

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

In re Request of)	
)	
E-STRING WIRELESS LIMITED)	Facility I.D. No. 171020
)	NAL/Acct. No. MB200741410356
For Waiver of Auction No. 70)	FRN: 0008605750
Form 301 Filing Deadline)	File No. BNPH-20070529AFO
)	
Application for Construction Permit for)	
New FM station, Munday, Texas)	

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

Adopted: August 14, 2007

Released: August 15, 2007

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the May 29, 2007, request of E-String Wireless, Ltd. (“ESW”), for waiver of the post-auction Form 301 “long form” application filing deadline. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (“NAL”), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),¹ by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,² we find that ESW apparently willfully violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing timely to file a post-auction Form 301 application.³ Based upon our review of the facts and circumstances before us, we conclude that ESW is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant ESW’s waiver request and accept its application for filing.

II. BACKGROUND

2. On September 21, 2006, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) jointly released a Public Notice announcing a March 7, 2007, auction of FM broadcast construction permits, Auction No. 70.⁴ ESW timely filed a FCC Form 175 application to participate in FM Auction No. 70, and was found to be a qualified bidder.⁵ By an April 2, 2007, Public Notice, the Bureaus announced that ESW was the winning bidder in FM Auction No. 70 for the FM

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

⁴ *Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007*, Public Notice, 21 FCC Rcd 10503 (MB/WTB 2006).

⁵ *Auction of FM Broadcast Construction Permits – 114 Bidders Qualified to Participate in Auction No. 70*, Public Notice, 22 FCC Rcd 3616 (MB/WTB 2007).

construction permit at Munday, Texas.⁶ Winning bidders were to file a post-auction FCC Form 301 long-form application by May 2, 2007. The *Auction No. 70 Closing Public Notice* cautioned that “[a]n applicant that fails to submit the required long-form application before the specified deadline, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in Section 1.2104(g) of the Commission’s rules.”⁷ ESW failed timely to file a post-auction Form 301 application. Its Form 301 application (the “Application”) was submitted on May 29, 2007, and included as Exhibit 1 a request for a waiver of the filing deadline set forth in Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules, as well as the *Auction No. 70 Closing Public Notice*.⁸

3. In its request for waiver, ESW states that it “did not receive actual notice of the May 2 filing deadline and, through inadvertence, was otherwise unaware of the deadline.”⁹ ESW also notes that it timely paid its winning auction bid in full and has otherwise complied with all other rules. It further contends that, because it was the only bidder for the Munday permit, grant of a waiver of the filing deadline will not prejudice any other party, whereas loss of all or part of its winning bid would work an “undue hardship” on the applicant.¹⁰

III. DISCUSSION

4. *Waiver Request.* Ordinarily, a winning bidder that fails to timely file the required long-form application is deemed to have defaulted, its application is dismissed, and it is subject to the default payment set forth in Section 1.2104(g) of the Rules.¹¹ However, the Commission may, for good cause, determine that a late filed long-form application should be accepted.¹² When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹³ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁴

5. The Commission has previously granted waivers of the post-auction long-form application filing deadline when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermine the Commission’s policy of facilitating rapid implementation of service to the public.¹⁵ We find that ESW has presented sufficient facts that, when considered in their totality,

⁶ *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 70*, Public Notice, 22 FCC Rcd 6323 (MB/WTB 2007) (“*Auction No. 70 Closing Public Notice*”).

⁷ *Id.* at 6327 (emphasis in original).

⁸ 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a). These Sections require a winning bidder to file its long-form application within 30 days of the release of the public notice announcing the close of the auction.

⁹ Exhibit 1 to Application.

¹⁰ *Id.*

¹¹ 47 C.F.R. § 1.2104(g).

¹² 47 C.F.R. § 73.5005(a).

¹³ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). In addition, Section 73.3566(a) of the Commission’s radio broadcast rules provides that requests for waiver “shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” 47 C.F.R. § 73.3566(a).

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

¹⁵ See, e.g., *Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005); *Silver Palm Communications, Inc.*, 17 FCC Rcd 6606, 6607 (WTB 2002); *City Page & Cellular Services, Inc.*, 17 FCC Rcd 26109, 22611-12 (WTB 2002); *Pinpoint Communications, Inc.*, 14 FCC Rcd 6421 (WTB 1999).

demonstrate circumstances that meet the standard for waiver of the application filing deadline. The record indicates that, prior to its late filing of the Form 301 application, ESW had complied with all previous Auction No. 70 requirements, including all filing and payment obligations, and was found to be a qualified bidder. We note that all winning Auction No. 70 bidders, including ESW, were sent copies of the *Auction No. 70 Closing Public Notice* by overnight delivery, calling into question ESW's claim that it did not receive actual notice of the Form 301 filing deadline. Additionally, the Federal Express tracking report indicates that the package containing, *inter alia*, a copy of the *Auction No. 70 Closing Public Notice* was delivered to ESW's address of record at 9:20 a.m. on April 3, 2007, and left at the front door pursuant to a signature release on file with Federal Express. We also note that "actual notice" is not required to be given,¹⁶ and that copies of the *Auction No. 70 Closing Public Notice* were provided to winning bidders strictly as a courtesy. However, we acknowledge ESW's admission of inadvertence, and thus find no evidence of bad faith on its part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to ESW's record of prior compliance with auction-related requirements, and its prompt action taken to remedy its error once that was called to its attention.

6. We also recognize that the FM licensing process was not significantly delayed nor materially adversely affected by ESW's late filing of the application here. Accepting ESW's Form 301 application would not undermine the Commission's broadcast auction policies. Thus, flexibility is appropriate in this instance. We find it in the public interest to avoid a delay in implementing new service to Munday, Texas, by having to re-auction the FM construction permit, and therefore grant ESW's waiver request below. Although we grant ESW a waiver of the rules that would otherwise require dismissal of its late-filed long-form application, and associated imposition of a default payment, we nonetheless find that it apparently failed to comply with the rules requiring timely submission of the post-auction Form 301 application.

7. *Proposed Forfeiture.* In this case, ESW has admitted that it failed timely to file a post-auction Form 301 application, as required by Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁷ 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.¹⁸ 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,¹⁹ and the Commission has so interpreted the term in the Section 503(b) context.²⁰

9. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.²¹ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the

¹⁶ See 47 C.F.R. § 73.3573(f)(5)(i) (winning bidder must file Form 301 "within 30 days of the release of the *public notice announcing the close of the auction...*") (emphasis added).

¹⁷ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

¹⁸ 47 U.S.C. § 312(f)(1).

¹⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²¹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

Act, including “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 such other matters as justice may require.”²²

10. In this case, ESW was on notice that it was responsible for timely submitting its post-auction Form 301 application, but failed timely to file its application. Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the full base amount of \$3,000.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that E-String Wireless, Ltd. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for its apparent willful violation of Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission’s Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, E-String Wireless, Ltd. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

14. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’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.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²³

17. IT IS FURTHER ORDERED, that E-String Wireless, Ltd.’s Request for Waiver of the Form 301 Filing Deadline IS GRANTED and the Application is accepted for filing.

²² 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

²³ See 47 C.F.R. § 1.1914.

18. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to E-String Wireless, Ltd., 24018 Middle Fork, San Antonio, TX 78258, and to its counsel, Harry C. Martin, Esquire, Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, VA 22209-3801.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau