

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

In the Matter of)	
)	
Ted W. Austin, Jr.)	File No. BNPB-20060224ACG
)	
Application for Review of Order)	
Denying Request for Waiver of)	
Down Payment Deadline for Auction 62)	

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 2015

Released: April 10, 2015

By the Commission:

I. INTRODUCTION

1. In this decision, we affirm an Order by the Auctions and Spectrum Access Division of the Wireless Telecommunications Bureau and the Audio Division of the Media Bureau that denied Ted W. Austin, Jr.'s ("Austin's") request for waiver of the deadline to make a down payment for the FM station construction permit he won in Auction 62.¹ Austin filed an Application for Review challenging the *Staff Decision*.² For the reasons stated below, we conclude that Austin fails to meet the Commission's standard for granting an application for review.

II. BACKGROUND

2. On January 31, 2006, the Wireless Telecommunications Bureau and the Media Bureau (collectively, the "Bureaus") concluded an auction of 171 FM broadcast construction permits for stations throughout the United States and the U.S. Virgin Islands (Auction 62).³ Austin was a winning bidder for an FM station construction permit in Baggs, Wyoming (MM-FM477-A), with a net winning bid of \$21,000.⁴ In keeping with the Commission's rules, the *Auction 62 Closing Public Notice* explained that each winning bidder was required to place on deposit funds sufficient to cover its down payment obligation (20% of its net winning bid(s)) into the Commission's lockbox bank by 6:00 p.m. (ET) on February 23, 2006.⁵ The *Auction 62 Closing Public Notice* also advised winning bidders that they "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**," and expressly warned

¹ Ted W. Austin, Jr., Request for Waiver of Down Payment Deadline for Auction 62, *Memorandum Opinion and Order*, 25 FCC Rcd 1439 (2010) ("*Staff Decision*").

² Ted Austin, Jr. Application for Review (dated March 22, 2010) ("Application for Review").

³ See Auction of FM Broadcast Construction Permit Closes, Winning Bidders Announced for Auction No. 62, Public Notice, 21 FCC Rcd 1071 (MB/WTB 2006) ("*Auction 62 Closing Public Notice*").

⁴ *Id.* at 1090.

⁵ See *id.* at 1071-72; see also 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, 10535 (MB/WTB 2005) ("*Auction 62 Procedures Public Notice*").

that “**failure to complete the down payment on or before February 23, 2006, will result in default.**”⁶ Austin failed to make the required down payment by the February 23, 2006, deadline and did not complete the wire transfer payment until the following day. On September 28, 2007, eighteen months after the down payment deadline, he filed a request for waiver of the deadline.⁷

3. In denying the Request for Waiver, the *Staff Decision* concluded that the Request for Waiver did not meet the standards set forth in the Commission’s Rules and that departure from the Commission’s longstanding and consistently applied policy of strict enforcement of the deadline for the first payment due following an auction would undermine the Commission’s ability to meet its policy objectives in future auctions.⁸ It noted that these policy objectives include not only ensuring the financial capability of winning bidders but also safeguarding the integrity of the auction by avoiding opportunities to “game” the auction process by assessing whether or not to go forward, or to “shop” a winning bid.⁹ The *Staff Decision* found that the Request for Waiver had failed to address how the underlying purposes of section 1.2107(b) would be served by waiving the down payment deadline in his asserted circumstances,¹⁰ and had not presented any unique facts or circumstances that merited waiver of Austin’s obligation to submit his down payment for the winning bid within ten business days as required by section 1.2107(b).¹¹ Based on these findings, the *Staff Decision* denied the request to waive the down payment deadline associated with Auction 62, assessed an interim default payment, and dismissed his long-form application.¹²

4. On March 22, 2010, Austin timely filed the Application for Review requesting that the Commission reverse the *Staff Decision*’s denial of his Request for Waiver.¹³ The Application for Review asserts that the Commission had accepted his down payment and began processing his long-form application without giving him any “hint that there was any problem relating to the timing of his down payment,” and asserts that inaction by Commission staff is responsible for delaying the provision of new FM service to the Baggs area.¹⁴ He reiterates his assertion that because his late down payment resulted from his bank’s failure to initiate a wire transfer upon his verbal command without his physical presence at the bank, which he claims he could not do because of a family emergency, he should have been granted a waiver of the deadline.¹⁵

⁶ *Auction 62 Closing Public Notice*, 21 FCC Rcd at 1073 (emphasis in original).

