



Federal Communications Commission
Washington, D.C. 20554

September 24, 2004

DA 04-3065

Audrey P. Rasmussen
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1120 20th Street, N.W.
Suite 700, North Building
Washington, D.C. 20036-3406

Re: FM Broadcast Auction No. 37 -- Tracy Broadcasting Corporation
Request for Expedited Action

Dear Ms. Rasmussen:

This letter denies your September 20, 2004 request that Tracy Broadcasting Corporation (“TBC”) be permitted to bid in Auction No. 37 and to submit a down payment on September 24, 2004.¹ The Media Bureau (“MB”) and the Wireless Telecommunications Bureau (“WTB”) (collectively, the “Bureaus”) rejected TBC’s application to participate in Auction No. 37 in the *Auction No. 37 Status Public Notice*.² The Bureaus rejected TBC’s application because TBC is in default on a Federal Communications Commission (“Commission”) license, within the meaning of the Commission’s competitive bidding rules.³ As discussed below, as of the filing deadline for applications to participate in Auction No. 37, TBC’s affiliate Tracy Corporation II (“Tracy II”) was in default on its installment payment obligations for an F block Personal Communications Services (“PCS”) license issued by the Commission. TBC therefore could not certify in compliance with Commission rules that it was not in default on a Commission license at the time of the filing deadline.⁴ Commission rules consequently

¹ Letter from Audrey P. Rasmussen, counsel to TBC, to Margaret Wiener, Chief, Auction and Spectrum Access Division (September 20, 2004), at 2.

² Auction of FM Broadcast Construction Permits; Status of FCC Form 175 Applications to Participate in Auction No. 37, *Public Notice*, DA 04-2948 (rel. Sept. 13, 2004) (“*Auction No. 37 Status Public Notice*”).

³ *Auction No. 37 Status Public Notice*, at 2, n.6 and Attachment C.

⁴ 47 C.F.R. § 1.2105(a)(2)(x); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Red 15293, 15317, n.142 (2000) (“If any one of an applicant's controlling interests or their affiliates as defined by Section 1.2110 of the Commission's rules (as adopted herein) is in default on any Commission licenses or is delinquent on any non-tax debt owed to any Federal agency at the time the applicant files it Form 175, the applicant will not be able to make the certification required by Section 1.2105(a)(2)(x) of the Commission's rules and will not be eligible to participate in Commission auctions. 47 C.F.R. §§ 1.2110 (as adopted herein), 1.2105(a)(2)(x).”)

require that TBC's application to participate in Auction No. 37 be rejected.⁵ Nothing presented in your request alters these facts or requires altering the Bureaus' prior action.

Pursuant to Commission rules, applicants to participate in an auction, such as TBC, must certify that the applicant and its affiliates are not in default on any Commission license.⁶ The rules expressly provide that an application "that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned."⁷ Finally, the rules expressly exclude failures to make the required certification from a limited opportunity to cure application defects.⁸ Given Tracy II's default, TBC cannot comply with the requirement that its application contain an accurate certification that TBC and its affiliates are not in default on any Commission license. Accordingly, the Bureaus rejected TBC's application.⁹

Tracy II filed a request that the Commission reinstate its F block license and waive relevant Commission rules in 2001.¹⁰ This request is still pending. Nevertheless, Tracy II concedes that it did not pay for its winning bid in compliance with Commission's rules.¹¹ Commission rules, as well as the Note applicable to Tracy II's winning bid payments, expressly define this failure as an event of default, subjecting Tracy II to an obligation to pay all outstanding amounts immediately in full.¹² Consequently, until all outstanding amounts are paid or Tracy II receives some other relief from its obligation, Tracy II is in default on a Commission license. Tracy II's pending pleadings do not affect the application of the Commission's rules or the provisions of Tracy II's Note.

Your letter contends that until the Commission takes final action on Tracy II's pending reinstatement request, provisions of the Administrative Procedures Act ("APA")¹³ preclude rejecting TBC's Auction No. 37 application based on Tracy II's status as a defaulter. The APA provisions cited in your letter, Sections 556 and 558, are inapposite to TBC's application to participate in Auction No. 37. Section 556(d) of the APA concerns hearings required as part of Section 553 rulemakings and Section

⁵ 47 C.F.R. § 1.2105(b)(1).

⁶ See n. 4, *supra*.

⁷ 47 C.F.R. § 1.2105(b)(1).

⁸ 47 C.F.R. § 1.2105(b)(2).

⁹ *Auction No. 37 Status Public Notice*, at 2 and Attachment C.

¹⁰ See Petition for Reinstatement of F Block License and Request for Waiver of 47 C.F.R. 1.2110(g)(4) (filed June 26, 2001) ("*Tracy II Petition*"), and Supplement to Petition for Reinstatement of F Block License and Request for Waiver of 47 C.F.R. 1.2110(g)(4) (filed September 10, 2001) ("*Tracy II Supplement*").

¹¹ See *Tracy II Petition* at 4 (asserting acknowledged non-payment was "an oversight"); *Tracy II Petition* at 2 (non-payment was "not intentional.")

¹² See 47 C.F.R. § 1.2110(g)(4)(iv).

¹³ 5 U.S.C. § 551 *et seq.*

554 adjudications.¹⁴ However, neither Section 553 nor Section 554 requires a hearing with respect to TBC's application to participate in Auction No. 37. Section 558 of the APA concerns the status of licenses, not, however, the status of a defaulter.¹⁵ Accordingly, even assuming for the sake of argument that Section 558 might have some relevance to Tracy II's F block license, it is not relevant to Tracy II's status as a defaulter on its winning bid for the license.

Finally, we disagree with your assertion that considering Tracy II in default for purposes of competitive bidding is inconsistent with taking into account Tracy II's pending reinstatement request in connection with collecting Tracy II's outstanding obligations. Awaiting resolution of pending requests for relief prior to collecting a debt is not inconsistent with considering the debtor's default in connection with a related auction application. Indeed, the Commission's recently adopted "red light rule," regarding how outstanding debts affect certain applications by debtors, explicitly notes that auction applications will be dismissed if the applicant cannot certify that it is not in default and states that "these [auction] rules are not affected by the red light rule."¹⁶ In brief, uncertainty regarding pending requests for relief does not alter a debtor's current status, which the Commission may take into account when considering an application to participate in an auction.

At the deadline for filing TBC's application to participate in Auction No. 37, Tracy II was in default, given that at that time it had not paid all its outstanding obligations in full or obtained other relief from its obligations pursuant to otherwise applicable law. Under these circumstances, the Commission's rules compelled the Bureaus to reject TBC's application to participate in Auction No. 37. Accordingly, the request in your letter that TBC be permitted to participate in Auction No. 37 is denied. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.¹⁷

Sincerely,

Gary D. Michaels
Deputy Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

¹⁴ 5 U.S.C. § 556(d).

¹⁵ 5 U.S.C. § 558.

¹⁶ Amendment of Parts 0 and 1 of the Commission's Rules; Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, *Report and Order*, 19 FCC Rcd 6540, 6541 n.11 (2004).

¹⁷ 47 C.F.R. § 0.331.