



Federal Communications Commission
Washington, D.C. 20554

June 18, 2007

DA 07-2664

Mr. Marcus D. Jones
President
Owensville Communications, LLC
1102 Newit Vick Drive
Vicksburg, MS 39183

Re: FM Broadcast Auction No. 37 – Request of Owensville Communications, LLC for Waiver of Section 1.2109(a) of the Commission’s Rules

Dear Mr. Jones:

This letter addresses the request of Owensville Communications, LLC (“Owensville”) for waiver of Section 1.2109(a) of the Commission’s rules,¹ and refund of a late fee paid as a result of the late submission of Owensville’s final payment to cover its winning bid for permit FM-266-A, Ipswich, South Dakota, in FM Broadcast Auction No. 37.² For the reasons set forth below, we deny the waiver request.

By way of background, on December 1, 2004, the Media and Wireless Telecommunications Bureaus (“Bureaus”) issued a Public Notice announcing the close of Auction No. 37 and identifying the winning bidders, including Owensville.³ In keeping with the Commission’s rules, the *Closing Public Notice* announced that by December 15, 2004, winning bidders were required to have on deposit with Mellon Bank, the financial institution that receives payments of winning bids on behalf of the Commission, enough funds to cover all required down payments.⁴ The *Closing Public Notice* also announced that winning bidders were required to submit completed long-form applications (FCC Form 301) for the licenses they had won by January 4, 2005.⁵ The *Closing Public Notice* stated that, upon favorable resolution of all matters raised in an applicant’s long-form application, the Commission would issue a public notice announcing that it was prepared to award the construction permits to the winning bidders.⁶ Winning bidders would then have ten business days after the date of such public notice to make full payment of the balance of their winning bids.⁷

Owensville satisfied its down payment requirement and filed its long-form application. After review of that application, on October 17, 2005, the Media Bureau released a Public Notice announcing that it was prepared to grant the Ipswich permit to Owensville upon the full and timely payment of the

¹ 47 C.F.R. § 1.2109(a).

² Letter from Marcus D. Jones, President, Owensville Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (filed November 29, 2005).

³ FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021 (2004) (*Closing Public Notice*).

⁴ *Id.* at 1021-22.

⁵ *Id.* at 1025-26.

⁶ *Id.* at 1022.

⁷ *Id.*

remaining balance of the applicant's winning bid by October 31, 2005.⁸ The *Final Payment Public Notice* also stated that, pursuant to Section 1.2109(a) of the Commission's rules, a winning bidder that fails to pay the balance of its winning bid in a lump sum by the October 31, 2005, deadline would have the alternative of making a late payment within ten business days after the payment deadline (*i.e.*, by November 15, 2005), provided that it also paid a late fee equal to five percent of the amount due.⁹ Owensville submitted its final payment of \$63,500.00 on November 4, 2005, which was four days after the initial deadline. Owensville submitted a late fee in the amount of \$3,175.00 on November 11, 2005. Thus, Owensville submitted its final payment and late fee within the period in which late payments were permitted.

On November 29, 2005, Owensville filed a request for waiver of Section 1.2109 and sought return of its late fee.¹⁰ Owensville contends that it did not learn of its pending payment obligation until it was informally advised by a Commission staff member.¹¹ In its request, Owensville states that, shortly before release of the *Final Payment Public Notice*, it had moved its offices from Alexandria, Louisiana to Vicksburg, Mississippi. It further contends that it promptly updated its address and contact information in both the Commission's CORES database and in the Media Bureau's Consolidated Data Base System ("CDBS").¹² The waiver request notes that a copy of the *Final Payment Public Notice*, as well as a pre-filled Form 159, was sent on October 17, 2005, by commercial next-day delivery service to Owensville's former Alexandria address but was returned to the Commission. Owensville argues that it took all necessary steps to advise the Commission of its address change, but that "for some reason beyond [its] control, only part of the CDBS account data was updated."¹³ Owensville contends that it did not learn of its pending payment obligation until it was informally advised by a Commission staff member.¹⁴ Owensville notes that it promptly paid its final payment amount along with a late fee.¹⁵ Owensville concludes that it has "successfully met the requirements of 47 C.F.R. [section] 1.925," but provides no additional explanation of how it meets the requirements of that legal standard for waiver of the Commission's rules.¹⁶

To obtain a waiver of Section 1.2109(a), Owensville must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that

⁸ See Media Bureau is Prepared to Grant Certain Auction No. 37 Broadcast Construction Permit Applications – Final Payments Due by October 31, 2005, *Public Notice*, 20 FCC Rcd 16285 (MB 2005) ("*Final Payment Public Notice*").

⁹ *Id.*

¹⁰ Letter from Marcus D. Jones, President, Owensville Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (filed November 29, 2005) (*Waiver Request*).

¹¹ *Id.*

¹² *Id.*

¹³ Owensville provides evidence that it successfully updated its address information in the Commission's CORES database (specifically, screen shots of the online CORES update page), but it does not provide any such information regarding the alleged update of its CDBS information, other than its bare assertion to that effect. *Id.* Cf. 47 C.F.R. § 1.5(b) (licensee is responsible for making any arrangements which may be necessary in its particular circumstance to assure that Commission documents delivered to its address will promptly reach it or someone authorized by it to act in its behalf). Further, the Commission's CORES Web page indicates that licensees must continue to update their information in the various licensing systems: "The various licensing systems in use at the FCC will continue to be the source for a licensee's official mailing address on a specific license." Go to: <https://svartifoss2.fcc.gov/coresWeb/faq.jsp> (Click on "Registration" and see Question 7).

