

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

In Reply Refer to:
1800B3-TSN

DA 02-2097
August 27, 2002

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Mondy-Burke Broadcasting Network
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Re: New(FM), Greenville, Mississippi
Delta Radio, Inc.
Facility ID No.: 16553
File No. BPH-19950417ME
Petition for Reconsideration and
Waiver
Motion for Declaratory Ruling

Dear Applicant and Counsel:

We have before us two pleadings relating to the above-captioned application. Delta Radio, Inc. ("Delta") filed a Petition for Reconsideration and Waiver ("Petition") on April 4, 2002, in which it seeks relief from the Commission's Public Notice dated March 7, 2002 ("*Payment Public Notice*"),¹ wherein we directed Delta to make its final payment pursuant to its winning bid in Closed Broadcast Auction No. 25 for an FM broadcast station construction permit at Greenville, Mississippi. Delta asserts that it is entitled to relief from the final payment deadline because of the pending application for review filed by Mondy-Burke Broadcasting Network ("MBN") of our denial of MBN's Petition to Deny Delta's Form 301 application.

¹ *Public Notice*: "FCC Announces It Is Prepared to Grant Broadcast Construction Permits After Final Payment Is Made," 17 FCC Rcd 4278 (2002).

MBN, in turn, filed a May 1, 2002, Motion for Declaratory Ruling (“Motion”), in which it seeks a declaration that, upon Delta’s default, it is entitled to purchase the Greenville construction permit for \$114,750, which was MBN’s net bid in Round 7 of Auction No. 25.² Round 7 was the first round in which MBN’s bid for the Greenville construction permit exceeded the final bid of the third-highest bidder.

For the reasons set forth below, we deny both the Petition and the Motion. Because Delta is in default of its payment obligations, we dismiss its application, and offer to MBN, as second-highest bidder, the opportunity to make the payments necessary to bring its funds on deposit with the Commission to \$54,150 (20% of its net high bid) and file any necessary amendment to its competing application for a new FM broadcast station at Greenville, Mississippi. However, the down payment and any final payment made by MBN must be based upon its net high bid of \$270,750.³

Background. Delta, MBN, and Margaret Adele Karr (“Karr”) were the only bidders in FM Mutually Exclusive (“MX”) Group 73 in Closed Broadcast Auction No. 25. Delta was the winning bidder for the construction permit, with a high bid of \$397,000.⁴ MBN timely filed a Petition to Deny Delta’s Form 301 application for the Greenville construction permit, alleging that Delta did not attach a proper divestiture commitment to its Form 175 application, and further alleging that Delta falsely certified its financial qualifications and was not, in fact, financially qualified to hold the Greenville construction permit. Alfred Roberson III (“Roberson”) filed an Informal Objection to Delta’s application, essentially repeating MBN’s allegations regarding Delta’s financial qualifications. Both the Petition to Deny and the Informal Objection were denied by letter dated May 17, 2000.⁵ On June 16, 2000, MBN filed an application for review of our denial of its Petition to Deny. That application for review is currently pending.

² In addition to the Petition, the following pleadings have been filed: an Opposition to Petition for Reconsideration and Waiver, filed April 12, 2002, by MBN; a Reply to Opposition to Petition for Reconsideration and Waiver, filed April 30, 2002, by Delta; a Supplement to Reply to Opposition, filed by Delta May 10, 2002, as part of its opposition to MBN’s Motion; a Further Supplement to Reply to Opposition, filed by Delta May 28, 2002; Errata to the Further Supplement to Reply to Opposition, filed by Delta May 30, 2002; and an Opposition to Further Supplement to Reply to Opposition, filed June 7, 2002, by MBN.

In addition to MBN’s Motion, the following pleadings have been filed: an Opposition to Motion for Declaratory Ruling, Supplement to Opposition to Application for Review, and Supplement to Reply to Opposition, filed by Delta May 10, 2002; and a Reply to Opposition to Motion for Declaratory Ruling, Supplement to Opposition to Application for Review, and Supplement to Reply to Opposition, filed May 16, 2002, by MBN.

³ MBN’s gross high bid was \$361,000; however, MBN claimed a 25% new entrant bidding credit pursuant to 47 C.F.R. § 73.5007(a).

