

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

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| In re Request of |) | |
| |) | |
| James M. Lout |) | Facility I.D. No. 190449 |
| |) | NAL/Acct. No. MB201241410035 |
| For Waiver of Auction 93 |) | FRN: 0003786225 |
| Form 301 Filing Deadline |) | File No. BNPH-20120607AAJ |
| |) | |
| Application for Construction Permit for |) | |
| New FM Station, New Llano, Louisiana |) | |

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

Adopted: July 5, 2012

Released: July 5, 2012

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the June 7, 2012, request of James M. Lout (“Lout”), 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”)*,¹ we find that Lout 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.² Based upon our review of the facts and circumstances before us, we conclude that Lout is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant Lout’s waiver request and have accepted his application for filing.

II. BACKGROUND

2. On September 12, 2011, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) jointly released a Public Notice announcing a March 27, 2012, auction of FM broadcast construction permits, Auction 93.³ Lout timely filed a FCC Form 175 application to participate in FM Auction 93, and was found to be a qualified bidder.⁴ By a April 17, 2012, Public Notice, the Bureaus announced that Lout was the winning bidder in FM Auction 93 for the FM construction permit at New Llano, Louisiana.⁵ Winning bidders were to file a post-auction FCC Form

¹ 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.

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

³ *Auction of FM Broadcast Construction Permits Scheduled for March 27, 2012; Comment Sought on Competitive Bidding Procedures for Auction 93*, Public Notice, 26 FCC Rcd 12865 (MB/WTB 2011).

⁴ *Auction of FM Broadcast Construction Permits; 109 Bidders Qualified to Participate in Auction 93*, Public Notice, 27 FCC Rcd 2385 (MB/WTB 2012).

⁵ *Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 93*, Public Notice, 27 FCC Rcd 4056 (MB/WTB 2012) (“*Auction 93 Closing Public Notice*”).

301 long-form application by May 29, 2012. The *Auction 93 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.”⁶ Lout failed timely to submit a post-auction Form 301 application. His Form 301 application (the “Application”) was submitted on June 7, 2012. Lout attached to the Application a request for 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 93 Closing Public Notice*.⁷

3. In his request for waiver, Lout states he did not receive a copy of the *Auction 93 Closing Public Notice*, nor did he have the assistance of counsel during the auction process. Lout further states that as a result he was unaware of the May 29, 2012, Form 301 filing deadline until he consulted with counsel approximately one week after the deadline to pursue a receipt for his final auction payment, believing he was not required to file Form 301 until he had received such a receipt. Lout, through counsel, then immediately filed the Form 301 application. Lout contends that a grant of a waiver of the filing deadline is in the public interest because: (1) he was unaware of the Form 301 filing deadline, thus there was no bad faith on his part, and he immediately took steps to remedy the relatively short (one week) delay in filing Form 301; (2) prior to this late application filing he had 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; (3) acceptance of this application will not harm or prejudice any party, and will neither disrupt the auction process nor undermine the Commission’s policy of facilitating rapid implementation of service; and (4) acceptance of the Application will avoid a delay in implementing new service to New Llano, Louisiana, 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.⁸ However, the Commission may, for good cause, determine that a late-filed long-form application should be accepted.⁹ When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹⁰ A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹¹

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 undermined the Commission’s policy of facilitating

⁶ *Id.* at 4060.

⁷ 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.

⁸ 47 C.F.R. § 1.2104(g).

⁹ 47 C.F.R. § 73.5005(c).

¹⁰ *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).

¹¹ 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.¹² We find that Lout 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, Lout had complied with all previous Auction 93 requirements, including all filing and payment obligations, and was found to be a qualified bidder. While Lout lacked the assistance of counsel and was inattentive to the specific post-auction application filing requirements and deadline announced in the *Auction 93 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 Lout'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 Lout's late filing of the application here. Accepting Lout'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 New Llano, Louisiana, by having to re-auction the FM construction permit, and therefore grant Lout's waiver request below. Although we grant Lout 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, Lout 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.¹³ 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.¹⁴ 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,¹⁵ and the Commission has so interpreted the term in the Section 503(b) context.¹⁶

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.¹⁷ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the

¹² See, e.g., *Joseph C. Tesiero*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 12-1004 (MB rel. June 27, 2012) (waiver granted and forfeiture assessed to applicant acting without assistance of counsel, 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).

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

¹⁴ 47 U.S.C. § 312(f)(1).

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

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

¹⁷ 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.”¹⁸

10. In this case, Lout 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 James M. Lout 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 that, pursuant to Section 1.80 of the Commission’s Rules, within thirty (30) days of the release date of this *NAL*, James M. Lout 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 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).¹⁹ Lout 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 12th Street, S.W., Washington DC 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, DC 20554.²⁰

¹⁸ 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).

¹⁹ *See* 47 C.F.R. § 1.1914.

²⁰ *Id.*

17. IT IS FURTHER ORDERED that Lout'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 James M. Lout, 765 Hemphill Street, Jasper, TX 75951, and to his counsel, Christopher D. Imlay, Esq., Booth, Freret, Imlay & Tepper, P.C., 14356 Cape May Road, Silver Spring, MD 20904-6011.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau