

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

In the Matter of)	
)	Facility ID No. 166080
Frank J. Neely)	NAL/Acct. No. MB-200641410067
)	FRN: 0008498685
Application for Construction Permit for)	File No. BNPH-20060324AFR
New FM Station, Due West, South Carolina)	

FORFEITURE ORDER

Adopted: June 5, 2009

Released: June 8, 2009

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”), we issue a monetary forfeiture in the amount of three thousand dollars (\$3,000), to Frank Neely (“Neely”), winning bidder in FM Auction No. 62 for the construction permit for a new FM Station in Due West, South Carolina, for willfully violating Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission’s Rules (“Rules”)¹ by failing to file a timely post-auction Form 301 application.

II. BACKGROUND

2. On July 21, 2006, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”) in the amount of three thousand dollars (\$3,000) to Neely for this violation.² Neely filed an Opposition to Notice of Apparent Liability for Forfeiture (“Opposition”) requesting a cancellation of the forfeiture on August 3, 2006.

3. In a Public Notice released February 8, 2006, the Commission announced that Neely was the winning bidder in FM Auction No. 62 for the FM construction permit in Due West, South Carolina.³ Pursuant to Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules, Neely was required to file a post-auction FCC Form 301 “long form” application by March 10, 2006.⁴ The *Auction No. 62 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.”⁵

¹ See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

² *Frank J. Neely*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8010 (MB 2006) (“*Frank J. Neely*”).

³ *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071 (MB/WTB 2006) (“*Auction No. 62 Closing Public Notice*”).

⁴ 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.

⁵ *Auction No. 62 Closing Public Notice*, 21 FCC Rcd at 1076.

Despite this warning, Neely did not file his Form 301 application until March 24, 2006. Neely submitted a request for waiver of the filing deadline with his application.⁶

4. On July 21, 2006, the Bureau granted Neely's request for waiver, finding that Neely had presented sufficient facts that when considered in their totality, demonstrated circumstances that met the standard for waiver of the post-auction, long form application filing deadline.⁷ It also found that the licensing process was not significantly delayed or adversely affected by Neely's late filing.⁸ However, notwithstanding the Bureau's decision to grant Neely a waiver of the Rules that would have otherwise required dismissal of the late-filed long form application and associated imposition of a default payment, the Bureau found that Neely failed to comply with the Rules requiring timely submission of the post-auction Form 301 application.⁹ Accordingly, the Bureau issued the *NAL* pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended ("Act"), and Section 1.80 of the Rules,¹⁰ based on Neely's apparent willful failure to timely file a post-auction Form 301 application, as required by Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules.¹¹ In response, Neely filed the subject Opposition.

5. In support of his Opposition, Neely states that a cancellation of forfeiture is warranted because: (1) he did not "fail[] to file a required form" but rather filed it late; and (2) he filed his Form 301 application voluntarily without any reminder from the Commission. Neely asserts these reasons warrant a cancellation of the assessed forfeiture.

III. DISCUSSION

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,¹² Section 1.80 of the Rules,¹³ and the Commission's *Forfeiture Policy Statement*.¹⁴ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we 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 such other matters as justice may require.¹⁵

⁶ *Frank J. Neely*, 21 FCC Rcd at 8011 ("In his request for waiver, Neely states he did not have the assistance of counsel during the auction process and that he neglected to fully read the February 8, 2006, *Auction No. 62 Closing Public Notice*. Neely asserts that, upon discovering that he needed to file a post-auction Form 301 application, he immediately retained counsel to assist in filing the Form 301 application using the appropriate procedures in CDBS for a late filing. Neely contends that a grant of a waiver of the filing deadline is in the public interest because (1) he has complied with all other requirements with respect to his auction application and auction participation in a timely manner; (2) acceptance of the late Form 301 will not harm or prejudice any other party; and (3) acceptance of the late Form 301 will greatly hasten the inception of the first local broadcast service in Due West, South Carolina.").

⁷ *Id.* at 8012.

⁸ *Id.*

⁹ *Id.*

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

¹¹ *Frank J. Neely*, 21 FCC Rcd at 8012.

¹² 47 U.S.C. § 503(b).

¹³ 47 C.F.R. § 1.80.

¹⁴ *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), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁵ 47 U.S.C. § 503(b)(2)(E). Prior to October 10, 2008, this provision was labeled 47 U.S.C. § 503(b)(2)(D). The text of the provision remains unchanged.

7. Neely first argues that a forfeiture based on failure to file a required form is not warranted because ultimately he did file his Form 301 application, albeit two weeks late. We disagree. Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules require winning bidders to file their Form 301 applications within 30 days of the release of the public notice announcing the close of the auction.¹⁶ In this case, winning bidders in Auction No. 62 were required to file their applications by March 10, 2006.¹⁷ By his own admission, Neely did not file his Form 301 application until March 24, 2006, two weeks after the filing deadline. Because Neely failed to file his application before or on the deadline, his assertion that the proposed forfeiture should not be based on the “failure to file a required form” is without merit.¹⁸

8. Neely also argues that a cancellation of the forfeiture is warranted because he filed his Form 301 application voluntarily without any “reminder or prodding from the Commission.”¹⁹ We reject this argument. While we recognize Neely’s efforts, corrective action taken to come into compliance with the Rules is expected, and does not nullify or mitigate any prior forfeitures or violations.²⁰ Moreover, Neely was required to submit the Form 301 post-auction application as a requirement of his winning bid.²¹ In view of the foregoing, Neely’s submission of the required form cannot be said to have been “voluntary.”²² We note that our decision is consistent with the Rules and the Commission’s *Forfeiture Policy Statement* and encourages parties to voluntarily disclose violations and promptly correct violations.²³

9. We have considered Neely’s response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Neely willfully²⁴ violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules and that no mitigating circumstances warrant a cancellation of the proposed forfeiture amount.

¹⁶ See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

¹⁷ *Auction No. 62 Closing Public Notice*, 21 FCC Rcd at 1076.

¹⁸ See *Manuel Huerta*, Forfeiture Order, 23 FCC Rcd 14647, 14648 (MB 2008) (rejecting the assertion that a late-filed form is significantly different from failure to file a required form, and should therefore have a smaller correlating forfeiture amount).

¹⁹ Opposition at 2.

²⁰ See *Pittman Broadcasting Services, L.L.C.*, Forfeiture Order, 23 FCC Rcd 2742, 2744 (EB 2008).

²¹ 47 C.F.R. § 73.3573(f)(5)(i) (“a winning bidder . . . *must*, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application”) (emphasis added); 47 C.F.R. § 73.5005(a) (“Within thirty (30) days following the close of bidding and notification to the winning bidders, each winning bidder *must* submit an appropriate long-form application”) (emphasis added).

²² See *Liability of Max Television of Tri-Cities L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 7088, 7092 (MMB 1999) (finding that satisfying an explicit requirement is not considered “voluntary”).

²³ See 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Guidelines for Assessing Forfeitures. See also *Local Phone Services, Inc.*, Order of Forfeiture, 23 FCC Rcd 8952 (2008) (finding that the issuance of a forfeiture despite petitioner’s voluntary disclosure of its Rule violations was appropriate and would not discourage other parties from voluntarily disclosing violations of the Act or Rules).

²⁴ 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. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. No. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,²⁵ that Frank J. Neely, SHALL FORFEIT to the United States the sum of three thousand dollars (\$3,000) for willfully violating Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's Rules.

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Forfeiture 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.²⁶ 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 in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).²⁷

12. IT IS FURTHER ORDERED, that copies of this Forfeiture Order shall be sent by Certified Mail, Return Receipt Requested, and by First Class Mail, to: Frank J. Neely, P.O. Box 861, Rock Hill, SC 29731, and to his counsel, David Tillotson, Esq., Law Office of David Tillotson, 4606 Charleston Terrace, N.W., Washington, DC 20007.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

²⁶ 47 U.S.C. § 504(a).

²⁷ See 47 C.F.R. § 1.1914.