

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

In the matter of )  
 )  
Ted W. Austin, Jr. )  
 )  
Request for Waiver of Down )  
Payment Deadline for Auction 62 )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 18, 2010**

**Released: February 18, 2010**

By the Chiefs, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau and Audio Division, Media Bureau:

**I. INTRODUCTION**

1. In this Order, we deny a Request for Waiver filed by Ted W. Austin, Jr., who was a winning bidder for one FM station construction permit in Baggs, Wyoming, (MM-FM477-A) in Auction 62. Mr. Austin failed to make his required down payment for the permit by the deadline established under section 1.2107(b) of the Commission's rules<sup>1</sup> and now seeks waiver of that deadline.<sup>2</sup> For the reasons set forth below, we deny Mr. Austin's Request for Waiver, assess an interim default payment, and dismiss his long-form application for the Baggs, Wyoming, FM permit.

**II. BACKGROUND**

2. On April 14, 2005, the Wireless Telecommunications Bureau and Media Bureau (collectively, the "Bureaus") announced that they would hold an auction of construction permits in the FM broadcast service for stations throughout the United States and the U.S. Virgin Islands (Auction 62).<sup>3</sup> On June 17, 2005, following a period of public comment, the Bureaus released a Public Notice announcing the procedures that would govern Auction 62.<sup>4</sup> The *Auction 62 Procedures Public Notice* described the requirements for participation in the auction and explained the post-auction procedures, including deadlines for the submission of down payments and the filing of long-form applications by winning bidders. The *Auction 62 Procedures Public Notice* specifically stated that down payments would be due from winning bidders ten business days after the release of the auction's closing public notice, as required by section 1.2107(b) of the Commission's rules.<sup>5</sup> It also stated that "[a]ny high bidder that

<sup>1</sup> 47 C.F.R. § 1.2107(b).

<sup>2</sup> Ted Austin, Jr. Request for Waiver (dated September 28, 2007) ("Request for Waiver").

<sup>3</sup> See Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 7999 (MB/WTB 2005).

<sup>4</sup> See Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 10492 (MB/WTB 2005) ("*Auction 62 Procedures Public Notice*").

<sup>5</sup> *Id.* at 10535.

defaults or is disqualified after the close of the auction (*i.e.*, fails to remit the required down payment within the prescribed period of time . . . or is otherwise disqualified) will be subject to the payments described in 47 C.F.R. § 1.2104(g)(2).<sup>6</sup> The *Auction 62 Procedures Public Notice* also made clear that long-form applications would be due thirty days after the release of the *Auction 62 Closing Public Notice*, as required by section 73.5005(a) of the Commission's rules.<sup>7</sup>

3. Mr. Austin timely filed his short-form application to participate in the auction (FCC Form 175) and timely submitted an upfront payment in the amount of \$1,500. He claimed eligibility for a twenty-five percent bidding credit on each of the twenty permits he selected.<sup>8</sup> Subsequently, the Bureaus released a public notice listing Mr. Austin as a qualified bidder.<sup>9</sup> Bidding in Auction 62 began on January 12, 2006, and ended on January 31, 2006.

4. On February 8, 2006, the Bureaus released the *Auction 62 Closing Public Notice*, which announced the close of Auction 62 and identified the winning bidders.<sup>10</sup> The *Auction 62 Closing Public Notice* indicated that Mr. Austin was the winning bidder for one FM broadcast construction permit, MM-FM477-A, at Baggs, Wyoming, with his net winning bid of \$21,000.00. In keeping with the Commission's rules, the *Auction 62 Closing Public Notice* declared that each winning bidder was required to have enough funds to cover its down payment on deposit with the Commission's lockbox bank on February 23, 2006.<sup>11</sup> The *Auction 62 Closing Public Notice* advised that "[w]inning bidders should coordinate with their bankers ahead of time regarding their wire transfers, and allow sufficient time for the wire transfer to be **initiated and completed prior to the deadline.**"<sup>12</sup> Mr. Austin was required to submit \$2,700 to the Commission by February 23, 2006, to satisfy his down payment obligation.<sup>13</sup> Mr. Austin failed, however, to pay this amount by the February 23, 2006, deadline, and did not complete his wire transfer payment until the following day.

