

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

In re Request of	)	
	)	
<b>Joseph C. Tesiero</b>	)	Facility I.D. No. 189565
	)	NAL/Acct. No. MB201241410033
For Waiver of Auction 91	)	FRN: 0020449757
Form 301 Filing Deadline	)	File No. BNPH-20110726AHZ
	)	
Application for Construction Permit for	)	
New FM Station, Speculator, New York	)	

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

**Adopted: June 27, 2012**

**Released: June 27, 2012**

By the Chief, Audio Division:

**I. INTRODUCTION**

1. The Commission has before it the July 26, 2011, request of Joseph C. Tesiero (“Tesiero”), 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”)*,<sup>1</sup> we find that Tesiero apparently willfully violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing to timely file a post-auction Form 301 application.<sup>2</sup> Based upon our review of the facts and circumstances before us, we conclude that Tesiero is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant Tesiero’s waiver request and have accepted his application for filing.

**II. BACKGROUND**

2. On September 21, 2010, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) jointly released a Public Notice announcing a March 29, 2011, auction of FM broadcast construction permits, Auction 91.<sup>3</sup> Tesiero timely filed a FCC Form 175 application to participate in FM Auction 91, and was found to be a qualified bidder.<sup>4</sup> By a May 23, 2011, Public Notice, the Bureaus announced that Tesiero was the winning bidder in FM Auction 91 for the FM construction

<sup>1</sup> This *NAL* is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”), and Section 1.80 of the Commission’s rules (the “Rules”). See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

<sup>2</sup> See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

<sup>3</sup> *Auction of FM Broadcast Construction Permits Scheduled for March 29, 2011; Comment Sought on Competitive Bidding Procedures for Auction 91*, Public Notice, 25 FCC Rcd 13034 (MB/WTB 2010).

<sup>4</sup> *Auction of FM Broadcast Construction Permits; 117 Bidders Qualified to Participate in Auction 91*, Public Notice, 26 FCC Rcd 5805 (MB/WTB 2011).

permit at Speculator, New York.<sup>5</sup> Winning bidders were to file a post-auction FCC Form 301 long-form application by June 30, 2011. The *Auction 91 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.”<sup>6</sup> Tesiero failed timely to submit a post-auction Form 301 application. His Form 301 application (the “Application”) was submitted on July 26, 2011. On May 11, 2012, Tesiero amended the Application, requesting 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 91 Closing Public Notice*.<sup>7</sup>

3. In his request for waiver, Tesiero states he did not have the assistance of counsel during the auction process and that he had been preoccupied with the construction of another station and issues related to his non-broadcast business. Tesiero has now retained counsel to assist with the Form 301 application. Tesiero contends that a grant of a waiver of the filing deadline is in the public interest because: (1) prior to this late application filing he has complied with all previous auction requirements, including all filing and payment obligations, and was found to be a qualified bidder. Thus, there is a record of prior compliance with auction-related requirements; (2) the omission was minor and inadvertent and there is no evidence of bad faith on his part; (3) acceptance of this application will not disrupt the auction process nor undermine the Commission’s policy of facilitating rapid implementation of service; (4) acceptance of the Application will avoid a delay in implementing new service to Speculator, New York, by having to re-auction the FM construction permit.

### 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.<sup>8</sup> However, the Commission may, for good cause, determine that a late filed long-form application should be accepted.<sup>9</sup> When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.<sup>10</sup> A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.<sup>11</sup>

5. The Commission has previously determined that an applicant has established good cause for a late-filed post-auction long-form application submission when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermine the Commission’s policy of facilitating

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<sup>5</sup> *Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 91*, Public Notice, 26 FCC Rcd 7541 (MB/WTB 2011) (“*Auction 91 Closing Public Notice*”).

<sup>6</sup> *Id.* at 7546.

<sup>7</sup> 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, unless a longer period is specified in that closing public notice.

<sup>8</sup> 47 C.F.R. § 1.2104(g).

<sup>9</sup> 47 C.F.R. § 73.5005(e).

<sup>10</sup> *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).

<sup>11</sup> See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *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)).

rapid implementation of service to the public.<sup>12</sup> We find that Tesiero has demonstrated circumstances that meet the standard for waiver of the application filing deadline. The record indicates that, prior to his late filing of the Form 301 application, Tesiero had complied with all previous Auction 91 requirements, including all filing and payment obligations, and was found to be a qualified bidder. While Tesiero lacked the assistance of counsel and was inattentive to the specific post-auction application filing deadline announced in the *Auction 91 Closing Public Notice*, we find no evidence of bad faith on his part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Tesiero's record of prior compliance with auction-related requirements.

6. We also recognize that the FM licensing process was not significantly delayed nor materially adversely affected by Tesiero's late filing of the application here. Accepting Tesiero'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 Speculator, New York, by having to re-auction the FM construction permit, and therefore grant Tesiero's waiver request below. Although we grant Tesiero a waiver of the rules that would otherwise require dismissal of his late-filed long-form application, and associated imposition of a default payment, we nonetheless find that he apparently failed to comply with the rules requiring timely submission of the post-auction Form 301 application.

7. *Proposed Forfeiture.* In this case, Tesiero has admitted that he failed 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.

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.<sup>13</sup> 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.<sup>14</sup> 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,<sup>15</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>16</sup>

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.<sup>17</sup> In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the

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<sup>12</sup> See, e.g., *Tallie Colville*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14216 (MB 2011) (waiver granted and forfeiture assessed, giving considerable weight to applicant's record of prior compliance with auction-related requirements); *Frank J. Neely*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8010 (MB 2006) (waiver granted and forfeiture assessed to applicant that stated it lacked assistance of counsel, and neglected to fully read auction closing Public Notice setting forth filing deadline); *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).

<sup>13</sup> 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

<sup>14</sup> 47 U.S.C. § 312(f)(1).

<sup>15</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>16</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>17</sup> 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.

violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>18</sup>

10. In this case, Tesiero was on notice that he was responsible for timely submitting his post-auction Form 301 application, but failed timely to file his 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 Joseph C. Tesiero is hereby NOTIFIED of his APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for his 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*, Joseph C. Tesiero 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 credit card, 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 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).<sup>19</sup> Tesiero will also send electronic notification on the date said payment is made to Lisa.Scanlan@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> 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.<sup>20</sup>

<sup>18</sup> 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).

<sup>19</sup> See 47 C.F.R. § 1.1914.

<sup>20</sup> *Id.*

17. IT IS FURTHER ORDERED, that Tesiero's Request for Waiver of the Form 301 Filing Deadline IS GRANTED and the Application will be processed in accordance with post-auction procedures.

18. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Joseph C. Tesiero, 1250 Riverfront Center, Amsterdam, NY 12010, and to his counsel, Howard M. Weiss, Esquire, Fletcher Heald & Hildreth, PLC, 1300 North 17<sup>th</sup> Street, 11<sup>th</sup> floor, Arlington, VA 22209-3801.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau