

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

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| In the Matter of |) | |
| |) | |
| Northeast Passage Corporation |) | File No.: EB-FIELDNER-13-00010092 |
| |) | NAL/Acct. No.: 201432400007 |
| Owner of Antenna Structure 1063673 |) | FRN: 0004942041 |
| Hightstown, New Jersey |) | |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: June 10, 2014

Released: June 10, 2014

By the District Director, Philadelphia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$15,000 against Northeast Passage Corporation (NE Passage), the owner of an antenna structure in Hightstown, New Jersey, for several violations of the Commission's rules concerning antenna structure lighting. Agents from the Enforcement Bureau's Philadelphia Office found that NE Passage was neither properly monitoring nor maintaining the daytime lights on its antenna structure. NE Passage also failed to notify the Commission of an increase in the antenna structure's height. NE Passage's disregard for the Rules posed a potential safety hazard to air traffic and warrants an increased penalty.

2. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that NE Passage apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act)¹ and Sections 17.23, 17.47(a), 17.48(a), 17.51(b), and 17.57 of the Commission's rules (Rules)² in connection with its antenna structure (Antenna Structure) by failing to (1) exhibit medium intensity obstruction lighting on the Antenna Structure during the daytime; (2) monitor the Antenna Structure obstruction lighting; (3) notify the Federal Aviation Administration (FAA) of a known light outage; and (4) immediately notify the Commission upon a change in the Antenna Structure's height. We conclude that NE Passage is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). In addition, we direct NE Passage to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury stating that the Antenna Structure is now in compliance with Part 17 of the Rules.

II. BACKGROUND

3. On July 19, 2013, an agent of the Enforcement Bureau's Philadelphia Office (Philadelphia Office) was returning from another investigation and passed the Antenna Structure in Hightstown, New Jersey, which did not appear to be painted or lit as required. At the time, the agent was not able to conduct an on-scene inspection, but returned with another agent on July 22, 2013. According to the Commission's Antenna Structure Registration (ASR) database, the Antenna Structure should stand 78.3 meters in height above ground level and should have paint for daytime visibility and red obstruction lighting for nighttime visibility.³

¹ 47 U.S.C. § 303(q).

² 47 C.F.R. §§ 17.23, 17.47(a), 17.48(a), 17.51(b), 17.57.

³ See Antenna Structure Registration database for antenna structure number 1063673; see also 47 C.F.R. § 17.21 (requiring antenna structures more than 60.96 meters in height to be painted and lighted).

4. During the July 22 inspection, the agents observed that the Antenna Structure did not conform to the painting and lighting requirements specified on the ASR. The Antenna Structure had the required red obstruction lighting, but in lieu of the required paint, it had white medium intensity lighting. The agents also observed that one of the two white medium intensity lights at the mid-level of the Antenna Structure and all white medium intensity lights at the top-level of the Antenna Structure were extinguished. The agents contacted the FAA and learned that no Notice to Airmen (NOTAM) had been issued for the Antenna Structure, which would have warned pilots of the hazards posed by the lighting outage. In addition, based on information from a contractor who was working on the Antenna Structure, the agents determined that the Antenna Structure significantly exceeded the 78.3 meters specified on the ASR.⁴

5. The agents checked FAA records and found that NE Passage filed an application with the FAA in 2006 specifying that the new overall height of the Antenna Structure was 382 feet above ground level. The FAA issued a Determination of No Hazard on April 26, 2006, specifying that the 382 foot structure required a medium intensity dual lighting system in accordance with Chapters 4, 8 and 12 of FAA Advisory Circular 70/7460-1K.⁵ NE Passage, however, did not notify the Commission of the new Antenna Structure height and the associated change in the lighting specifications.

6. The agent spoke by telephone with the President of NE Passage (President) on July 22 and 25, 2013, and August 5, 2013. During the course of those conversations, the President informed the agent that he was aware of the light outage at the mid-level of the Antenna Structure, but he was not aware of the light outage at the top-level. He claimed that the contractors who were working on the Antenna Structure were going to fix the lights, a claim that the contractors later denied. The President also claimed that the Antenna Structure lights were being monitored by US Tower Services, which in turn contracted with Nextel to monitor the lights. The agent spoke to representatives from US Tower Services and Nextel, both of whom indicated that there was no contract in place with NE Passage to monitor the Antenna Structure lights.