5. Mr. Austin has provided differing accounts of the events leading up to the down payment deadline. In an email sent to staff of the Commission's Office of Managing Director on September 13,

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<sup>6</sup> *Id.* at 10536 (citing 47 C.F.R. § 1.2104(g)(2)).

<sup>7</sup> *Id.* at 10536 (citing 47 C.F.R. § 73.5005(a)).

<sup>8</sup> Auction of FM Broadcast Construction Permits, 214 Bidders Qualified to Participate in Auction No. 62, *Public Notice*, 20 FCC Rcd 19937, 19990 (Attachment B) (MB/WTB 2005) ("*Auction 62 Qualified Bidders Public Notice*").

<sup>9</sup> *Auction 62 Qualified Bidders Public Notice*, 20 FCC Rcd 19937.

<sup>10</sup> Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 62, *Public Notice*, 21 FCC Rcd 1071 (MB/WTB 2006) ("*Auction 62 Closing Public Notice*").

<sup>11</sup> See *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1071-72; see also *Auction 62 Procedures Public Notice*, 20 FCC Rcd at 10535.

<sup>12</sup> *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1073 (emphasis in original). Cf. *Auction 62 Procedures Public Notice*, 20 FCC Rcd 10517 (similarly advising potential Auction 62 participants with regard to upfront payments to discuss arrangements with their bankers "several days" before executing their wire transfers and to allow sufficient time for transfers to be initiated and completed before the deadline). Prospective bidders were also reminded of dates and the consequences of failing to meet them in a free, public seminar conducted by Commission staff on July 27, 2005. Potential bidders who were unable to attend the seminar could view a live webcast of the seminar on the FCC's website. A recording of the webcast was also available for playback from the FCC's website following the seminar: [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_seminar&id=62](http://wireless.fcc.gov/auctions/default.htm?job=auction_seminar&id=62)

<sup>13</sup> Attachment B of the *Auction 62 Closing Public Notice* advised winning bidders of the exact amounts for deposits due after the application of the bidder's upfront payment. *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1093-98. The *Auction 62 Closing Public Notice* shows that Mr. Austin had an upfront payment amount of \$1,500 on deposit and therefore was required to submit an additional \$2,700 by February 23, 2006, to satisfy the \$4,200 down payment obligation.

2007 (which was approximately two weeks prior to the filing of the waiver request), Mr. Austin stated that he was attending to a family emergency through most of February 23<sup>rd</sup>, and arrived at his bank after the bank's 2:00 p.m. wire transfer deadline.<sup>14</sup> However, in a letter to Senator Michael B. Enzi on the following day (September 14, 2007), Mr. Austin claims that he did not visit his bank on February 23<sup>rd</sup> but that he telephoned the bank to initiate a wire transfer and was informed that he would have to visit the bank in person to provide a signature.<sup>15</sup> Mr. Austin also acknowledged in that letter that he submitted his down payment on February 24<sup>th</sup>, the day after the deadline.<sup>16</sup> In his September 28, 2007, waiver request, Mr. Austin states that he telephoned the bank on February 23<sup>rd</sup> to instruct a bank employee to wire the required funds to the Commission's account, but that the bank employee with whom he spoke did not inform him about any additional requirements to complete the wire transfer that day, causing him to believe that the wire transfer "would be completed on time, as directed."<sup>17</sup> In his waiver request, Mr. Austin asserts that he was first advised on the morning of February 24<sup>th</sup> that he would have to visit the bank and provide a signature and show personal identification before the bank could execute the wire transfer, and that he did so later that day.<sup>18</sup> The waiver request also provides a copy of a letter from a Client Relations Representative at Key Bank, stating that the bank considers the delay in completing the wire transfer to be the responsibility of its employee and not that of Mr. Austin.<sup>19</sup>

