

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

In re Requests of)	
)	
NORTHWAY BROADCASTING, LLC	)	NAL/Acct. No. MB201341410009
	)	FRN: 0017873902
For Waiver of Auction 93)	
Form 301 Filing Deadline)	
)	
Application for Construction Permit for	)	Facility I.D. No. 190450
New FM Station, Blythe, California	)	File No. BNPH-20120530ANW
)	
Application for Construction Permit for	)	Facility I.D. No. 190451
New FM Station, Fernley, Nevada	)	File No. BNPH-20120530AOH
)	
Application for Construction Permit for	)	Facility I.D. No. 190452
New FM Station, Silver Springs, Nevada	)	File No. BNPH-20120530AOI
)	
Application for Construction Permit for	)	Facility I.D. No. 190453
New FM Station, Poultney, Vermont	)	File No. BNPH-20120530ANQ

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

Adopted: September 5, 2013

Released: September 6, 2013

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the May 30, 2012, requests of Northway Broadcasting, LLC (“Northway”), 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 Northway apparently willfully violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing to timely file post-auction Form 301 applications.² Based upon our review of the facts and circumstances before us, we grant Northway’s waiver requests to the extent indicated herein, and conclude that Northway is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also accept Northway’s four post-auction FCC Form 301 applications for filing.³

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 Northway was the provisional winning bidder on four permits in FM Auction 93. It submitted post-auction FCC Form 301 applications for all four permits: Blythe, California, File No. BNPH-20120530ANW; Fernley, Nevada, File No. BNPH-20120530AOH; Silver Springs, Nevada, BNPH-20120530AOI; and Poultney, Vermont, File No. BNPH-20120530ANQ (collectively, the “Applications”).

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 93.⁴ Northway timely filed an FCC Form 175 application to participate in FM Auction 93, and was found to be a qualified bidder.⁵ By an April 17, 2012, Public Notice, the Bureaus announced that Northway was the winning bidder in FM Auction 93 for the FM construction permits at Blythe, California; Fernley, Nevada; Silver Springs, Nevada; and Poultney, Vermont.⁶ Winning bidders were required to file post-auction FCC Form 301 long-form applications 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.”⁷ Northway failed timely to submit post-auction Form 301 applications. The Applications were submitted on May 30, 2012. Northway attached to the Applications requests 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*.⁸

3. In its requests for waiver, Northway states that, based on its successful filing of FCC Form 175 without the “direct assistance” of counsel, it believed it could also file its post-auction applications with only the assistance of its engineering consultant.⁹ However, on the date of the filing deadline, May 29, 2012, Northway states that it realized that it would be more difficult to prepare the four FCC Form 301 applications than it had anticipated. Northway therefore contacted its counsel to assist it in completing the Applications, and its counsel was able to complete the non-engineering portions of the Applications that same day, whereupon Northway forwarded the Applications to its engineering consultant in the late afternoon of May 29. Northway does not indicate when exactly it first attempted to file the Applications; it states only that on the morning of May 30 its counsel checked the Media Bureau’s Consolidated Data Base System (“CDBS”), and learned that the Applications had not yet been filed. Northway further states that, after conferring with Commission staff and confirming that the electronic filing system had stopped accepting Auction 93 filings after midnight on May 29, Northway’s counsel was informed that form submissions were possible on the afternoon of May 30, and Northway states that all four of the Applications were filed as of 6:33 p.m. on May 30.¹⁰ Northway contends that a grant of a waiver of the filing deadline is in the public interest because its filing delay was, at most, a minor, inadvertent post-auction delinquency that did not disrupt the auction process, nor did it undermine the Commission’s policy of facilitating rapid implementation of new radio service to the public.¹¹

⁴ *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).

⁵ *Auction of FM Broadcast Construction Permits; 109 Bidders Qualified to Participate in Auction 93*, Public Notice, 27 FCC Rcd 2385 (MB/WTB 2012).

⁶ *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*”).

⁷ *Id.* at 4060.

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, unless a longer period is specified in that closing public notice.

⁹ Exhibit 1 to each of the Applications.

¹⁰ *Id.*

¹¹ *Id.*

III. DISCUSSION

4. *Waiver Requests.* 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.¹² However, the Commission may, for good cause, determine that a late-filed long-form application should be accepted.¹³ When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹⁴ A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹⁵

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 rapid implementation of service to the public.¹⁶ We find that Northway has demonstrated 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 Applications, Northway had complied with all previous Auction 93 requirements, including all filing and payment obligations, and was found to be a qualified bidder. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Northway's record of prior compliance with auction-related requirements.

6. We also recognize that the Auction 93 licensing process was not significantly delayed nor materially adversely affected by Northway's filing of the Applications one day late. Accepting Northway's Form 301 Applications 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 Blythe, Fernley, Silver Springs, and Poultney, by having to re-auction the FM construction permits, and therefore grant Northway's waiver requests below. Although we grant Northway waiver of the rules that would otherwise require dismissal of its late-filed long-form Applications, 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 Applications.

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

¹² 47 C.F.R. § 1.2104(g).

¹³ 47 C.F.R. § 73.5005(c).

¹⁴ *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).

¹⁵ 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)).

¹⁶ See, e.g., *Joseph C. Tesiero*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Red 7195 (MB 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 Red 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 Red 17157 (MB 2005); *Silver Palm Communications, Inc.*, 17 FCC Red 6606, 6607 (WTB 2002); *City Page & Cellular Services, Inc.*, 17 FCC Red 26109, 22611-12 (WTB 2002); *Pinpoint Communications, Inc.*, 14 FCC Red 6421 (WTB 1999).

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)(6) 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 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, Northway was on notice that it was responsible for timely submitting its post-auction Form 301 application, but failed timely to file its Applications. Northway states it believed it would be able to file the Applications without the assistance of counsel, but admits that it waited until the day of the filing deadline before realizing this could not be accomplished. Also, contrary to Northway’s assertion, late applications were accepted after the May 29 filing deadline expired. Although Northway contends it was advised that the CDBS filing system was “locked” as of midnight on May 29, at least one applicant was able to file its post-Auction 93 Form 301 at approximately 3:00 a.m. on May 30.²³ However, Northway’s waiver request does evidence a degree of diligence in contacting counsel to assist with the filing, and the Applications were filed less than 24 hours after the deadline. 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 total forfeiture, for all four Applications, 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 Northway Broadcasting, LLC, 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 that, pursuant to Section 1.80 of the Commission’s Rules, within thirty (30) days of the release date of this *NAL*, Northway Broadcasting, LLC, SHALL PAY the

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)(6), note to paragraph (b)(6), Section I.

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)(6).

²³ *RF Services Inc.*, Memorandum and Order and Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10138 (MB 2012).

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).²⁴ Northway 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 20554.²⁵

17. IT IS FURTHER ORDERED that Northway's Requests for Waiver of the Form 301 Filing Deadline ARE GRANTED in part and DENIED in all other respects, and the Applications ARE ACCEPTED FOR FILING and will be processed in accordance with post-auction procedures.

18. IT IS FURTHER ORDERED that a copy of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Northway Broadcasting, LLC, ATTN: Clayton Ashworth, 238 Bay Road, Queensbury, NY 12804.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ See 47 C.F.R. § 1.1914.

²⁵ *Id.*