⁷ Ted Austin, Jr. Request for Waiver (dated Sept. 28, 2007) (“Request for Waiver”).

⁸ See *Staff Decision*, 25 FCC Rcd at 1442-43 ¶ 8 (explaining that full and timely down payment is critical to the integrity of the auction and noting that “the Commission has consistently denied every request for waiver of the down payment deadline”). *Id.* at 1442 ¶ 8.

⁹ *Staff Decision*, 25 FCC Rcd at 1442 ¶ 8. The Commission established a fixed down payment deadline to occur within days of the close of each auction to forestall speculative bidding that might occur if financially unqualified bidders are provided an opportunity to “shop” a winning bid in an effort to obtain financing for a down payment and thereby undermine the integrity of the auction process. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2381-82 ¶ 192 (1994) (*Second Report and Order*).

¹⁰ *Staff Decision*, 25 FCC Rcd at 1442 ¶ 8.

¹¹ *Id.* at 1444 ¶ 12. Specifically, the *Staff Decision* stated, “we cannot find that Mr. Austin’s inattention to post-auction obligations constitutes a special circumstance that warrants a deviation from the general rule.” *Id.*

¹² *Id.* at 1446-47 ¶¶ 17-21.

¹³ Application for Review at 1.

¹⁴ *Id.* at 1-2, 6, 8.

¹⁵ *Id.* at 8-9.

III. DISCUSSION

5. The Commission will grant an application for review of a final action taken on delegated authority when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned or revised; or makes an erroneous finding as to an important or material factual question.¹⁶ For the reasons set forth below, we conclude that the Application for Review fails to meet any of these criteria.

6. The Application for Review argues that the *Staff Decision* misapprehends the Commission's rules and policies governing waivers of payment deadlines.¹⁷ We disagree, and find that the *Staff Decision* correctly applied the Commission's competitive bidding rules and waiver policy. As a threshold matter, we find that the *Staff Decision* correctly explained that the Commission may waive rule provisions "for good cause shown" by the petitioner.¹⁸ Courts have interpreted this standard to require a party seeking waiver of a rule's requirements to demonstrate that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹⁹ The *Staff Decision* also correctly found that to demonstrate the required special circumstances, Austin needed to 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 him to comply with this rule.²⁰ Alternatively, he needed to demonstrate that a waiver would not conflict with the policy underlying section 1.2107(b) of the rules.²¹ We agree with the conclusion of the *Staff Decision* that the Request for Waiver failed to meet any of these articulations of the standard.

7. Contrary to the assertion that the *Staff Decision* conflicts with Commission precedent and established policy, we find that the *Staff Decision* fully accords with Commission rules and policy governing payment waivers. The Commission has consistently determined that timely payment of the initial down payment is not only a valuable indicator of an applicant's financial viability but also essential to a fair and efficient auction process.²² Indeed, as noted in the *Staff Decision*, the Commission has always drawn a sharp distinction in this regard between the initial down payment and subsequent or final payments, in light of their different functions and underlying purposes.²³ Thus, when codifying a ten-day grace period for *subsequent* payments, the Commission continued to insist on "strict enforcement" of the

¹⁶ 47 C.F.R. § 1.115(b)(2).

¹⁷ Application for Review at 2-4.

¹⁸ 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)).

¹⁹ *See, e.g., Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*"), cited at *Staff Decision*, 25 FCC Rcd at 1442 ¶ 7 n. 26. *Accord, NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008). *See also* 47 C.F.R. § 1.925(a)(3)(i).

²⁰ *See Staff Decision*, 25 FCC Rcd at 1442 ¶ 7. *See also* 47 C.F.R. § 1.925(a)(3)(ii); *Northeast Cellular*, 897 F.2d at 1166.

²¹ *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).

²² *See e.g., Mountain SMR Group, L.L.C., Letter Order*, 13 FCC Rcd 16344 (WTB 1998) (citing 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, 430 ¶ 96 (1998)(*Third Report and Order*)), *recon. denied*, *Mountain SMR Group, L.L.C., Order on Reconsideration*, 14 FCC Rcd 3823 (WTB 1999).

