

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

In re Request of
Eternity Media Group LLC
For Waiver of Auction 99
Form 349 Filing Deadline
Application for Construction Permit for
New FM translator station,
North Augusta, South Carolina
Facility I.D. No. 200658
NAL/Acct. No. MB201941410003
FRN: 0022166623
File No. BNPFT-220180822AAO

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 25, 2019

Released: June 25, 2019

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the August 22, 2018, Form 349 long-form application of Eternity Media Group LLC (Eternity), for a new FM cross-service translator station at North Augusta, South Carolina. Also before us is the September 7, 2018, Informal Objection (Objection) to the Application filed by J.J. & B Broadcasting, Inc. (JJB). In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the Act), and section 1.80 of the Commission's rules, by the Chief, Audio Division, Media Bureau, by authority delegated under section 0.283 of the rules, we deny the Objection. We find, however, that Eternity apparently willfully violated sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's rules by failing to timely file a post-auction Form 349 application. Based upon our review of the facts and circumstances before us, we conclude that Eternity is apparently liable for a monetary forfeiture in the amount of one thousand dollars (\$1,000). We also accept Eternity's application for filing.

II. BACKGROUND

2. On June 1, 2017, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") jointly released a Public Notice announcing details and filing instructions for the first of two filing windows for AM station licensees seeking to establish new cross-service FM

1 File No. BNPFT-20180822AAO (Application).

2 47 U.S.C. § 503(b); 47 CFR § 1.80.

3 See 47 CFR § 0.283.

4 See 47 CFR §§ 73.3573(f)(5)(i), 73.5005(a).

translator stations to rebroadcast their AM signals.⁵ This filing window, designated Auction 99, was opened by direction of the Commission in the *AM Revitalization* proceeding.⁶ Eternity timely filed a FCC Form 175 application to participate in Auction 99, and was found to be a qualified bidder.⁷ By a May 25, 2018, Public Notice, the Bureaus announced that Eternity was the winning bidder in Auction 99 for the FM construction permit at North Augusta, South Carolina.⁸ Winning bidders were directed to file a post-auction FCC Form 301 long-form application by July 2, 2018.⁹ The *Auction 99 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.”¹⁰ Eternity failed timely to submit a post-auction Form 349 application. Its Form 349 application (Application) was submitted on August 22, 2018, and was followed by a letter dated August 30, 2018, requesting waiver of the filing deadline (Waiver Request).¹¹

3. In its request for waiver, Eternity states that its engineer “Mr. Alan [Kilgore],” had represented that he would file the Form 349 long-form application, but then informed Eternity’s Managing Member, Donald H. Pugh, Sr. (Pugh) that he had neglected to do so, as he thought the filing window opened on July 2, rather than closing on that date.¹² Eternity further states that its engineer Kilgore was preoccupied at the time the filing was to be made with the hospitalization and resettlement of his elderly mother.¹³ In the Objection, JJB contends that these facts are insufficient to overcome the “high hurdle” of a waiver.¹⁴

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.¹⁵ However, the Commission may, for good cause, determine that a late filed long-form application should be accepted.¹⁶ When an applicant seeks a waiver

⁵ *Filing Instructions for Cross-Service FM Translator Auction Filing Window for AM Broadcasters to be Open July 26 – August 2, 2017*, Public Notice, 32 FCC Rcd 4663 (MB/WTB 2017).

⁶ *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12153-54, para. 17 (2015) (*AM Revitalization First R&O*).

⁷ *Auction of Cross-Service FM Translator Construction Permits – 19 Bidders Qualified to Participate in Auction 99*, Public Notice, 33 FCC Rcd 4475 (MB/WTB 2018).

⁸ *Auction of Cross-Service FM Translator Construction Permits Closes – Winning Bidders Announced for Auction 99*, Public Notice, 33 FCC Rcd 5001, 5010 (MB/WTB 2018) (*Auction 99 Closing Public Notice*).

⁹ *Id.* at 5006.

¹⁰ *Id.*

¹¹ 47 CFR §§ 73.3573(f)(5)(i), 73.5005(a). These rules 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.

¹² Waiver Request at 1.

¹³ *Id.*

¹⁴ Objection at 2, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*).

¹⁵ 47 CFR § 1.2104(g).

¹⁶ 47 CFR § 73.5005(a).

of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹⁷ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁸

5. The Commission has previously granted waivers of the post-auction long-form application filing deadline 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.¹⁹ We find that Eternity has presented sufficient facts that, when considered in their totality, demonstrate 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 application, Eternity had complied with all previous Auction 99 requirements, including all filing and payment obligations, and was found to be a qualified bidder. While Eternity’s delegation of the long-form filing to its engineer evidences inattention to the clearly delineated post-auction procedures and the Form 349 filing deadline announced in the *Auction 99 Closing Public Notice*, we find no evidence of bad faith on its part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Eternity’s record of prior compliance with auction-related requirements, and its prompt action taken to remedy its error once that was called to its attention.

6. We also recognize that the FM translator licensing process was not significantly delayed nor materially adversely affected by Eternity’s late filing of the application here. Accepting Eternity’s Form 349 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 translator service to North Augusta, South Carolina, by having to re-auction the FM translator construction permit, and therefore grant Eternity’s waiver request below. Although we grant Eternity a waiver of the rules that would otherwise require dismissal of its late-filed long-form application, 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 349 application.

7. *Proposed Forfeiture.* In this case, Eternity 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.²⁰ 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.²¹ 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,²² and the Commission has so interpreted the term in the section 503(b) context.²³

¹⁷ *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 CFR § 73.3566(a).

¹⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*).

¹⁹ See, e.g., Alfred L. “Pat” Roberson III, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 12933, 12935, para. 6 (MB 2013); *Northway Broadcasting, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 12928 (MB 2013).

²⁰ 47 U.S.C. § 503(b)(1)(B). See also 47 CFR § 1.80(a)(1).

²¹ 47 U.S.C. § 312(f)(1).

²² See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

9. The Commission's *Forfeiture Policy Statement* and section 1.80(b) of the rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.²⁴ 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."²⁵

10. In this case, Eternity was on notice that it was responsible for timely submitting its post-auction Form 349 application, but failed timely to file its application. We also, however, account for the fact that Eternity is applying for an FM translator station, which does not originate programming, and which therefore involves a considerably smaller financial investment than a full-service AM or FM broadcast station. 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 amount of \$1,000.

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 Eternity Media Group LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$1,000 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, pursuant to section 1.80 of the Commission's rules, that, within thirty (30) days of the release date of this *NAL*, Eternity Media Group LLC 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 forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),²⁶ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:²⁷

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).²⁸ For

²³ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²⁴ 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 CFR § 1.80(b), note to paragraph (b)(8), Section I.

²⁵ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 CFR § 1.80(b)(8).

²⁶ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

²⁷ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

²⁸ Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.

- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a dollar limitation on credit card transactions, which cannot exceed \$24,999.99.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and choose the "Pay from Bank Account" option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

14. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.²⁹ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Albert Shuldiner, Chief, Audio Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

16. 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.

17. IT IS FURTHER ORDERED that Eternity Media Group LLC's Request for Waiver of the Form 349 Filing Deadline IS GRANTED and the Application will be processed in accordance with post-auction procedures.

18. IT IS FURTHER ORDERED that J.J. & B Broadcasting, Inc.'s Informal Objection IS DENIED.

19. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to Eternity Media Group LLC, P.O. Box 6424, Laurel, MS 39440.

FEDERAL COMMUNICATIONS COMMISSION

²⁹ See 47 CFR § 1.1914.

Albert Shuldiner
Chief, Audio Division
Media Bureau