7. On August 7, 2013, the Philadelphia Office issued a Notice of Violation to NE Passage regarding the violations observed on July 19 and 22, 2013, and confirmed during subsequent conversations with the President.⁶ By letter dated August 28, 2013, NE Passage submitted a response to the Notice of Violation, stating that the lights would be repaired on or about September 6, 2013.⁷ NE Passage also claimed that visual monitoring of the lights had been conducted periodically by a local electrical contractor and by tenants on the Antenna Structure.⁸ Further, NE Passage reported that it ordered an automatic monitoring system that would be installed to monitor the obstruction lights and that the ASR database would be updated.⁹

⁴ The contractor performed a tape drop measurement which showed that a cellular antenna mounted just below the mid-level of the Antenna Structure was 146 feet (44.5 meters) above ground level. Based on the tape-drop measurement information, the agent concluded that the Antenna Structure exceeded 292 feet (89 meters).

⁵ See Aeronautical Study No. 2006-AEA-1463-OE.

⁶ See *NE Passage, Inc.*, Notice of Violation, V201332400039 (rel. August 7, 2013).

⁷ See Letter from Walter Holm, President, Northeast Passage Corporation to David Dombrowski, District Director, Philadelphia Office, Northeast Region, Enforcement Bureau, dated August 28, 2013.

⁸ *Id.*

⁹ *Id.*

III. DISCUSSION

8. 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.¹⁰ 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.¹¹ 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,¹² and the Commission has so interpreted the term in the Section 503(b) context.¹³ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁴ The term “repeated” means the commission or omission of such act more than once or for more than one day.¹⁵

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

9. 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.¹⁶ Section 17.23 of the Rules provides that “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.’”¹⁷ Section 17.51(b) of the Rules states that “[a]ll high intensity and medium intensity obstruction lighting shall be exhibited continuously unless otherwise specified.”¹⁸ Section 17.47(a) of the Rules states that owners of antenna structures “(1) [s]hall make an observation of the antenna structure’s lights at least once each 24 hours . . . to insure that all such lights are functioning properly as required; or alternatively (2) [s]hall provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide

¹⁰ 47 U.S.C. § 503(b).

¹¹ 47 U.S.C. § 312(f)(1).

¹² H.R. Rep. No. 97-765, 97th 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 . . .”).

¹³ 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).

¹⁴ 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 repeated signal leakage).

¹⁵ 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.

¹⁶ 47 U.S.C. § 303(q).

¹⁷ 47 C.F.R. § 17.23.

¹⁸ 47 C.F.R. § 17.51(b).

indication of such failure to the owner.”¹⁹ Section 17.48(a) provides that “[t]he owner of any antenna structure which is registered with the Commission and has been assigned lighting specifications referenced in this part: (a) [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 within 30 minutes.”²⁰

10. The evidence in this case is sufficient to establish that NE Passage violated Section 303(q) of the Act and Sections 17.23, 17.47(a), 17.48(a), and 17.51(b) of the Rules.²¹ According to the FAA Determination of No Hazard issued on April 26, 2006, the Antenna Structure is required to display a dual lighting system, which consists of medium intensity white obstruction lighting during the daytime and red obstruction lighting at night. On July 19, 2013, an agent from the Philadelphia Office observed during daytime hours that the required top-level white medium intensity obstruction lighting was extinguished on the Antenna Structure. On July 22, 2013, agents from the Philadelphia Office conducted an inspection and confirmed that the top-level white obstruction lighting was extinguished and also found that one of the two white medium intensity obstruction lights at the mid-level of the Antenna Structure was also extinguished. During telephone conversations, the President of NE Passage admitted that he was aware of the mid-level obstruction lighting outage. The agents also determined that NE Passage had not notified the FAA of the known mid-level light outage. Although NE Passage claimed at various times during the course of the investigation that the lights were being monitored by US Tower Services, Nextel, a local electrical contractor, and/or tenants on the Antenna Structure, the agents determined that no one was conducting daily monitoring. NE Passage is responsible for monitoring the Antenna Structure lights and is liable for any violations resulting from the failures or omissions of its employees.²² Therefore, based on the evidence before us, we find that NE Passage apparently willfully and repeatedly violated Section 303(q) of the Act and Sections 17.23, 17.47(a), 17.48(a), and 17.51(b) of the Rules by failing to (1) exhibit all required obstruction lighting from sunrise to sunset on the Antenna Structure, (2) monitor the Antenna Structure’s lights on a daily basis, and (3) notify the FAA of a known tower light outage.