²³ *See Staff Decision*, 25 FCC Rcd at 1443 ¶ 10.

deadline for initial down payment.²⁴ Furthermore, prior decisions upholding our policy of strictly enforcing this deadline have provided clear notice to auction winners that the Commission “does not waive the first down payment deadline because its strict enforcement is essential to protect the integrity of the auctions process by preventing insincere bidding and to determine the financial qualifications of a new licensee to provide communication services,”²⁵ and, as noted above, the *Auction 62 Closing Public Notice* specifically emphasized to bidders the importance of taking appropriate steps – including “coordinat[ing] with their bankers ahead of time regarding their wire transfers” – to assure that they would be in compliance with this obligation.²⁶

8. To date, every request by an auction winner to waive any aspect of its first post-auction payment obligation has been denied,²⁷ and the Court of Appeals for the District of Columbia Circuit upheld our policy of strict enforcement of an auction payment deadline based on the Commission’s reasoning that “the integrity and functioning of the auction process is dependent on having payment obligations on winning bids promptly met.”²⁸ The *Staff Decision* is fully consistent with this precedent, including cases involving similar factual situations where, for example, unsuccessful waiver applicants blamed a late down payment, in whole or in part, on a medical exigency or bank error.²⁹

9. The *Staff Decision* is also consistent with precedent regarding the very same down payment deadline in the same auction.³⁰ In that matter, Kankakee Valley Broadcasting Co., Inc. (Kankakee Valley) failed to meet its down payment deadline because its representative was out of town due to a medical condition. Kankakee Valley’s request for waiver was denied.³¹ Austin asserts, however, that his situation is distinguishable from *Kankakee* because his payment was one day late, whereas

²⁴ *Third Report and Order*, 13 FCC Rcd at 430 ¶ 96.

²⁵ See TPS Utilicom, Inc., *Memorandum Order and Opinion*, 16 FCC Rcd 14835, 14838 ¶ 8 (WTB 2001) (citing BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 15341, 15343 ¶ 4 (1997); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384, 6384 ¶ 5 (CCB 1994); Phoenix Data Communications, Inc., *Order on Reconsideration*, 14 FCC Rcd 21122, 21124 ¶ 5 (WTB 1999); National Telecom PCS, Inc., *Order on Reconsideration*, 14 FCC Rcd 18822, 18826 ¶ 9 (1999); *aff’d*, *National Telecom Inc. v. FCC*, 254 F.3d 316 (D.C. Cir. 2000); *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir., 1999)).

²⁶ See para. 2, *supra*.

²⁷ See TPS Utilicom, Inc., *Order on Reconsideration*, 18 FCC Rcd 2516, 2520 ¶ 9 (WTB 2003) (“*TPS Order*”). See also Kankakee Valley Broadcasting Co., Inc., *Memorandum Opinion and Order*, 22 FCC Rcd 8591 (WTB 2007) (“*Kankakee*”) (denying request for waiver of section 1.2107(b) and dismissing long-form application for FM construction permit where winning bidder claimed to be “unaware” of deadlines because of its principal’s distraction due to medical treatments).

²⁸ *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).

²⁹ *Kankakee*, 22 FCC Rcd 8591 (denying a waiver request where the applicant asserted that it failed to meet the initial payment deadline because the employee responsible for making the payment was “distracted” by his acceptance into a medical treatment training program and had left town to participate in the program while the auction remained in progress). See also Aircom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806 (WTB 2003) (denying request for waiver where winning bidder’s bank submitted letter claiming it was not possible to send the down payment to the Commission “because of technical difficulties.”); Four Corners Broadcasting, LLC, *Letter Order*, 25 FCC Rcd 9046 (WTB 2010) (denying waiver request where applicant seeking to participate in broadcast auction claimed its late upfront payment was due to a “bank error completely out of the [applicant’s] control.”).

³⁰ *Kankakee*, 22 FCC Rcd 8591.

³¹ *Id.*

Kankakee Valley's payment was four months late.³² We conclude that this distinction is not relevant where the rules impose a firm deadline that is applicable to all applicants. Austin and Kankakee Valley were both successful bidders in Auction 62, both had advance warning of the down payment deadline, and both blamed their respective failures, in part, on medical situations. We agree with the *Staff Decision* that Austin's substantive justification did not warrant a waiver of our down payment rule. Absent compelling factual circumstances not presented here, we decline to adopt an arbitrary distinction between the Waiver Request and the Kankakee Valley request based solely on the issue of how long is too long for a missed deadline.³³ We are reluctant to forego "the gain in certainty and administrative ease" notwithstanding "some hardship in individual cases,"³⁴ in the absence of any objective standards for or showing of unique circumstances warranting a waiver. We also emphasize that Austin's considerable delay in requesting a waiver of the Commission's payment rule, despite knowing that he missed the deadline, was no less significant than Kankakee Valley's failure to take timely action and, contrary to Austin's claims, also created substantial licensing delays.³⁵ Austin's attempt to argue that his delay in making his down payment was somehow less consequential does not persuade us that the *Staff Decision* was erroneous in any factual or material respect.³⁶