6. In his Request for Waiver, Mr. Austin asserts that the Commission accepted his down payment and that he filed a long-form application for the FM construction permit and the associated filing fee in advance of the due date for those submissions.<sup>20</sup> Mr. Austin also asserts that, in the period following these events, "he had no reason to believe anything but that his rights in the ultimate license were not affected by the slight delay in payment."<sup>21</sup> He states that he learned that his long-form application "was in danger of dismissal" during a courtesy call from Commission staff received approximately two weeks prior to the filing of the Request for Waiver.<sup>22</sup> Mr. Austin blames the delay on Key Bank's employee, arguing that the "unique circumstances" of these events justify waiver of the deadline.<sup>23</sup>

### III. DISCUSSION

7. Pursuant to section 1.2107(b) of the Commission's rules, each winning bidder in Auction 62, including Mr. Austin, was required to submit sufficient funds (in addition to its upfront payment) to

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<sup>14</sup> Email from Ted Austin to Gail Glasser, sent Thursday, September 13, 2007 at 6:44 p.m. ("*September 13<sup>th</sup> Email*").

<sup>15</sup> Letter from Ted Austin to the Honorable Michael B. Enzi, United States Senate, dated September 14, 2007 ("*September 14<sup>th</sup> Letter*").

<sup>16</sup> *Id.*

<sup>17</sup> Request for Waiver at 3.

<sup>18</sup> *Id.* This assertion is inconsistent with the "Declaration" Mr. Austin attached to the Request for Waiver, in which he states that when he contacted the bank on February 23<sup>rd</sup>, he was "not informed, until too late to complete the wire *that day*" of Key Bank's signature and photo identification requirements. (emphasis added)

<sup>19</sup> Letter of Ms. Kristi Bratt, Client Relations Representative, Key Bank, dated September 21, 2007, submitted as an attachment to the Request for Waiver. The letter also states that Mr. Austin had called in with instructions to wire funds to the Commission on February 23<sup>rd</sup> and that the bank's teller did not inform him at that time of signature and personal identification requirements.

<sup>20</sup> Request for Waiver at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3-4.

<sup>23</sup> *Id.* at 4.

bring its total amount of money on deposit with the Commission for its winning bids to twenty percent of the net amount of its winning bids within ten business days after release of the *Auction 62 Closing Public Notice*.<sup>24</sup> The Commission may waive rule provisions “for good cause shown” by the petitioner.<sup>25</sup> As interpreted by the courts, the party seeking waiver of a rule’s requirements must demonstrate that “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”<sup>26</sup> In order to demonstrate the required special circumstances, Mr. Austin must show that the application of the rule would be inequitable, unduly burdensome or contrary to the public interest or that no reasonable alternative existed which would have allowed Mr. Austin to comply with this rule.<sup>27</sup> Alternatively, Mr. Austin bears the burden of convincing us that a waiver would not conflict with the policy underlying this rule.<sup>28</sup>

8. Mr. Austin does not address how the underlying purposes of section 1.2107(b) would be served by waiving the payment deadline in these circumstances. The Commission has explained that one of the principal purposes of the requirement of full and timely down payment is “to ensure that bidders are financially capable of constructing and operating their systems,” and that “[t]imely payment of both upfront and down payment obligations is one of the best indicators prior to award of licenses of a bidder’s *bona fide* ability to pay.”<sup>29</sup> When it adopted the down payment deadline rule, the Commission considered and rejected suggestions to allow a flexible period between auction and payment, because “[s]uch a procedure could give winning bidders the opportunity to ‘game’ [the Commission’s] processes by making an upfront payment, bidding on a license, and then assessing afterwards whether to go forward with the award of the license.”<sup>30</sup> The Commission observed that “a substantial delay between auction and down payment would subvert [its] objective of reducing speculative bidding because it would provide financially unqualified bidders with an opportunity to ‘shop’ a winning bid in an effort to obtain financing for a down payment,” and concluded that such conduct “would undermine the integrity of the auction itself.”<sup>31</sup> Accordingly, to date, the Commission has consistently denied every request for waiver of the down payment deadline.<sup>32</sup> Mr. Austin presents no arguments that persuade us to depart from our policy

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<sup>24</sup> 47 C.F.R. § 1.2107(b). See *Auction 62 Procedures Public Notice*, 20 FCC Rcd at 10535.

<sup>25</sup> 47 C.F.R. § 1.3. This waiver standard, and the waiver standard applied in the context of wireless radio services licenses, 47 C.F.R. § 1.925, have been found to be substantially the same. See *Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16891 ¶ 7 & n.19 (2003) (citing *Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)).

<sup>26</sup> See, e.g., *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”). See also 47 C.F.R. § 1.925(a)(3)(i).

<sup>27</sup> See 47 C.F.R. § 1.925(a)(3)(ii). See also *Northeast Cellular*, 897 F.2d at 1166.

<sup>28</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1155, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (“*WAIT Radio*”) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

<sup>29</sup> *BDPCS, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598-99 ¶ 15, 17598-99 ¶ 16 (2000), *review denied BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003). See also *Mountain Solutions Ltd., Inc. v. FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999) (“*Mountain Solutions*”) (upholding Commission policy of strict enforcement of down payment deadlines).

<sup>30</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2381-82 ¶ 192 (1994).

<sup>31</sup> *Id.* at 2382 ¶ 192.

<sup>32</sup> See *TPS Utilicom, Inc., Order on Reconsideration*, 18 FCC Rcd 2516, 2520 ¶ 9 (2003) (“*TPS Order*”). See also *Kankakee Valley Broadcasting Co., Inc., Memorandum Opinion and Order*, 22 FCC Rcd 8591 (WTB/ASAD 2007) (“*Kankakee*”) (denying request for waiver of section 1.2107(b) and dismissing long-form application for FM

(continued...)

of strict enforcement of the down payment rule here. In this case, waiver of the down payment deadline would conflict with these policies and would undermine our ability to meet the Commission's policy objectives in future auctions.

9. Mr. Austin argues that the Commission's acceptance of his "payments" prior to his submission of a long-form application provides him with rights "in the nature of a conditional license," and that it would be unfair to dismiss his long-form application without providing notice that the payment was late and might not be treated as if timely paid.<sup>33</sup> Mr. Austin cites two orders in which installment payments had been accepted after the relevant payment deadline, *Lancaster* and *TE-MCG*.<sup>34</sup> These are, however, inapposite. Subsequent to the decisions in *Lancaster* and *TE-MCG*, both the Wireless Telecommunications Bureau and the Commission have made clear that even in an installment payment context, mere acceptance of payment does not by itself constitute a constructive waiver of the consequences of failure to meet payment deadlines.<sup>35</sup> The Court of Appeals for the District of Columbia has recently upheld the Commission's refusal to grant relief to installment debtors based on claims of constructive waiver.<sup>36</sup>

10. Moreover, Mr. Austin missed a down payment deadline, not an installment payment deadline.<sup>37</sup> The Commission has long distinguished its analyses of requests for waiver of the down payment rules from requests for waiver of the installment payment rules in light of the different functions and underlying purposes of those rules.<sup>38</sup> Further, the Court of Appeals for the District of Columbia Circuit has upheld the Commission's strict enforcement of the down payment deadline, having recognized the Commission's position that "the integrity and functioning of the auction process is dependent on having payment obligations on winning bids promptly met."<sup>39</sup>

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construction permit where winning bidder claimed to be "unaware" of deadlines because of principal's distraction due to medical treatments).

<sup>33</sup> Request for Waiver at 5. Mr. Austin's late down payment was the only post-auction payment he submitted for the Baggs, Wyoming, construction permit.

<sup>34</sup> Request for Waiver at 4 (citing Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, 14 FCC Rcd 2173 (1999) ("*TE-MCG*"); Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., 1998 WL 709412 (1998) ("*Lancaster*").

<sup>35</sup> See *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. Petition for Reconsideration, Order on Reconsideration*, 15 FCC Rcd 17500, 17511 ¶ 19 (2000) (rejecting constructive waiver arguments that relied on, inter alia, *Lancaster* and *TE-MCG*, citing *Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977)); *Morris Communications, Inc., Memorandum Opinion and Order*, 23 FCC Rcd 3179, 3192 ¶ 29 (2008).

<sup>36</sup> See *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 188-191 (D.C. Cir. 2009).

<sup>37</sup> Under the Commission's installment payment program, qualified small businesses that won licenses in certain services were allowed to pay winning bids in quarterly installments over the initial term of the license. See 47 C.F.R. § 1.2110(g). Only after a winning bidder had submitted both required down payments, however, and the Commission had completed its review of the winner's long-form application, was the winning bidder permitted to pay in installments. See *id.* In 1997, the Commission discontinued the use of installment payments for future auctions. See 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, 397-98 ¶¶ 38-39 (1998). Down payments must be made before any license or construction permit can be granted.

<sup>38</sup> See *Southern Communications Systems, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 25103, 25109-11 ¶¶ 13-15 (2000); *Vista Communications, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16957, 16963-64 ¶ 16 (2003).

<sup>39</sup> *Mountain Solutions*, 197 F.3d at 517.

11. We also find unavailing Mr. Austin's reliance on the Bankruptcy Court's decision in the *NextWave* litigation.<sup>40</sup> Because we have not taken any final action on his long-form application, we reject Mr. Austin's assertion, for which he cites no supporting authority, that he has been awarded rights in the Baggs, Wyoming, construction permit. Unlike this case, NextWave had been granted the licenses at issue, and had already sought protection under the Bankruptcy Code, when it missed an installment payment deadline.<sup>41</sup> By contrast, the Commission has not processed Mr. Austin's long-form application or made any determinations about his qualifications to hold a Commission license.<sup>42</sup> Moreover, we reject Mr. Austin's claim that he was without notice that his down payment was late, because both his *September 14<sup>th</sup> Letter* and his Request for Waiver indicate that at the time he submitted his down payment on February 24, 2006, he either was, or should have been, aware that he was doing so after the established deadline had passed.

12. We are not persuaded that Mr. Austin has presented any unique facts or circumstances that merit waiving his obligation to submit his down payment for the winning bid within the ten-day period required by section 1.2107(b).<sup>43</sup> The *Auction 62 Procedures Public Notice* explicitly instructed all bidders, including Mr. Austin, well in advance of the auction that down payments would be due within ten business days after the release of the *Auction 62 Closing Public Notice*.<sup>44</sup> Moreover, both the *Auction 62 Procedures Public Notice* and the *Auction 62 Closing Public Notice* explicitly warned all winning bidders to coordinate with their banks in advance of payment deadlines to ensure that their wire transfers could be initiated and completed prior to those deadlines.<sup>45</sup> While personal emergencies may be unexpected and difficult to address, they are not unique, and we cannot find that Mr. Austin's inattention

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<sup>40</sup> Request for Waiver at 5 (citing *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 263 (Bkrcty. S.D.N.Y. 2000)).

<sup>41</sup> In the *NextWave* case, the Commission did not waive its automatic license cancellation rule, but rather the Supreme Court ruled that section 525(a) of the Bankruptcy Code precluded the Commission from enforcing its automatic license cancellation rule against NextWave, a licensee in bankruptcy, upon its failure to make timely installment payments for its licenses. *FCC v. NextWave Personal Communications Inc., et al.*, 537 U.S. 293 (2003) (affirming the D.C. Circuit's decision, 254 F.3d 130 (D.C. Cir. 2001), that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code, its licenses did not automatically cancel for nonpayment while it was in bankruptcy). Even if the Commission had granted Mr. Austin a construction permit, Mr. Austin was not in bankruptcy when he missed the down payment deadline. As the Wireless Telecommunications Bureau has explained, where section 525(a) of the Bankruptcy Code does not apply, nothing in the *NextWave* decision prevents the regular operation of the Commission's rules. See *Alpine PCS, Inc., Order*, 22 FCC Rcd 1492, 1500-01 at ¶ 21 (2007).

<sup>42</sup> Under the Communications Act of 1934, as amended, before awarding a license the Commission must review an applicant's application to determine whether the applicant possesses the requisite legal, financial and technical qualifications to hold a Commission license. See 47 U.S.C. §§ 303(l), 308(a)-(b).

<sup>43</sup> Mr. Austin's mere statement that his circumstances are unique, and thus, not likely to be encountered by other Commission applicants, is not sufficient to satisfy the requirements of *WAIT Radio*. See *Northeast Cellular*, 897 F.2d at 1166-67.