B. Failure to Notify the Commission of a Change in Structure Height

11. Section 17.57 of the Rules states that the “owner [of a registered antenna structure] must also immediately notify the Commission using FCC Form 854 upon any change in structure height or change in ownership information.”²³ On July 22, 2013, an agent inspected the Antenna Structure and

¹⁹ 47 C.F.R. § 17.47(a).

²⁰ 47 C.F.R. § 17.48(a).

²¹ At the time of the inspection on July 22, 2013, NE Passage had not yet updated the ASR database to reflect the new FAA “no hazard” determination authorizing NE Passage to install medium intensity white obstruction lighting for daytime visibility in lieu of paint. Therefore, in determining whether the Antenna Structure complied with Part 17 of the Rules, we could have chosen to consider the condition of the Antenna Structure’s paint instead of the lighting. The paint on the Antenna Structure was so severely faded that a proposed \$10,000 forfeiture for failure to repaint as often as necessary to maintain good visibility, as required by Section 17.50 of the Rules, would have been warranted under that analysis along with a \$2,000 upward adjustment for the duration of the violation.

²² See, e.g., *Tidewater Communications, LLC*, Order on Review, 25 FCC Rcd 1675, 1676, para. 5 (2010) (finding that a violator can be held liable for violations resulting from mistakes of its employees) (citing *North Country Repeaters*, Forfeiture Order, 19 FCC Rcd 22139 (Enf. Bur. 2004); *PBJ Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1988); *Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358 (1986); *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235 (1984).

²³ 47 C.F.R. § 17.57.

found that it had an overall height that far exceeded the 78.3 meter height specified on the ASR. Based on the evidence before us, we find that NE Passage apparently willfully and repeatedly violated Section 17.57 of the Rules by failing to immediately notify the Commission of a change in antenna height for the Antenna Structure.

C. Proposed Forfeiture and Reporting Requirement

12. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failure to comply with prescribed lighting and or marking (painting) is \$10,000 and the base forfeiture amount for failing to file required forms or information is \$3,000.²⁴ 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.²⁵ We find that the failure of NE Passage to notify the FAA of a known light outage combined with its lack of diligence with regard to the monitoring of the Antenna Structure lights represent a deliberate disregard for Commission rules that are critical to ensuring the safety of air navigation. Accordingly, we conclude that an upward adjustment of \$2,000 is warranted. Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that NE Passage is apparently liable for a total forfeiture in the amount of \$15,000.

13. We also direct NE Passage to submit a written statement, pursuant to Section 1.16 of the Rules,²⁶ signed under penalty of perjury by a principal or officer of NE Passage, stating the steps taken to correct the violations, including the dates on which: (1) all obstruction light outages were corrected; (2) the obstruction lighting began being monitored on a daily basis; and (3) the FCC Form 854 was submitted to the Commission regarding the change in the Antenna Structure's overall height; and (4) the ASR database was updated. NE Passage shall also certify that it will otherwise comply with the Commission's antenna structure requirements.²⁷ This statement must be provided to the Philadelphia Office at the address listed in paragraph 16 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

14. 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 of the Rules, Northeast Passage Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Section 303(q) of the Act and Sections 17.23, 17.47(a), 17.48(a), 17.51(b), and 17.57 of the Rules.²⁸

15. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Northeast Passage Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

²⁴ *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.

²⁵ 47 U.S.C. § 503(b)(2)(E).

²⁶ 47 C.F.R. § 1.16.

²⁷ See 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.1–17.57.

²⁸ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.23, 17.47(a), 17.48(a), 17.51(b), 17.57.

16. **IT IS FURTHER ORDERED** that Northeast Passage Corporation **SHALL SUBMIT** a written statement, as described in paragraph 13, 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, Northeast Region, Philadelphia Office, One Oxford Valley Building, Suite 404, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047. Northeast Passage Corporation shall also e-mail the written statement to NER-Response@fcc.gov.

17. 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. Northeast Passage Corporation shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁹ 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.
- 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.

18. 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. 20554.³⁰ 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.

19. 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 Rules.³¹ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, One Oxford Valley Building, Suite 404, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047, and include the NAL/Acct. No. referenced in the caption. Northeast Passage Corporation also shall e-mail the written response to NER-Response@fcc.gov.

²⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

³⁰ See 47 C.F.R. § 1.1914.

³¹ 47 C.F.R. §§ 1.16, 1.80(f)(3).

20. 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.

21. **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 Northeast Passage Corporation, PO Box 390, Bayville, New Jersey 08721.

FEDERAL COMMUNICATIONS COMMISSION

David C. Dombrowski
District Director
Philadelphia Office
Northeast Region
Enforcement Bureau