

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

|                                     |   |                              |
|-------------------------------------|---|------------------------------|
| In the Matter of                    | ) |                              |
|                                     | ) |                              |
| <b>James M. Lout</b>                | ) | Facility I.D. No. 190449     |
|                                     | ) | NAL/Acct. No. MB201241410035 |
| Application for Construction Permit | ) | FRN: 0003786225              |
| For New FM Station, New Llano, LA   | ) | File No. BNPH-20120607AAJ    |

**FORFEITURE ORDER**

**Adopted: December 6, 2012**

**Released: December 7, 2012**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. In this Forfeiture Order, the Media Bureau (“Bureau”) issues a monetary forfeiture to James M. Lout (“Lout”) in the amount of three thousand dollars (\$3,000) for willfully violating Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission’s Rules (“Rules”) by failing to timely file his post-auction Form 301 long-form application (“Application”).<sup>1</sup>

**II. BACKGROUND**

2. Lout timely filed an FCC Form 175 application to participate in FM Auction 93, and was found to be a qualified bidder.<sup>2</sup> By an April 17, 2012, Closing Public Notice, the Bureau and the Wireless Telecommunications Bureau announced that Lout was the winning bidder for an FM construction permit at New Llano, Louisiana.<sup>3</sup> The *Auction 93 Closing Public Notice* also announced that winning bidders were to submit their FCC Form 301 long-form applications by May 29, 2012.<sup>4</sup> However, Lout did not submit his Application until June 7, 2012.<sup>5</sup> With his Application, Lout also submitted a request for waiver of the filing deadline, stating that he never received a copy of the *Auction 93 Closing Public*

<sup>1</sup> See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a), which 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>2</sup> *Auction of FM Broadcast Construction Permits; 109 Bidders Qualified to Participate in Auction 93*, Public Notice, 27 FCC Rcd 2385 (MB/WTB 2012).

<sup>3</sup> *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*”).

<sup>4</sup> *Id.* at 4060.

<sup>5</sup> *James M. Lout*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 7517, 7518 (MB 2012) (“*NAL*”).

*Notice*, and that he did not have the assistance of counsel at any time during the Auction 93 process.<sup>6</sup> He further stated that, because of these two conditions, he was unaware of the May 29, 2012, Form 301 filing deadline until he consulted with counsel.<sup>7</sup>

3. The *Auction 93 Closing Public Notice* stated 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>8</sup> An applicant establishes good cause if minor, inadvertent, post-auction delinquencies neither disrupted the auction process, nor undermined the Commission’s policy of facilitating rapid implementation of service to the public.<sup>9</sup> In the *NAL*, the Bureau granted Lout’s request for waiver of the filing deadline.<sup>10</sup> The Bureau found good cause because: (1) Lout had previously complied with all Auction 93 filing and payment obligations and was initially found to be a qualified bidder; (2) there was no indication of bad faith; (3) Lout’s untimely filing of the Application was only a minor violation, and accepting the application would not undermine the Commission’s auction policies; and (4) it would be in the public interest to allow Lout to retain his FM construction permit and to proceed with the implementation of a new radio service at New Llano, Louisiana.<sup>11</sup> The waiver allowed Lout’s late Application to be accepted and excused him from the default payment specified in the Rules.<sup>12</sup>

4. Despite granting Lout’s waiver request, the Bureau nonetheless held that Lout violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules, which require winning bidders who have met their down payment obligations to file the appropriate long-form application within thirty (30) days following the closing of bidding and notification of the winners, for each construction permit won.<sup>13</sup> In accordance with the Commission’s *Forfeiture Policy Statement*, Section 503(b)(2)(E) of the Communications Act of 1934 (“Act”), and Section 1.80(b)(6) of the Rules, the Bureau proposed the full statutory base amount of \$3,000 for Lout’s violations.<sup>14</sup> The Bureau stated that it would not depart from this amount because Lout was on notice that he was responsible for timely submitting his Application, but he failed to do so.<sup>15</sup>

5. On August 7, 2012, Lout filed a response to the *NAL* (“Response”). In the Response, Lout asserts that the forfeiture should be reduced from \$3,000 to a nominal amount (less than \$500) because: (1) he did not receive notice of the Application filing deadline, and a \$3,000 forfeiture is

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<sup>6</sup> Application, Exh. 11, Auction Information and Request for Waiver of Long Form Filing Deadline.