<sup>44</sup> The *Auction 62 Procedures Public Notice* was released more than eight months before the down payment deadline, and provided ample notice to prospective applicants of the down payment deadline.

<sup>45</sup> *Auction 62 Procedures Public Notice*, 20 FCC Rcd at 10517 (advising potential Auction 62 participants with regard to upfront payments to discuss arrangements with their bankers "several days" before executing their wire transfers and to allow sufficient time for transfers to be initiated and completed before the deadline); *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1073.

to post-auction obligations constitutes a special circumstance that warrants a deviation from the general rule.<sup>46</sup>

13. Leaving aside the inconsistencies in the record concerning when Mr. Austin first learned of the need to make a personal appearance at his bank to comply with banking requirements,<sup>47</sup> it is clear that Mr. Austin did not make efforts to meet this post-auction payment requirement until just prior to the payment deadline. Mr. Austin does not explain why he did not attempt to initiate a wire transfer of his down payment prior to the last day of the ten business-day period provided by section 1.2107(b). We reject Mr. Austin's assertion that "he had no timely notice that the FCC might reject his payment long after the fact."<sup>48</sup> The *Auction 62 Closing Public Notice* explicitly warns that "[f]ailure to complete the down payment on or before February 23, 2006, will result in default."<sup>49</sup>

14. We also are not persuaded that Mr. Austin's asserted intent to "bring local radio to underserved areas" outweighs the public interest benefit in consistent enforcement of the Commission's competitive bidding rules. Where an entity has presented circumstances that raise questions about its ongoing ability and willingness to fulfill its payment obligations, assertions about the provision of service do not outweigh those questions.<sup>50</sup> None of the arguments presented merit our relieving Mr. Austin of his obligations pursuant to section 1.2107(b) to have made the down payment on his winning bid by the February 23, 2006, deadline. Accordingly, we deny Mr. Austin's request that we waive the down payment deadline associated with Auction 62.

#### IV. INTERIM DEFAULT PAYMENT

15. The Commission's rules provide that a bidder who fails to remit the required final payment for a license for which it was the high bidder is subject to a default payment.<sup>51</sup> The default payment is composed of two parts. The first component is the difference between the bidder's net defaulted bid and the subsequent net winning bid or the difference between the bidder's gross defaulted bid and the subsequent gross winning bid, whichever is less, the next time the license is offered by the

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<sup>46</sup> See *Kankakee*, 22 FCC Rcd at 8591.

<sup>47</sup> Compare *September 13<sup>th</sup> Email* (stating that Mr. Austin arrived at his bank after 2 p.m. wire transfer deadline on February 23<sup>rd</sup>) with Letter to Senator Enzi (Mr. Austin states that he was unable to get to the bank until February 24<sup>th</sup>) and Request for Waiver (asserting that Mr. Austin was not advised by Key Bank of the need to be physically present at the bank until February 24<sup>th</sup>).

<sup>48</sup> Request for Waiver at 5.

<sup>49</sup> *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1073 (emphasis in original).

<sup>50</sup> Mr. Austin's assertions of benefits to the Baggs, Wyoming, community are similar to the public interest arguments the Commission has consistently rejected in declining to grant other requests for waiver of its competitive bidding rules. See, e.g., Southern Communications Systems, Inc., *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357, 18361 ¶ 9 (2001) ("[E]nforcing the Commission's payment rules . . . serves the public interest better than relying on the wholly unsubstantiated possibility that [petitioner] might have provided service in its license area sooner than the successor licensees will."); see also Spectrum IVDS, L.L.C., *Order*, 23 FCC Rcd 8800, 8807 ¶ 19 (2008) (Commission noted that "[a]llowing winning bidders to retain licenses when they are unable to pay their winning bids prevents the auction process from assigning licenses to those parties best able to serve the public."); AirCom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806, 1810-11 (WTB 2003) (following Commission precedent in rejecting the petitioner's argument that the down payment and default rules should be waived to provide communications services to underserved tribal lands and rural areas); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Gregory M. Schmidt, Vice-President, Banks Broadcasting, Inc. and Jonathan D. Blake, Counsel to Banks Broadcasting, Inc., 18 FCC Rcd 10431, 10434-36 (2003) (rejecting claim that public interest would be served by offering unsold licenses to auction's second-highest bidder rather than re-auctioning them).

