

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

In re Request of)	
)	
VALLEYDALE BROADCASTING, LLC)	Facility I.D. No. 189500
)	NAL/Acct. No. MB201241410038
For Waiver of Auction 91)	FRN: 0018897223
Form 301 Filing Deadline)	File No. BNPH-20110721AAA
)	
Application for Construction Permit for)	
New FM Station, Vaiden, Mississippi)	

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

Adopted: August 22, 2012

Released: August 22, 2012

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the request of Valleydale Broadcasting, LLC (“Valleydale”), 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 Valleydale 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 grant Valleydale’s waiver request to the extent indicated herein, and conclude that Valleydale is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also accept its 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 91.³ Valleydale timely filed a FCC Form 175 application to participate in FM Auction 91, and was found to be a qualified bidder.⁴ By a May 23, 2011, Public Notice, the Bureaus announced that Valleydale was the winning bidder in FM Auction 91 for the FM construction

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 29, 2011; Comment Sought on Competitive Bidding Procedures for Auction 91*, Public Notice, 25 FCC Rcd 13034 (MB/WTB 2010).

⁴ *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 Vaiden, Mississippi.⁵ Winning bidders were required 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.”⁶ Valleydale failed timely to submit a post-auction Form 301 application. Its Form 301 application (the “Application”) was submitted on July 21, 2011. On July 9, 2012, Valleydale amended the Application to request a 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*.⁷

3. In its request for waiver, Valleydale states that its intended transmitter site was possibly short spaced to an unbuilt allotment on Channel 273C3 at Lexington, Mississippi. According to Valleydale, the allotment had remained unbuilt despite the grant and expiration of two construction permits to the licensee of WAGR-FM, Lexington, Mississippi, and further states that it relied on the statement of a WAGR-FM representative that it did not intend to build the upgraded Class C3 allotment for WAGR-FM. However, Valleydale further states that the WAGR-FM licensee changed its mind during the last week before the filing deadline, forcing Valleydale to find another site, a process that according to Valleydale took three weeks to accomplish. Valleydale thus did not file its FCC Form 301 application until July 21, 2011. Valleydale contends that grant of a waiver of the filing deadline is justified because Valleydale relied in good faith on the WAGR-FM licensee’s representation that it would not apply to build a modified facility at the Channel 273C3 allotment at Lexington. Valleydale also notes that it did not have benefit of counsel through the process. It further argues that waiver is in the public interest because its application 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.

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 *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*”).

⁶ *Id.* at 7546.

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)).

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.¹² We find that Valleydale 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 Application, Valleydale had complied with all previous Auction 91 requirements, including all filing and payment obligations, and was found to be a qualified bidder. Valleydale's recitation of its efforts to secure a rule-compliant site does not evidence bad faith on its part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Valleydale's record of prior compliance with auction-related requirements.

6. We also recognize that the Auction 91 licensing process was not significantly delayed nor materially adversely affected by Valleydale's late filing of the Application here. Accepting Valleydale'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 Vaiden, Mississippi, by having to re-auction the FM construction permit, and therefore grant Valleydale's waiver request below. Although we grant Valleydale a waiver of the rules that would otherwise require dismissal of its late-filed 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 301 application.

7. *Proposed Forfeiture.* In this case, Valleydale has admitted that it 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)(6) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.¹⁷ In determining 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)(6), note to paragraph (b)(6), Section I.

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.”¹⁸

10. In this case, Valleydale was on notice that it was responsible for timely submitting its post-auction Form 301 application, but failed timely to file the Application. Valleydale contends that it relied on certain representations with regard to its preferred transmitter site. However, regardless of WAGR-FM’s licensee’s intentions or representations, Valleydale was required to protect the Channel 273C3 allotment at Lexington, and thus was required to take this into account when securing a transmitter site. Further, while Valleydale states that it acted without benefit of counsel, we note that the decision not to retain counsel was Valleydale’s alone. 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 Valleydale 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*, Valleydale Broadcasting, 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 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 Valleydale 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

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)(6).

¹⁹ See 47 C.F.R. § 1.1914.

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

17. IT IS FURTHER ORDERED that Valleydale's Request for Waiver of the Form 301 Filing Deadline IS GRANTED in part and DENIED in all other respects, and the Application IS 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 Valleydale Broadcasting, LLC, c/o Lee Reynolds, 2711 Pelham Parkway, Pelham, AL 35124.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁰ *Id.*