<sup>7</sup> *Id.*

<sup>8</sup> *Auction 93 Closing Public Notice*, 27 FCC Rcd at 4060.

<sup>9</sup> *NAL*, 27 FCC Rcd at 7518-19. See also, e.g., *Joseph C. Tesiero*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 7195, 7196-97 (MB 2012) (stating the standard for establishing good cause for waiver of filing deadline).

<sup>10</sup> *NAL*, 27 FCC Rcd at 7519.

<sup>11</sup> *Id.*

<sup>12</sup> 47 C.F.R. § 1.2104(g). Ordinarily, a winning bidder that fails to timely file the required FCC 301 long-form application is deemed to have defaulted, its application is dismissed, and it is subject to a default payment.

<sup>13</sup> *NAL*, 27 FCC Rcd at 7520. See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

<sup>14</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 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(6), Section I.

<sup>15</sup> *NAL*, 27 FCC Rcd at 7521.

“draconian” under such circumstances; (2) he acted *pro se* in Auction 93; and (3) his circumstances demonstrate three of the four downward adjustment criteria for Section 503 forfeitures.<sup>16</sup>

### III. DISCUSSION

6. “The Commission has held repeatedly that an item mailed is presumed to be received by the addressee.”<sup>17</sup> To rebut the presumption, “the question of receipt should be resolved on the basis of all of the record of evidence.”<sup>18</sup> The evidence pointing towards non-receipt of the *Auction 93 Closing Public Notice* is Lout’s own claim that he “did not receive a copy of the April 17, 2012 Public Notice, DA 12-600.”<sup>19</sup> However, the Bureau possesses a copy of a UPS “Proof of Delivery” notice showing that, on April 18, 2012, the *Auction 93 Closing Public Notice* sent by the Bureau and the Wireless Telecommunications Bureau was delivered to Lout’s address on file with the Commission. When documents are sent to an address that the applicant has filed with the Commission, it is not the Bureau’s responsibility to ensure that the applicant has received them.<sup>20</sup> In light of all the evidence, Lout has not rebutted the presumption of receipt. The Bureau rejects Lout’s argument that his non-receipt of the *Auction 93 Closing Public Notice* prevented him from timely filing his Application.<sup>21</sup>

7. The Bureau also rejects Lout’s argument that the \$3,000 forfeiture amount is “draconian” and unjustified under the circumstances. The payment of other auction-related obligations has no bearing on the amount of the penalty for untimely filing the Application. Section 1.80(b), Section I of the Rules, which lists \$3,000 as the base penalty for failure to file required forms, justifies the proposed amount.<sup>22</sup> This amount is consistent with other forfeitures proposed and assessed in similar circumstances.<sup>23</sup>

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<sup>16</sup> Response at 1-4. See 47 C.F.R. § 1.80(b)(6), Section II.

<sup>17</sup> *Juan Galiano*, Memorandum Opinion and Order, 5 FCC Rcd 2446, 2448 (Rev. Bd.), review denied, 5 FCC Rcd 6442 (1990) (“*Galiano IP*”); see also *Denver MDS Company*, 2 FCC Rcd 643 (1987); *Lakeland Cablevision, Inc.*, 66 FCC 2d 452 (1977); *Midwest Video Corp.*, 43 FCC 2d 262 (1973); *El Paso Cablevision, Inc.*, 27 FCC 2d 835 (1971); *Delaware County Cable Television Co.*, 13 FCC 2d 899 (1968).

<sup>18</sup> *Galiano II*, 5 FCC Rcd at 6442 (citing *In re Yoder*, 758 F.2d 1114 (6th Cir. 1985)).

<sup>19</sup> Response at 2 (emphasis in original).

<sup>20</sup> See 47 C.F.R. § 1.5(b) (“The licensee is responsible for making any arrangements which may be necessary in his particular circumstances to assure that Commission documents or correspondence delivered to [the address furnished to the Commission] will promptly reach him or some person authorized by him to act on his behalf.”).

<sup>21</sup> The *Auction 93 Closing Public Notice*, and other auction-related public notices and documents, was posted to the Web via the Auction 93 website on the day of its release, April 17, 2012. Auction 93 website, <http://wireless.fcc.gov/auctions/default.htm?job=release&id=113&y=2012> (visited Dec. 4, 2012). Thus, there was public notice of the winning bidders in Auction 93. See also 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 . . . .”); 47 C.F.R. 73.5005(a) (within thirty (30) days following the close of bidding and notification to the winning bidders, unless a longer period is specified by public notice, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder).

