL No. 315KI0021; W&M Specialty Company, Inc., Station KNEV532, NAL No. 315KI0022; Saich Co., Station WNBD877, WNBD878, WNXC354, NAL No. 315KI0023; Harlan Farms Inc., Station WYV525, NAL No. 315KI0027; Florida Network USA Inc., Station WPAW602, NAL NO. 315KI0031; Alice Communications Service Inc. Station WNBD877, WNBD878, WNXC354, NAL No. 315KI0032; Brian Menking, Station WYV525, NAL NO. 315KI0035; Coastal States Management Corporation, Station WGX924, NAL No. 315KI0037; Jack Cherry, Station WNNF728, NAL No. 315KI0039; Enso Drilling Company, Station KKS544, NAL No. 315KI0040; FESCO, Inc., Station KKK933, NAL No. 315KI0042; Conoco Communications, Inc., Station KKA340, NAL No. 315KI0043; Pool Company, Station KK1393, NAL No. 315KI0045; and Western Company of North America, Station KJT785, NAL No. 315KI0053.

²The Compliance and Information Bureau (CIB) was formerly named the Field Operations Bureau. The name change became effective on November 27, 1994.

Smith), a the tower owner,³ on behalf of the above captioned licensees who rented antenna space on towers owned by Bowen-Smith. The petition requests reconsideration of the monetary forfeitures issued against the licensees pursuant to Section 503 (b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for violation of tower painting requirements under Sections 17.23 and 17.50 of the Commission's rules. 47 C.F.R. §§ 17.23, 17.50; see also 47 U.S.C. § 303(q). For the reasons noted below, we find that forfeitures in the amount of \$5,000 for each licensee are warranted.

II. Background

2. On December 7, 1992, FCC agents from the Compliance and Information Bureau's Kingsville Field Office inspected Bowen-Smith's antenna tower facilities located near Alice, Texas, at North Latitude 27° 47' 58," West Longitude 98° 08' 08:" and North Latitude 27° 43' 28," West Longitude 098° 08' 44." This visual inspection disclosed that the paint on the towers was so badly faded and peeling that contrasting color bands were not clearly visible.

3. On December 18, 1992, the Kingsville Field Office issued Notices of Apparent Liability (NALs), by certified mail, to the licensees who shared the towers. Each NAL proposed an \$8,000 forfeiture for the violation. All licensees acknowledged receipt of the NALs and requested that the forfeitures be issued instead to the owner of the tower structures, Bowen-Smith. On February 23, 1993, the Kingsville Field Office issued Notices of Forfeitures to each of the above licensees. Bowen-Smith responded to the Notices of Forfeiture on behalf of the named licensees, and filed the instant petition for reconsideration.

III. Discussion and Conclusion

4. As indicated above, the Kingsville Field Office assessed forfeitures to the licensees on the two tower facilities because of painting violations on the antennae structures. Section 17.23 specifies color and bandwidth painting requirements for tower structures, and Section 17.50 imposes additional maintenance requirements (that licensees clean and repaint towers for good visibility). 47 C.F.R. § 17.50.⁴ Bowen-Smith has requested cancellation or mitigation of the forfeitures on behalf of its lessees on the tower structures. In its petition,

³ We accept the petition for reconsideration pursuant to 1.106(b)(1).

⁴ We note that although many of the tower specification provisions of Part 17 have been streamlined in the Report and Order *Streamlining the Antenna Structure Clearance Procedure and Revision of the Rules Concerning Construction, Marking and Lighting of Antenna Structures*, 11 FCC Rcd 4272 (1995), tower inspection, painting, FAA notification and general maintenance requirements remain the same under the rules. A new Section, 47 C.F.R. § 17.6, reiterates the responsibilities of Commission licensees and sets out new or modified responsibilities for the owners of antenna structures.

Bowen-Smith does not deny the violation but it raises several points which, it argues, merit reduction or cancellation of the forfeiture.