10. We also disagree with the argument that cases relied on by the *Staff Decision*, namely *Mountain Solutions* and *MFRI*, demonstrate that a waiver is warranted in his circumstances.³⁷ Austin maintains that the court in *Mountain Solutions* noted with "apparent approval" cases where the Commission had granted waivers to applicants whose payment was one day late due to inadvertent error.³⁸ He likens his situation to those matters by characterizing himself as "the inadvertent victim of unfortunate circumstances on the due date."³⁹ His circumstances, however, are distinguishable from the

³² Application for Review at 5-6.

³³ See *Kankakee*, 22 FCC Rcd at 8591-92.

³⁴ *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004) (upholding denial of waiver of ten-day grace period for final payment). See also *Mary V. Harris Foundation v. FCC*, No. 13-1304 (D.C. Cir. Jan. 20, 2015), slip op. at 14-15 (upholding Commission decision regarding award of a noncommercial educational ("NCE") FM construction permit in case in which Media Bureau had denied waiver of rule requiring showing of NCE service to 10% underserved area, to applicant proposing a 9.46% underserved area where the bright-line threshold had been adopted to provide easy administration of NCE selection preferences).

³⁵ Application for Review at 6. We note that the Bureau's action to enforce the Commission's rule in this case, while serving the goals of the rule, did not impose penalties or additional requirements (other than the default payment), or bar Austin from seeking to acquire this (or any other) license in a future auction, provided he complies with the eligibility and all of the other requirements set forth in our competitive bidding rules. See 47 C.F.R. §§ 1.2101 – 1.2112, 73.5000 – 73.5009. Kankakee Valley, for example, subsequently acquired the permit upon which it defaulted through the auction process. See Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 93, *Public Notice*, 27 FCC Rcd 4056 (MB/WTB 2012) (announcing Auction 93 results); Letter to Sidney Marks, Kankakee Valley Broadcasting Company, Inc., 27 FCC Rcd 7035 (WTB 2012) (notice and demand of final default payment for Culver, IN permit); and Broadcast Actions, *Public Notice*, Report No. 47777 (rel. July 11, 2012) (announcing grant of new FM permit, FCC File No. BNPH-20120514AAI).

³⁶ See 47 C.F.R. § 1.115(b)(2).

³⁷ Application for Review at 4-5, citing *Mountain Solutions Ltd., Inc. v. FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999), *MFRI, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 1540 (WTB 1997) ("*MFRI*") and *Paradise Cable, Inc., Order*, 12 FCC Rcd 9760 (VSD 1997).

³⁸ *Id.* at 4-5.

³⁹ *Id.* at 5. We disagree with Austin's characterization of himself as an "inadvertent victim" since, as noted above, the Auction 62 Closing *Public Notice* expressly warned him about the very "circumstances" that he claims to have suffered. See para. 2 *supra*, citing Auction 62 Closing *Public Notice*, 21 FCC Rcd at 1073 (advising 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**," and warning that "**failure to complete the down payment on or before February 23, 2006, will result in default**." (emphasis in original)).

cases cited in *Mountain Solutions*, because in all of those matters the bidders had already timely made their first post-auction down payments and only sought and received a waiver of the deadline for their second down payment.⁴⁰ As noted above, the Commission has consistently distinguished between defaults on the initial down payment, due days after the auction's close, and defaults later in the post-auction process.⁴¹ The Application for Review therefore fails to demonstrate that the *Staff Decision* conflicts with precedent or established Commission policy or that his circumstances involve an application of a Commission precedent or policy that should be overturned.⁴²