<sup>22</sup> 47 C.F.R. 1.80(b), Section I.

<sup>23</sup> See, e.g., *David Tillotson, Esq.*, Letter, 26 FCC Rcd 7942 (MB 2011) (denying petition for reconsideration of \$3,000 forfeiture issued to *pro se* applicant who failed to heed Closing Public Notice, untimely filed Form 301 long-form application, and was granted waiver of the filing deadline); *E-String Wireless Limited*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 15216 (MB 2007) (\$3,000 forfeiture proposed where applicant failed to timely file the Form 301 long-form application, and where applicant had complied with all other auction requirements and the Bureau found good cause to waive the filing deadline).

8. The Bureau also rejects Lout's argument that the proposed forfeiture amount should be reduced because he participated in Auction 93 *pro se*. Lout made the decision to participate without advice of counsel. Parties that act *pro se* assume the responsibility of complying with the Rules.<sup>24</sup>

9. Finally, Lout argues that the Bureau's finding in the *NAL* that Lout met the standard for waiver of the application filing deadline warrants reduction of the forfeiture because Lout demonstrated three of the four downward adjustment criteria from Section 1.80(b), Section II, of the Rules.<sup>25</sup> However, the Bureau has typically reduced forfeitures in this context only when the late-filing applicant has demonstrated more diligence than Lout. In *RF Services Inc.*,<sup>26</sup> the Bureau granted the request for waiver of the Form 301 long-form application filing deadline and reduced the proposed forfeiture from \$3,000 to \$1,500 because the applicant was "diligent in prosecuting [its] application"<sup>27</sup>: it successfully obtained site assurance by the filing deadline, and although it experienced software difficulties in preparing its application's technical exhibits, it filed its application just three hours late. However, in *Joseph C. Tesiero*, the Bureau proposed the full \$3,000 forfeiture on a *pro se* applicant who demonstrated good cause for waiver of the filing deadline but who filed late because he was "preoccupied" and unaware of the filing deadline until after it passed.<sup>28</sup> Similarly, in *Frank J. Neely*,<sup>29</sup> another late-filing *pro se* applicant demonstrated circumstances that warranted waiver of the filing deadline but was unaware of the deadline until after it passed and the Bureau proposed a \$3,000 forfeiture. Like the applicants in the previous two cases, and unlike the applicant in *RF Services, Inc.*, Lout was unprepared to file his Application by the deadline; he did not realize the deadline existed until he contacted counsel more than one week later.<sup>30</sup> The Bureau finds that the circumstances Lout references from the *NAL*, while justifying waiver of the filing deadline, do not justify reduction.

#### IV. ORDERING CLAUSES

10. 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 SHALL FORFEIT to the United States the sum of three thousand dollars (\$3,000) for his willful violation of Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's Rules.

11. 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

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<sup>24</sup> See *Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 595 (2008) (applicant's *pro se* status did not exempt it from complying with Commission rules or statutory provisions); *Mandeville Broadcasting Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 2523, 2524 (1987) ("[P]ro se parties do assume the responsibility of conforming with the Commission's Rules and policies." (citations omitted)).

<sup>25</sup> See Response at 3. The *NAL* found that (1) the one-week delay in filing the Application was a "minor, inadvertent post-auction delinquency"; (2) the Commission found "no evidence of bad faith" on Lout's part; and (3) Lout had a "record of prior compliance with auction-related requirements." *NAL*, 27 FCC Rcd at 7519.

<sup>26</sup> *RF Services, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10138 (MB 2012).

<sup>27</sup> *Id.* at 10141.

<sup>28</sup> *Joseph C. Tesiero*, 27 FCC Rcd at 7196-98.

<sup>29</sup> *Frank J. Neely*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 8010, 8011-13 (MB 2006).

<sup>30</sup> Response at 2.

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).<sup>31</sup> Lout will also send electronic notification on the date said payment is made to Lisa.Scanlan@fcc.gov and Alex.Polley@fcc.gov. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.<sup>32</sup>

12. IT IS FURTHER ORDERED that copies of this Forfeiture Order 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

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<sup>31</sup> See 47 C.F.R. § 1.1914.

<sup>32</sup> *Id.*