



Federal Communications Commission  
Washington, D.C. 20554

September 14, 2004

DA 04-2975

Mr. Richard Hodson  
Hodson Broadcasting  
520 Monticello Drive  
Las Vegas, NV 89107-3616

Re: Hodson Broadcasting – Request for Waiver of Section 1.2106(a) Former Defaulter  
Upfront Payment Requirement For Participation in FM Broadcast Auction No. 37

Dear Mr. Hodson:

The Commission has received your application (FCC Form 175) to participate in the upcoming FM Broadcast Auction (“Auction No. 37”). In this letter we address your request for waiver of the requirement that an applicant that has previously been in default on any Commission license 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.<sup>1</sup> For the reasons discussed below, we deny the waiver request.

In your waiver request, you state that in 1985 you obtained a \$2,240 Stafford Student Loan, guaranteed by the Higher Education Assistance Foundation, to attend broadcasting school. You further state that, due to unemployment and other financial setbacks, the loan went into default and was eventually referred to the Internal Revenue Service. In January 1992, you were able to repay the loan in full, including accrued interest, but state that due to an oversight a letter of satisfaction was not issued by the U.S. Department of Education until March of 2003.

You argue that because your loan default was cured over 12 years ago, you should be relieved of the requirement to make an upfront payment that is 50 percent higher than that set for each license, as set forth in Section 1.2106(a). You also contend that waiver may be granted under Section 1.2110(h) of the Commission’s rules, which provides that the Commission may establish different upfront payment requirements for categories of designated entities, and that grant of the requested waiver will comport with various federal mandates giving relief to small businesses such as Hodson Broadcasting.<sup>2</sup>

To obtain a waiver of the Commission’s competitive bidding rules,<sup>3</sup> you must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this

---

<sup>1</sup> 47 C.F.R. § 1.2106(a).

<sup>2</sup> Specifically, in support of your waiver request, you cite Section 257 of the Telecommunications Act of 1996, which requires the Commission to remove entry barriers for entrepreneurs and other small businesses, and the Regulatory Flexibility Act, 5 U.S.C. § 603(c), which “requires an agency to describe any significant alternatives that it has considered in reaching its proposed procedures and/or regulations,” including, *inter alia*, “an exemption for coverage of the rule, or any part thereof, for such small entities.” Hodson Broadcasting, FCC Form 175 Application, Waiver Justification at 2 (emphasis in original).

<sup>3</sup> 47 C.F.R. § 1.2105(b)(2).

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.<sup>4</sup>

Based on the record before us, you have not satisfied the Commission's criteria for granting a waiver of Section 1.2106(a). You contend that your full payment of the former debt should justify waiver of the more stringent upfront payment requirement. We disagree. The "former defaulter" policies were incorporated into the Commission's Part 1 general competitive bidding rules in 2000.<sup>5</sup> The Commission reasoned 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."<sup>6</sup> Thus, while cure of an outstanding federal default or delinquency enables the former defaulter or delinquent to participate in an auction,<sup>7</sup> former defaulters and delinquents are required to make a larger upfront payment. You have not shown that enforcing the requirement in this case would frustrate this purpose or would not serve it. Furthermore, you have not demonstrated how satisfaction of your delinquent debt constitutes "unique facts and circumstances" sufficient to justify the requested waiver.

We also reject your contention that 47 C.F.R. § 1.2110(h) of the Commission's rules and Section 257 of the Telecommunications Act of 1996 provide authority for the waiver you seek. Section 1.2110(h) allows the Commission to "establish different upfront payment requirements for *categories* of designated entities . . ."<sup>8</sup> Section 257 requires the Commission to identify and eliminate, *by regulations*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services . . ."<sup>9</sup> Neither Section 257 of the Telecommunications Act of 1996 nor Section 1.2110(h) of the Commission's rules compel us to grant a waiver that would establish a different upfront payment requirement in response to the request of an individual applicant. Moreover, the Regulatory Flexibility Act, 5 U.S.C. § 603(c) does not support your request for a waiver of 1.2106(a). Section 603(c) of the Regulatory Flexibility Act requires Federal agencies to prepare an analysis of the impact of proposed rules on small entities, including a discussion of significant alternatives to the proposed rule.<sup>10</sup> Thus, Section 603 applies only in the context of the Commission's rulemaking proceedings, and not to individual requests to waive a final rule.

We disagree with your argument that denial of the waiver request would frustrate Congress' directives to ensure that the auction process provides ample opportunity to small businesses. The Commission has consistently rejected arguments that Sections 309(j)(3)(B) and 309(j)(4)(C), which are

---

<sup>4</sup> 47 C.F.R. § 1.925.

<sup>5</sup> 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, 15316-17 (2000).

<sup>6</sup> *Id.* at 15317.

<sup>7</sup> *Id.* at 15316.

<sup>8</sup> 47 C.F.R. § 1.2110(h) (emphasis added).

<sup>9</sup> 47 U.S.C. § 257(a) (emphasis added).

<sup>10</sup> Section 603(c) lists "an exemption from coverage of the rule, or any part thereof, for such small entities" as an example of the significant alternatives to be discussed in an initial regulatory flexibility analysis. 5 U.S.C. § 603(c).

the statutory bases pursuant to which the Commission has adopted bidding credits and other provisions to provide greater opportunities to small businesses 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.<sup>11</sup> The Commission fulfills competitive bidding statutory mandates and policy goals with appropriate rule provisions, not by forbearing from enforcing its competitive bidding rules.

Waiver of the upfront payment requirement in this instance would lead to an inconsistent application of our 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. Your waiver request is therefore DENIED.

Hodson Broadcasting's short-form application has been accepted. Based on the disclosure regarding a prior default, 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.<sup>12</sup> 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.

Sincerely,

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

---

<sup>11</sup> See, e.g., *TPS Utilicom*, 18 FCC Rcd 2516, 2522-23 and 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).

<sup>12</sup> 47 C.F.R. § 1.2106(a).