11. We also disagree with Austin's contention that, because he had sufficient funds in his bank account on the payment deadline, strict enforcement of the payment deadline does not serve the underlying purposes of section 1.2107(b) of the rules.⁴³ As noted above, those purposes include not only assurance of ability to pay but also safeguarding the integrity of the auction process by avoiding opportunities to game the auction process.⁴⁴ Moreover, the rule also serves a broader purpose because it eliminates the need for the Commission to undertake an individualized analysis of the financial circumstances of each auction applicant. If this argument were correct, any winning bidder that could show it had had the required amount of funds in its bank account at the time the initial down payment was due could justify a request for waiver of the deadline seeking an extension for any length of time. In adopting the down payment rule, the Commission explained that the requirement for timely payment upholds the integrity of the competitive bidding and licensing processes.⁴⁵ To this end, a uniform and predictable application of the rule serves its underlying purpose and, accordingly, the public interest. This does not mean, as Austin contends, that the Commission has foreclosed the possibility that some combination of circumstances might warrant a waiver of the down payment deadline in the future,⁴⁶ but

⁴⁰ See *Mountain Solutions*, 197 F.3d at 515. See also *MFRI*, 12 FCC Rcd 1540. As with the successful waiver applicants in *Mountain Solutions*, the applicant in *MFRI* defaulted on its second down payment, not its first down payment. *Id.* at 1542 ¶ 7 (finding that "[t]he record indicates that prior to the second down payment, MFRI made all previously required auction payments on time and in full."). See also *Paradise Cable, Inc.*, 12 FCC Rcd at 9763 ¶ 7 (same). Second down payments were required only of winning bidders participating in the Commission's installment payment program. Upon payment within ten days after the conditional grant of the license application, the second down payment commenced the licensee's installment payment plan. See 47 C.F.R. § 1.2110(g)(2). The use of installment payments, which have never been employed for broadcast auctions, was suspended by the Commission for future auctions in 1997. See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 398-400 ¶ 40 (1997).

⁴¹ See *TPS Order*, 18 FCC Rcd at 2521 ¶ 11 ("[T]he Commission always has held that a bidder's inability or refusal to make the first post-auction down payment poses a more significant threat to the integrity of [the] auction process than a later default.").

⁴² See 47 C.F.R. § 1.115(b)(2).

⁴³ Application for Review at 3.

⁴⁴ See para. 3, *supra*.

⁴⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2381-82 ¶ 192 (1994).

⁴⁶ The Commission's rules do not require it to make any affirmative findings concerning a winning bidder's financial qualifications prior to denying an applicant's waiver request. See 47 C.F.R. § 1.925(a)(3)(ii). It is the applicant's burden to prove that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Tel. Co.*, 897 F.2d at 1166. Austin has not made such a showing here. His assertion that "the Commission has never addressed whether circumstances that may be insufficient to warrant a waiver when considered alone might, in combination prove sufficiently 'unique and compelling' to justify the requested relief" therefore has no relevance to this matter. Application for Review at 2. The Application for Review fails to identify any facts, details, or circumstances that were not adequately considered, either singly or in combination, in the *Staff Decision*. We note that contrary to his assertion, the Commission has addressed whether the uniqueness of multiple factors, when considered in combination, support a waiver of a payment deadline even if

(continued....)

he has failed to present any such circumstances here. As the court in *BellSouth* explained, “[r]igid and consistent adherence to a policy will be upheld if it is valid.”⁴⁷ Here too, the Application for Review does not demonstrate that the *Staff Decision* conflicts with precedent or established Commission policy, that his circumstances involve an application of a precedent or policy that should be overturned; or that the *Staff Decision* included an erroneous finding as to an important or material factual question.⁴⁸

12. Strict enforcement of the downpayment deadline for auction winners is a programmatic approach that promotes the expeditious deployment of services by minimizing opportunities for defaulters to contest the consequences of their default and thereby delay the award of licenses. Following this approach, we find no basis for overturning the *Staff Decision* based on Austin’s claims that would have Commission staff engage in the kind of individualized analysis of circumstances that our bright-line approach is designed to avoid. Thus, we find no merit in Austin’s arguments that his failure to meet the downpayment deadline was less significant than that of the defaulting bidder in *Kankakee*⁴⁹ or that Commission staff is somehow at fault on account of the passage of time in addressing his request for waiver.⁵⁰ Similarly, we reject his contention that he was somehow already a Commission licensee or had rights in the Baggs FM permit such that his failure to meet the payment deadline did not affect the timing of the Bureau’s substantive determination of whether he was qualified to hold the permit.⁵¹ Along with all other participants in the auction, Austin was informed of the requirement to make a timely down payment at the close of the auction, and the consequence of failing to do so.⁵² He knowingly missed the payment deadline, and then waited more than 18 months to file his request for waiver of the rule. Further, he acknowledges he only sought a waiver when it became clear that staff would not process his application.⁵³ The promptness of the Commission’s actions, therefore, is not an issue in this proceeding

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the individual factors do not. See e.g., *Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16892 ¶ 9 (2003) (finding that “none of the five factors listed by [the winning bidder] is sufficiently compelling, either singly or in combination, to justify the requested final payment waiver.”), *aff’d*, *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 902 (D.C. Cir. 2004) (finding that the Commission’s order showed why the Commission did not find each factor “persuasive singly or in combination to create an exception to the normal payment rules.”).