<sup>51</sup> 47 C.F.R. §§ 1.2109(b), 1.2104(g)(2).

Commission (in the event the subsequent winning bid is less than the defaulted bid).<sup>52</sup> The second component is an additional payment, which at the time of Mr. Austin's default was equal to three percent of the defaulter's bid, or of the subsequent winning bid, whichever is less.<sup>53</sup> If either bid amount is subject to a bidding credit, the three percent will be calculated using the same bid amounts and basis (net or gross bids) as in the first component of the default payment.<sup>54</sup> In the event that the subsequent winning bid is greater than or equal to the defaulted bid, the total default payment is equal to three percent of the defaulted bid.<sup>55</sup>

16. Section 1.2109(b) of the Commission's rules provides that a winning bidder who fails to remit the required down payment within ten business days after the Commission has declared competitive bidding closed will be deemed to have defaulted, its application will be dismissed, and it will be liable for the applicable default payment obligations specified in 47 C.F.R. § 1.2104(g).<sup>56</sup> Although we cannot determine Mr. Austin's total default payment at this time, we will assess an interim default payment owed by Mr. Austin, amounting to three percent of his defaulted net bid for the Baggs construction permit, or \$630.<sup>57</sup> Pursuant to section 1.2106(e) of the Commission's rules, we will apply Mr. Austin's payment on deposit to satisfy this interim default payment obligation.<sup>58</sup>

## V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that Ted W. Austin, Jr.'s Request for Waiver, dated September 28, 2007, is DENIED.

18. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and sections 1.2107(b), 1.2109(b), and 1.2104(g), of the Commission's rules, 47 C.F.R. §§ 1.2107(b), 1.2109(b), and 1.2104(g), that Ted W. Austin, Jr. is assessed an interim default payment in the amount of \$630.00 for the construction permit associated with MM-FM477-A, at Baggs, Wyoming.

19. IT IS FURTHER ORDERED, pursuant to sections 1.2104 and 1.2106 of the Commission's rules, 47 C.F.R. §§ 1.2104 and 1.2106, that the funds of Ted W. Austin, Jr. on deposit will be applied to satisfy the interim default payment obligation.

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<sup>52</sup> 47 C.F.R. § 1.2104(g)(2).

<sup>53</sup> *Id.* See Mountain Solutions Ltd., Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21996-97 ¶ 25 (1998). In the event that the amount of the final default payment is determined to be less than the amount of the remaining monies on deposit, such excess will be refunded to the payor of record. The rule was modified in 2006 and now provides for an additional default payment of between three and 20 percent, with the specific percentage to be set by the Commission prior to the auction. See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 903-04 ¶ 31 (2006).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 47 C.F.R. §§ 1.2104(g) and 1.2109(b).

<sup>57</sup> Consistent with Commission precedent, the disposition of the remaining amount of monies on deposit with the Commission related to this matter will be addressed in a subsequent letter to the payor of record, once a construction permit covering the same spectrum is re-auctioned and the final default payment can be calculated. See AirCom Communication Consultants, Inc., *Order*, 16 FCC Rcd 17685, 17691 n.47 (WTB 2001), *recon. denied sub nom.*, AirCom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806 (WTB 2003). See also 47 C.F.R. § 1.2104(g)(2).

<sup>58</sup> See 47 C.F.R. § 1.2106(e). See also *TPS Order*, 18 FCC Rcd at 2516.

20. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.2104(g) of the Commission’s rules, 47 C.F.R. § 1.2104(g), that Ted W. Austin, Jr. will be subject to the balance of the default payment specified in section 1.2104(g) of the Commission’s rules, 47 C.F.R. § 1.2104(g), once the actual default payment is determined.

21. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.2109(c), the long-form application of Ted W. Austin, Jr., File Number BNPH – 20060224ACG, is DISMISSED.

22. This action is taken pursuant to delegated authority under sections 0.131 and 0.331 of the Commission’s rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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

Peter H. Doyle  
Chief, Audio Division  
Media Bureau