5. Bowen-Smith questions the validity of some of the forfeitures, contending that the FCC failed to give some of the licensees proper notice of the violations. It argues that Alice Communications Service (Alice) was cited as the licensee of several stations that it did not own. It also maintains that Alice received a Notice of Forfeiture addressed to Triple "S" Mobile Phone, Inc. (Triple "S"), and Triple "S" received the Notice of Forfeiture intended for Alice. It also contends that the Kingsville Field Office sent the NOF for Harlan Farms, Inc. to the wrong address rather than to the address of record. Contending that Brian Menking was listed as the licensee for a station for which it does not hold a license, Bowen-Smith argues that this constitutes a lack of proper service on Menking. Bowen-Smith also argues that other procedural irregularities in several of the forfeitures void those forfeiture orders. These included clauses improperly referring to the forfeiture orders as notices of apparent liability, as well as an irregularity in the order to Coastal States Management Corp. (Coastal) in which the forfeiture order indicated that Coastal is licensed in the Private Land Mobile Services when the station is actually licensed in the Private Operational-Fixed Microwave Service.

6. With respect to the violations at issue, Bowen-Smith argues that the Kingsville Field Office failed to consider several factors requiring a reduction in the forfeiture amounts. By way of background, Bowen-Smith indicates that, as part of its obligation to its customers to respond to the Commission on tower inquiries, it indemnifies its customers, if necessary, for any monetary forfeitures that may be imposed. In this regard, Bowen-Smith requests mitigation based on its history of overall compliance. It also argues that it should receive a reduction in the forfeiture amount for its voluntary disclosure to FCC agents of its tower maintenance schedule which, according to Bowen-Smith, was "a road map to enforcement targets" that led the agents to discover the violations. Bowen-Smith argues that it shared with the FCC a maintenance contract for its towers that included a scheduled repainting of the tower in question in August 1992. According to Bowen-Smith, it did not paint the towers as scheduled because of Hurricane Andrew and its then recent acquisition of a 1,000 foot tower which was badly in need of painting. Bowen-Smith also maintains that the Kingsville Field Office failed to consider the financial impact that the forfeitures would have on the corporation. Because it would bear the financial responsibility, Bowen-Smith contends that the proposed forfeitures, totalling \$152,000 are unconscionable. It argues that the forfeitures would jeopardize its financial rating with its creditors.

7. We note that the forfeiture amounts were initially calculated pursuant to the Commission's Forfeiture Policy Statement that was vacated by the U.S. Court of Appeals for the District of Columbia. USTA v. FCC, 28 F.3d 1232 (D.C.Cir. 1994). Thus, we are assessing the forfeiture amounts in light of the factors listed in Section 503(b) of the Act.

8. We reject Bowen-Smith's argument that the forfeitures should be cancelled because the notices issued were procedurally defective and improperly served. We find that

the licensees were provided with actual and legally sufficient notice. Section 503(b)(4)(B) of the Act, 47 U.S.C. § 503(b)(4)(B), which sets out the type of notice required for imposition of a valid forfeiture, states that no forfeiture may be imposed against any person unless: (1) the Commission issues a notice of apparent liability, in writing, (2) the NAL has been received by such person, or until the Commission has sent the NAL to the last known address of such person by registered or certified mail, and (3) the person is granted an opportunity, in writing, to show why the forfeiture should not be imposed. The field office sent each notice of apparent liability and forfeiture order by certified mail, return receipt requested. Each licensee responded to the notice of apparent liability and each informed the Commission that Bowen-Smith would respond to the forfeiture order on behalf of each licensee. Thus, while we acknowledge that administrative mishaps occurred, the actions of each licensee indicate that each received the notice of the violation at issue and exercised the right to respond. Moreover, we find that any error in the forfeiture order clauses directing the service of a "Notice of Apparent Liability" rather than a "Notice of Forfeiture" was harmless in view of the ordering clauses imposing the forfeitures and the actual service of the NAL and NOF documents.