⁴ *Public Notice*, “Closed Broadcast Auction No. 25 Closes; 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits,” 14 FCC Rcd 17186, 17197 (1999). Since Delta did not claim eligibility for a bidding credit, its high gross bid is also its high net bid.

⁵ *Letter to Mr. Alfred L. Roberson III, Lauren A. Colby, Esq., and Mr. Larry G. Fuss from Linda Blair, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-ALB (May 17, 2000).

On March 7, 2002, the Mass Media Bureau issued the *Payment Public Notice*, announcing that the Greenville construction permit was ready for grant upon Delta's timely payment of the balance of its winning bid.⁶ In the *Payment Public Notice*, the Bureau set March 21, 2002 as the date on which final payment was due, further setting April 4, 2002 as the deadline by which final payment could be made along with a 5% late penalty ("late payment deadline"), as expressly provided in Section 1.2109(a) of the Commission's Rules.⁷

Delta failed to make its final payment by the March 21, 2002 deadline. Delta filed its Petition on April 4, 2002, the late payment deadline, seeking a "temporary waiver" of the final payment deadline. To date, Delta has not made its final payment.

Discussion. *Petition for Reconsideration and Waiver:* Delta contends it is entitled to a waiver due to the "unique and compelling circumstances" to which it has been subjected.⁸ Specifically, Delta argues it is unable to borrow the funds necessary to make its final payment while MBN's application for review is pending. Additionally, Delta states its revenue has been "severely hurt by the economic slowdown that came about in the aftermath of September 11[, 2001]," and that its principals are unable to use their personal stock portfolios as collateral for the needed loan, as the value of their stocks has plummeted since September 11, 2001. Thus, concludes Delta, these "unforeseeable circumstances" and the "uncertain finality" of the construction permit justify a waiver of the final payment deadline.⁹

We reject Delta's arguments and deny its request for reconsideration and waiver. Delta fails to distinguish the facts of this case from those presented to the Commission in the recent cases of *Abundant Life, Inc.* ("*Abundant Life II*"),¹⁰ and *Winstar Broadcasting Corp.* ("*Winstar*").¹¹ In *Abundant Life II*, the winning bidder in another Auction No. 25 MX group, Abundant Life, Inc. ("ALI"), sought a declaratory ruling that it did not have to make its final payment while a court challenge to its application was pending, and in the alternative requested a waiver of the final payment deadline. The Commission rejected ALI's arguments, holding that upon denial of a petition to deny, the staff was required to issue a public notice establishing a deadline for the winner bidder to submit its final payment.¹² These payment requirements ensure that only serious, financially qualified bidders will receive construction permits.¹³ Additionally,

⁶ *Id.*

⁷ *Payment Public Notice*, 16 FCC Rcd at 5410-11; *see also* 47 C.F.R. §§ 1.2109(a), 73.5003(c).

⁸ Petition, p. 1.

⁹ Petition, pp. 5-6.

¹⁰ 17 FCC Rcd 4006 (2002).

¹¹ 17 FCC Rcd 6126 (2002).

¹² 17 FCC Rcd 4007 n.5.

¹³ *See, e.g., BDPCS, Inc.*, 12 FCC Rcd 3230, 3235 (1997), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997) ("[I]n order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial

the Commission rejected ALI's waiver request, stating that it had never granted a waiver of a final payment obligation based on a pending challenge to an application.¹⁴ The auction rules regarding payment deadlines are clear, the Commission held, and ALI had notice of the consequences of default when it chose to participate in the auction. Thus, there were no special circumstances warranting a waiver of the final payment deadline, and such a waiver was not in the public interest.

Abundant Life II involved a request for waiver while a challenge to the winning bidder's application was pending in court, a fact Delta attempts to distinguish from its own situation, in which an application for Commission review is pending. However, in *Winstar*, winning bidder Winstar Broadcasting Corp. ("WBC") sought a stay of the final payment pending action on an application for review by the Commission. However, just as in *Abundant Life II*, the Commission found WBC in default for failing to submit its final auction payment by the announced payment deadline, dismissed its application, and offered the construction permit to the second-highest bidder at its final bid.¹⁵

We also find unconvincing Delta's assertion that the events of September 11, 2001, and the subsequent economic downturn, are sufficiently "unique and compelling" circumstances to justify a waiver of the final payment deadline. The post-September 11 economic downturn has recently been held insufficient to justify a waiver of the Commission's installment payment rules requested by a licensee in the Specialized Mobile Radio Service.¹⁶ In the *CommNet Decision*, the Wireless Telecommunications Bureau ("WTB") held that "a downturn in economic conditions coupled with a lack of financial participation by lenders" that decreased the applicant's ability to fund its operation and development and make payments, "is not a unique fact or circumstance that meets the waiver standard."¹⁷ WTB pointed out that all licensees bear the risk of changes in the market, which does not mitigate their obligation to maintain sufficient resources to build out and pay for their licenses.¹⁸ There is no reason to treat a broadcast applicant differently, and we decline to do so here.

deadlines." See also *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904, 5907-08 (Wireless Telecomm. Bureau 1997), *aff'd*, 13 FCC Rcd 21983 (1997) ("The purpose of the second down payment rule is to ensure the financial viability of a license winner and to provide an indication as to the capability of the winning bidder to actually build out its system.") (emphasis in original), *review denied in part and dismissed in part, Mountain Solutions LTD, Inc. v. F.C.C.*, 197 F.3d 512 (D.C. Cir. 1999).

¹⁴ 17 FCC Rcd at 4011.

¹⁵ 17 FCC Rcd at 6131.

¹⁶ See *Letter to Delaney M. DiStefano, Esq. from Kelly Quinn, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau*, 17 FCC Rcd 10418 (2002) ("CommNet Decision").

¹⁷ 17 FCC Rcd at 10422.

¹⁸ See also *Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, Order*, 13 FCC Rcd 22071, 22072 (1998) ("The challenge of raising capital to finance . . . licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petition for recon. denied*, 14 FCC Rcd 6080 (1999), *aff'd sub nom, SouthEast Telephone v. F.C.C.*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) (cited in *CommNet Decision*).

Delta, in summary, has failed to show special circumstances warranting deviation from the final payment rule, nor that the public interest will be served by waiving its deadline. Both must be shown before we will waive the rule requiring timely final payment.¹⁹ Likewise, Delta does not present facts that warrant reconsideration of our *Payment Public Notice* under 47 C.F.R. § 1.106, as we find no error in requiring Delta to make its final auction payment.

Post-default procedure / Motion for Declaratory Ruling: Under the Commission's rules, a bidder who fails to remit the required down or final payment for a license for which it was the high bidder is in default, and is subject to a default payment and dismissal of its application.²⁰ Further, Section 1.2109(c) of the Commission's rules provides that, if a winning bidder defaults, "the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids."²¹ For purposes of Closed Broadcast Auction No. 25, the Commission has already determined that, in the event that a winning bidder defaults on a down or final payment obligation, the construction permit is to be offered to the next-highest bidder at its final bid.²²

Delta's application will be dismissed, and under our rules and Commission procedure the Greenville construction permit will be offered to MBN, the next highest bidder, at its final bid amount. However, MBN has filed a Motion for Declaratory Ruling, requesting we declare that it be permitted to purchase the Greenville construction permit, assuming it is qualified, for the sum of \$114,750. This is neither MBN's final net bid amount, which was \$270,750, nor its final gross bid amount of \$361,000, but rather its net bid amount in Round 7 of the auction, which is the first round in which MBN's bid exceeded the final bid of Karr, the third-highest bidder. MBN asserts that since Delta was not financially qualified to hold the construction permit, Delta's bids should be disregarded, and MBN should only be required to pay the amount by which it finally outbid the only other qualified applicant.

We reject this contention. Our rules state that, in the event a winning bidder is found unqualified, the Commission may offer the permit to the other highest bidders, in descending order, at their *final* bids.²³ The rule clearly contemplates groups with more than two bidders, yet still provides that the amounts the remaining bidders are to pay are their final bids, not any other sums. Declaratory rulings may be issued where necessary to "terminat[e] a controversy or

¹⁹ *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

²⁰ 47 C.F.R. §§ 1.2104(g), 1.2109(b)-(c), 73.5004(a)-(b) (1998); see also *National Telecom PCS, Inc.*, 12 FCC Rcd. 10163, 10171-72, ¶ 15 (1997); *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 434 ¶ 107 (1997).

²¹ 47 C.F.R. § 1.2109(c).