⁴⁷ *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (DC Cir. 1999).

⁴⁸ 47 C.F.R. § 1.115(b)(2).

⁴⁹ Application for Review at 6. We note that the Bureau’s action to enforce the Commission’s rule in this case, while serving the goals of the rule, did not impose penalties or additional requirements [other than the default payment], or bar Austin from seeking to acquire this (or any other) license in a future auction, provided he complies with the eligibility and all of the other requirements set forth in our competitive bidding rules. See 47 C.F.R. §§ 1.2101 – 1.2112, 73.5000 – 73.5009. *Kankakee Valley*, for example, subsequently acquired the permit upon which it defaulted through the auction process. See Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 93, *Public Notice*, 27 FCC Rcd 4056 (MB/WTB 2012) (announcing Auction 93 results); Letter to Sidney Marks, *Kankakee Valley Broadcasting Company, Inc.*, 27 FCC Rcd 7035 (WTB 2012) (notice and demand of final default payment for Culver, IN permit); and Broadcast Actions, *Public Notice*, Report No. 47777 (rel. July 11, 2012) (announcing grant of new FM permit, FCC File No. BNPH-20120514AAI).

⁵⁰ Application for Review at 2, 6.

⁵¹ See *id.* at 8.

⁵² *Auction 62 Procedures Public Notice*, 20 FCC Rcd 10492, 10534 (default and disqualification of winning bidders). See *BDPCS Order*, 15 FCC Rcd at 17600 ¶ 16 FN 66 (2000) (“[T]he obligation to pay the winning bid is imposed at the close of the auction, and neither the pendency of the license application, nor the filing of any petition to deny or objection, relieves the winning bidder of that obligation.”).

⁵³ Application for Review at 2 (Mr. Austin concedes that he filed a waiver of his late payment only after staff informed him that his long form could not be processed absent such a request.); see also Ted Austin, Jr. Request for Waiver at 3-4 (dated September 28, 2007) (Mr. Austin 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.).

and has no bearing on Austin's obligation to pay his initial down payment within the ten business days required by section 1.2107(b). Nor is the timing of the *Staff Decision* relevant to his failure to promptly seek a waiver upon missing the payment deadline. Austin alone is responsible for his lack of diligence, and its corresponding consequences. We agree with the *Staff Decision* that Austin had no rights in the Baggs, Wyoming construction permit because the Bureaus did not take any final action on his long-form application prior to dismissing it in the *Staff Decision*, and did not make any determination about his qualifications to hold this permit.⁵⁴

13. In sum, none of the arguments presented by Austin merit the relief he seeks in his Application for Review. Accordingly, we conclude that the Application for Review did not demonstrate that the *Staff Decision* conflicts with statute, regulation, precedent, or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.⁵⁵ Although Austin did present evidence that the bank played a role in his failure to meet the payment deadline, he offers no explanation as to why he failed to heed the Commission's warnings to coordinate with his bank ahead of time and waited until the day of the deadline to initiate a request to wire the money to the Commission. We therefore deny his request that we reverse the *Staff Decision* denying his Request for Waiver.

IV. ORDERING CLAUSES

14. For the reasons discussed above, we hereby deny the Application for Review of the *Staff Decision* denying Austin's Request for Waiver in connection with his failure to submit the required down payment for the FM station construction permit in Baggs, Wyoming (MM-FM477-A).

15. Accordingly, it is ORDERED, pursuant to sections 4(i) and 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(4), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed on March 22, 2010, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁴ *Staff Decision*, 25 FCC Rcd at 1443 ¶ 11, citing 47 U.S.C. §§ 308(a)-(b) (provisions of Communications Act of 1934, as amended, requiring that 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 also *id.* §§ 309(j)(5), 309(j)(6)(B), 309(j)(6)(D) (confirming that such requirements extend to auction applicants).

⁵⁵ 47 C.F.R. § 1.115(b)(2).