9. At the time of the violations, licensees on an antenna structure were solely responsible for violations of the terms of their license. Although Congress authorized the Commission to impose forfeitures on non-licensee tower-owners,⁵ this change did not alter a licensee's ultimate responsibility for compliance. An FCC licensee may not delegate its responsibility to comply with the Commission's rules, and is held responsible for the acts of its agents and similarly situated persons. Liability of MTD, 6 FCC Rcd 34 (1991). Furthermore, a licensee is required to comply with the provisions in its license and the FCC's rules, and "oversight or failure to acquaint itself with the Commission's requirements will not excuse" a violation. Triad Broadcasting Co., Inc., 96 FCC 2d 1235, 1242 (1984). See also Southern California Broadcasting Company, 6 FCC Rcd 4387 (1991). Moreover, violations that result from inadvertence, omissions, or mistakes are equally subject to monetary forfeiture penalties. PJB Communication of Virginia, Inc., 7 FCC Rcd 2088 (1992); Standard Communications Corporation, 1 FCC Rcd 358 (1986). Therefore, we find no reason to change the field office's determination to hold the licensees responsible.

10. With respect to Bowen-Smith's arguments for reduction of the forfeiture, we note that hurricanes may delay repair of towers. Acquiring a new tower and repairing it prior to the ones found in violation, however, constitutes a business decision reflecting an economic motive for delaying compliance with the rules; this is not a justification for delay beyond that caused by the hurricane. We also reject as unfounded Bowen-Smith's argument that its maintenance schedule served as a road map for the issuance of forfeitures.

11. With respect to Bowen-Smith's argument regarding its financial circumstances, we note that forfeitures were assessed against licensees, not the tower owner. It is the

⁵ See Pub. L. 102-538, 106 Stat. 3533 (1992); see also 47 C.F.R. §1.80(d).

licensees' financial condition, therefore, which is relevant to our determination of the proper amount of the forfeiture. No evidence was presented regarding the licensees' financial conditions. Nevertheless, we have examined other circumstances surrounding the violation and find that a reduction of the forfeiture amount is warranted. The record indicates that as a result of a previously imposed and paid forfeiture sanction, the tower owner provided the Commission with a tower maintenance schedule for all its towers, including the ones at issue. According to Bowen-Smith, approximately one month before the inspection, they notified the Commission of delays in the scheduled repainting of some of its towers. Although we disagree that the events mentioned justified the length of the delay (exceeding one year), we have reduced the forfeiture on the basis that the notices of delayed schedule qualify as a voluntary disclosure of the violation. The long delays, following imposition of a previous forfeiture for similar violations, however, do not support the argument that the amount should be further reduced because of any likelihood of compliance. Based on the circumstances surrounding the violation, we find that a forfeiture in the amount of \$5,000 for each Notice of Forfeiture, is reasonable and sufficient to ensure future compliance.

IV. Ordering Clauses

12. **IT IS ORDERED**, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, that the forfeiture is reduced to five thousand dollars (\$5,000) for each of the licensees listed in Note 1.

13. **IT IS FURTHER ORDERED**, that each of the licensees listed in Note 1 must pay the forfeiture amount of five thousand dollars (\$5,000) within thirty (30) days of the date of release of this Order. Payment may be made by check or money order drawn on a U.S. financial institution, payable to the Federal Communications Commission. Payment may also be made by credit card with the appropriate documentation.⁶ Please place the appropriate NAL account numbers on the remittance(s) and mail to:

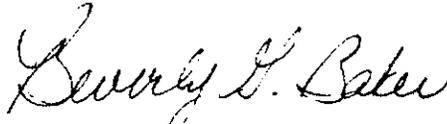
Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days of the release date of this Order may be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

⁶ Requests for installment payments should be mailed to: Chief, Billings and Collections, Mail Stop A, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules. Contact Chief, Billings and Collections for more information on payment by credit card.

14. **IT IS FURTHER ORDERED**, that a copy of this Order shall be sent by certified mail, return-receipt requested to the Petitioners and counsel.

FEDERAL COMMUNICATIONS COMMISSION



Beverly G. Baker
Chief, Compliance and Information Bureau