²² *Broadcast First Report and Order*, 13 FCC Rcd at 15952 ¶ 86, 15953 n.81.

²³ 47 C.F.R. § 1.2109(c). See also *Broadcast First Report and Order*, 13 FCC Rcd at 15952 ¶ 86; *Abundant Life II*, 17 FCC Rcd at 4013-14 (construction permit offered to second-highest bidder at its last bid amount).

remov[e] uncertainty.”²⁴ Here, there is no uncertainty to be removed or controversy to be terminated, and a declaratory ruling is therefore unwarranted.²⁵ Thus, the Greenville construction permit will be offered to MBN at its net final bid of \$270,750.²⁶

Delta is further subject to the default payment provisions specified in 47 C.F.R. § 1.2104(g).²⁷ Specifically, Delta is liable for an amount equal to the difference between the amount that it bid and the amount of the subsequent winning bidder’s high bid.²⁸ In addition, Delta is liable for an amount equal to three percent of its defaulted bid or the subsequent winning bid, whichever is less.²⁹ Delta’s default payment will be calculated following resolution of the procedures set forth in the *Broadcast First Report and Order* and applicable rules.³⁰

Conclusion / Ordering clauses. Accordingly, IT IS ORDERED that the Petition for Reconsideration and Waiver filed by Delta Radio, Inc. IS DENIED.

IT IS FURTHER ORDERED that the application of Delta Radio, Inc., for a construction permit at Greenville, Mississippi, File No. BPH-19950417ME, IS HEREBY DISMISSED as Delta is in default. Delta’s default payment, pursuant to 47 C.F.R. § 1.2104(g), will be calculated following resolution of the procedures for defaulting auction bidders set forth in the rules and the *Broadcast First Report and Order*, and the staff will issue a subsequent Order setting forth the default payment and any required refund or deficiency.

IT IS FURTHER ORDERED that the Motion for Declaratory Ruling filed by Mondy-Burke Broadcasting Network IS DENIED. The Greenville construction permit is offered to MBN at its net final bid of \$270,750. Pursuant to the provisions of 47 C.F.R. § 1.2107, Mondy-Burke Broadcasting Network shall have ten (10) business days from the date of this letter to make its down payment by depositing with Mellon Bank in Pittsburgh, Pennsylvania, such funds

²⁴ 47 C.F.R. § 1.2.

²⁵ See, e.g., *Petitions to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, 66 FCC 2d 1021, 1024 n. 13 (1977) (denying request for declaratory ruling “in stark contravention of a clear, comprehensive rule.”).

²⁶ MBN also makes a perfunctory request for waiver of the auction rules if necessary to provide it the relief requested. Motion for Declaratory Ruling, p. 4. However, its request consists of two short sentences, with no attempt to demonstrate the presence of the factors set forth in *Northeast Cellular v. F.C.C.*, *supra*, or *WAIT Radio v. F.C.C.*, *supra*. Accordingly, we decline to waive the provisions of 47 C.F.R. §§ 1.2109(c), 73.5004(b), and the *Broadcast First Report and Order* (see footnote 12), all of which dictate that we offer the construction permit to MBN at its final bid amount.

²⁷ See also 47 C.F.R. § 1.2109(c).

²⁸ *Id.* This portion of the default payment amount, in the event a bidding credit applies, is calculated on the difference between the net bid amounts or the gross bid amounts, whichever is less. 47 C.F.R. §§ 1.2104(g)(1)-(2).

²⁹ 47 C.F.R. § 1.2104(g)(2). If the gross amount of the subsequent winning bid is utilized in calculating the bid difference payment (see footnote 16), it is also used in calculating the 3% penalty. *Id.*

³⁰ 47 C.F.R. § 1.2109.

as are necessary to bring its total deposits up to \$54,150, twenty percent (20%) of its final net bid. If, after submitting its down payment, MBN defaults on its final payment or is disqualified, it shall be subject to the provisions of 47 C.F.R. § 1.2104(g). If MBN makes a timely down payment, MBN shall have thirty (30) days from the date of this letter in which to submit any necessary amendment to its previously filed Form 301 application (File No. BPH-19950413MC).

Sincerely,

Peter H. Doyle, Chief
Audio Division
Office of Broadcast License Policy
Media Bureau

cc: Ms. Margaret Adele Karr