



Federal Communications Commission
Washington, D.C. 20554

July 23, 2009

DA 09-1578

Ms. Hye C. Kim
16 Radio Road
Dahlonega, GA 30533

Re: Hye C. Kim – Request for Waiver of Section 1.2106(a) of the Commission’s Rules for Auction 79 (FM Broadcast)

Dear Ms. Kim:

The Commission has received your application (FCC Form 175) to participate in the Commission’s upcoming auction of FM broadcast permits (Auction 79). In this letter, we address your request for waiver of the requirement in Section 1.2106(a) of the Commission’s rules that an applicant that has previously been in default on any Commission license or construction permit or has been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license or construction permit.¹ For the reasons discussed below, we deny the waiver request.

In your waiver request, you state that you are the president, sole director and sole shareholder of USK Broadcasting, Inc. (“USK”), and acknowledge that your payment of USK’s FY 2008 regulatory fee was untimely. USK did not pay its FY 2008 regulatory fees by September 25, 2008, which was the deadline for licensees, such as USK, to make such annual payments without incurring a 25 percent late payment penalty.² You confirm that you subsequently received a letter and invoice from the Commission demanding payment of the outstanding regulatory fee and penalty amount by no later than March 20, 2009. You further state that you mailed a check to the Commission on March 19, 2009, with the understanding that the U.S. Postal Service’s “next-day” delivery service would not deliver the check to the Commission’s P.O. box address until March 23, 2009, the first business day following the payment deadline. The Commission’s records confirm that this payment was received on March 23, 2009.

An applicant is considered a “former defaulter” when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, has defaulted on any Commission construction permit or license or been delinquent on any non-tax debt owed to any Federal agency, but has remedied all such defaults and cured all of the outstanding non-tax delinquencies as of the short-form application filing deadline.³ Upfront payments help deter frivolous or insincere bidding, and provide the Commission

¹ 47 C.F.R. § 1.2106(a).

² See Payment Methods and Procedures For Fiscal Year 2008 Regulatory Fees, *Public Notice*, 23 FCC Rcd 12849, DA 08-1973 (2008); see also 47 C.F.R. § 1.1164(a).

³ 47 C.F.R. § 1.2105(a)(2)(xi); see 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 Rcd 15293, 15317 ¶ 42 & n.142 (2000) (“*Part 1 Fifth Report and Order*”); see also “Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009; Notice and Filing

with a source of funds in the event that the bidder incurs liability during the auction.⁴ Applicants that are former defaulters, as described above, must pay upfront payments 50 percent greater than the payments required for non-former defaulters.⁵

To obtain a waiver of the Commission's competitive bidding rules, you 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 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.⁶ Based on the record before us, you have not satisfied the Commission's criteria for granting a waiver of Section 1.2106(a).

We find that your waiver request fails to demonstrate that enforcement of this upfront payment requirement would frustrate the rule's purpose or would not serve it, and that grant of the requested waiver would serve the public interest. You argue that the underlying purpose of this rule would not be served if applied to you "based on USK's efforts to pay" the outstanding amounts by the March 20, 2009 final payment deadline. We disagree. The Commission adopted the requirement of a 50 percent higher upfront payment for "former defaulters" in recognition that "past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee."⁷ The Commission reasoned, however, that "the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from applicants with a poor Federal financial track record."⁸ Thus, while cure of an outstanding federal default or delinquency enables the former defaulter or delinquent to participate in an auction,⁹ former defaulters and delinquents are required to make a larger upfront payment. Such larger upfront deposits provide additional security for the Commission in the event that an applicant with a poor financial track record incurs liability as a result of its participation in an auction. You explain that you had sent USK's payment one day before the final deadline, suggesting that fault for the late delivery is due to the delivery service's procedures for deliveries to P.O. boxes. You provide no explanation, however, for why you did not choose to use a different delivery service or make efforts to submit the payment any earlier. In this regard, we remind you that deadlines for auction-related payments are enforced strictly.¹⁰

Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 79," *Public Notice*, DA 09-810, 24 FCC Rcd 4448 ¶ 64 (2009) ("*Auction 79 Procedures Public Notice*").

⁴ See *Auction 79 Procedures Public Notice* at ¶ 94.

⁵ 47 C.F.R. § 1.2106(a); see also *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15316-17 ¶¶ 40-42.

⁶ See 47 C.F.R. §§ 1.3 and 1.925.

⁷ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15317.

⁸ *Id.*, 15 FCC Rcd at 15316-17.

⁹ *Id.* at 15316.

¹⁰ The Commission has determined that a policy of strict adherence to payment deadlines is necessary to serve the public interests of integrity, fairness and efficiency of the auction process. See *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901, 903 (D.C. Cir 2004) ("Entering the auction unprepared to pay on schedule is precisely the kind of conduct the FCC rules are designed to deter."). For this reason, we have reminded all potential bidders in Auction 79 that they should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make any payments by wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. See *Auction 79 Procedures Public Notice* at ¶ 90.

We also reject your contention that grant of a waiver of section 1.2106(a) would serve the public interest by encouraging investments in broadcasting by female and minority auction applicants. The Commission has consistently rejected arguments that Sections 309(j)(3)(B) and 309(j)(4)(C), which are the statutory bases pursuant to which the Commission has adopted bidding credits and other provisions to provide greater opportunities to designated entities to participate in the provision of spectrum-based service, also obligate the Commission to afford such entities special treatment under its general competitive bidding rules.¹¹ Waiver of the upfront payment requirement in this instance would lead to an inconsistent application of our competitive bidding rules and would not serve the public interest. The Commission's rules and the integrity of the competitive bidding process are best served by applying the upfront payment requirement in a fair and consistent manner.

We are also not persuaded that your circumstances render application of Section 1.2106(a)'s higher upfront payment requirement inequitable, unduly burdensome, or otherwise contrary to the public interest. We do not find that the U.S. Postal Service's inability to make next day deliveries to a post office box is a unique fact or circumstance that justifies the requested waiver. Moreover, you have not demonstrated how your difficulty in making the additional upfront payment amount constitutes a unique circumstance. Financial difficulties do not constitute unique circumstances sufficient to justify waiver of the Commission's payment rules.¹² You do not explain why you should be treated differently than other auction applicants who previously were delinquent on a single non-tax debt owed to a Federal agency.¹³ Under such circumstances, we find that application of section 1.2106(a) would be neither inequitable nor unduly burdensome. Your waiver request is therefore DENIED.¹⁴

Your short-form application has been accepted. Based on your disclosure regarding USK's prior delinquency, and our denial of your waiver request, the Commission's rules require that you submit an upfront payment equal to 50 percent more than that set for the construction permits on which you wish to be eligible to bid.¹⁵ Accordingly, your eligibility will be calculated by applying any payments received prior to the upfront payment deadline based on upfront payments that are 150 percent of the amounts required for other applicants in this auction.

¹¹ See, e.g., *TPS Utilicom*, 18 FCC Rcd 2516, 2522-23 & n.39 (WTB 2003) and cases cited therein. Cf. Reallocation and Service Rules for the 698-746 Spectrum MHz Band (Television Channels 52-59), *Report and Order*, GN Docket 01-74, 17 FCC Rcd 1022, 1089-90 (2002) (rejecting arguments that Sections 309(j)(3)(B) and 309(j)(4)(C) amount to a "congressional mandate" to establish a special bidding credit for rural telephone companies).

¹² Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Div., to Walter Iwachiw, 23 FCC Rcd 110, 112 (Auc. Div. 2008) (denying waiver of upfront payment rule where applicant claimed financial difficulties).

¹³ See, e.g., Richard Hodson – Request for Waiver of Section 1.2106(a) of the Commission's Rules, *Memorandum Opinion and Order*, 19 FCC Rcd 22309 (2004) (denial of request for waiver of Section 1.2106(a) for FM Auction 37).

¹⁴ Because we deny your waiver request, we dismiss as moot your request to amend your certification on your short-form application stating that you have been delinquent on a non-tax debt owed to a Federal agency.

¹⁵ 47 C.F.R. § 1.2106(a).

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This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.¹⁶

Sincerely,

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

cc: Mr. Jeffrey L. Timmons Esq.

¹⁶ 47 C.F.R. § 0.331.