¹⁴ *Waiver Request*.

¹⁵ *Id.*

¹⁶ *Id.*

the grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹⁷ As explained below, we find that Owensville has failed to meet this standard.

The Commission's competitive bidding rules promote a number of statutory purposes, including the development and rapid deployment of new technologies and services for the benefit of the public and the efficient and intensive use of spectrum.¹⁸ To achieve these objectives, the rules are designed to provide for an auction and licensing process that assigns licenses only to serious, financially qualified bidders that are able to use the spectrum effectively and efficiently.¹⁹ As the Commission has explained, its competitive bidding rules are intended to protect the integrity of this process by ensuring that the provision of reliable service to the public is not undermined by winning bidders financially incapable of paying the amounts they bid, constructing systems, and providing service.²⁰ As the Commission has further stated, "We have determined that timely payments of auction obligations are the manner in which we can be assured of the financial qualifications, and thus the seriousness, of a winning bidder."²¹

In establishing the ten-day late payment period provided for in Section 1.2109(a), the Commission determined that ten days would "provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems."²² The Commission also concluded that a lengthier late payment period "could threaten the integrity, fairness, and efficiency of the auction process."²³ In

¹⁷ 47 C.F.R. § 1.925.

¹⁸ See 47 U.S.C. § 309(j)(3). See also H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

¹⁹ Abundant Life, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 4006, 4009 ¶ 8 (2002) ("Abundant Life III"). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2375 ¶ 160 (1994) ("Second Report and Order"); Mountain Solutions Ltd, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21990 ¶ 14 (1998), *review denied in part and dismissed in part*, *Mountain Solutions Ltd, Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999).

²⁰ BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598-99 ¶ 15 (2000) (citing *Second Report and Order*, 9 FCC Rcd at 2381 ¶ 190).

²¹ *Abundant Life III*, 17 FCC Rcd at 4009 ¶ 8 (citing BDPCS, Inc., 12 FCC Rcd 3230, 3235 ¶ 8 (1997), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997)). See also *In re Application of Delta Radio, Inc.*, *Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16896-97 ¶ 19 (2003) ("Timely auction payments are the principal way we determine whether a winning bidder is financially qualified to build out the permit being auctioned."); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25123-24 ¶ 22 (2000) ("Insisting that licensees demonstrate their ability to pay . . . is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace."), *recon. denied*, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17257 (2001), *petition dismissed in part and denied in part*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003); WSS, LLC, *Memorandum Opinion and Order*, 21 FCC Rcd 6635, 6637 ¶ 6 (WTB/ASAD 2006) ("Prompt payment of auction obligations is an objective indicator that a winning bidder is financially able to meet its obligations and intends to provide service to the public.").

²² Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 429-30 ¶ 95 (1997).

²³ *Id.*

establishing the requirement of a 5 percent late fee, the Commission found, *inter alia*, that such a fee would deter bidders from making late payments.²⁴

Owensville has not established that the underlying purpose of the Commission's rules would not be served by enforcement of the final payment deadline and late fee provisions of Section 1.2109 in this case. Owensville does not dispute that it failed to make the required payments by the initial deadline established under the Commission's rules, but argues that its failure to do so was inadvertent. More specifically, Owensville states that it was unaware of the *Final Payment Public Notice* until it was notified by a member of the Commission's staff.²⁵ Owensville's asserts that its failure to receive notice of the final payment deadline was not attributable to any inaction on its part, suggesting that the Commission was obligated to provide personal notice to Owensville of its payment obligations. However, Owensville misapprehends the nature of the notice to which it was entitled. Neither the Administrative Procedures Act nor the Communications Act of 1934, as amended, requires the Commission to provide applicants personal notice of procedural payment deadlines.²⁶ Owensville had adequate notice of the final payment deadline because: (1) section 1.2109(a) of the Commission's rules specifies that final payment is due within ten business days "following the release of a public notice establishing the payment deadline;"²⁷ (2) this requirement was explained in the June 10, 2004 public notice announcing the procedures that would govern Auction No. 37,²⁸ as well as in the December 1, 2004 *Closing Public Notice*;²⁹ and (3) and the *Final Payment Public Notice*, released on October 17, 2005, notified the public that final payment for the identified permits would be due on October 31, 2005. Although the Media Bureau customarily sends a copy of the public notice establishing the final payment deadline to applicants, this is done strictly as a courtesy to the winning bidder. It is incumbent upon applicants to diligently prosecute their applications by ascertaining and complying with the applicable payment deadlines established by public notice. We therefore reject Owensville's argument that it is entitled to a waiver of its late fee because it did not receive proper notice of its payment obligation.³⁰

For the foregoing reasons, Owensville's Request for Waiver IS DENIED.

Sincerely,

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁴ *Id.*

²⁵ Petition at 2-3, 5.

²⁶ See Longstreet Communication International, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 4032, 4033-34 ¶ 5 (WTB 1999).

²⁷ See 47 C.F.R. § 1.2109(a) (emphasis added).

²⁸ Auction of FM Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, [at p 36].

²⁹ *Closing Public Notice*, 20 FCC Rcd at 1022.

³⁰ See Macon County Broadcasting, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd. 8669 (1993) (dismissing mutually exclusive application for new FM construction permit for failure to remit hearing fee within deadline established by public notice and rejecting arguments that personal, not public, notice of payment deadline is required).