

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re)
)
Auction of FM Broadcast Construction) AU Docket No. 12-239
Permits Scheduled for March 26, 2013)

To: The Commission

COMMENTS OF TED W. AUSTIN, JR.

On September 11, 2012, the Commission issued a Notice requesting comments on its plans for the auctioning off of the right to apply for permits for construction of some 117 new FM radio broadcast stations.

Among the channels listed in the attachment to the notice as set to be auctioned next March is Channel 277 in Baggs, Wyoming. This listing is improvident, for the reasons set forth herein. Mr. Austin therefore requests that the Baggs channel be removed from Auction 94.

The notice does not disclose that Mr. Austin holds rights in respect of this frequency that could result in its being awarded to him rather than to a new bidder.

Specifically, Mr. Austin was the winning bidder for this frequency in Auction 62, as announced by the Commission of February 8, 2006, more than six years ago. Mr. Austin submitted his down payment in full to the FCC by wire transfer. Unfortunately, through a communication error with his bank (for which the bank took responsibility) and a family emergency, the down payment was received by the FCC one day late, on February 24, 2006. The FCC nevertheless accepted Mr. Austin's payment. The agency made no mention of any problem with the timeliness of Mr. Austin's submission at any

time during 2006. Indeed, Mr. Austin had proceeded to file his long form application for a construction permit for Channel 277 on the same day the down payment was received by the Commission – i.e., February 24, 2006. This was well before the deadline of March 10, 2006. It was not until more than a year later, when Mr. Austin received an informal contact from a member of the Commission's staff, that he had any indication that there was might be a problem with his payment. Shortly thereafter, on September 28, 2007, Mr. Austin filed a waiver request.

The Auctions and Spectrum Access Division and the Audio Division denied his waiver request by Memorandum Opinion and Order released February 18, 2010. In that decision, the staff inexplicably determined that the one-day delay in submission of Mr. Austin's down payment bore some relation to the likelihood that he would build the Baggs station in a timely fashion. The staff ignored the more pertinent evidence that Mr. Austin has actually built a number of broadcast stations, indeed every station for which he received a permit. Clearly, strict enforcement of the rule would not promote the purpose of the rule, because if the waiver had been granted Mr. would have already built the station by the time the staff acted on his waiver request. Accordingly, Mr. Austin filed an application for review of the staff decision. That Application remains pending with the full Commission. It is unopposed.

The Commission has, since the filing of the waiver request, granted several waivers for applicants who failed to submit their long form applications on time. There is no rational distinction justifying a draconian approach to the payment deadline while allowing leniency as to the application filing deadline. Moreover, the Commission is still holding Mr. Austin's down payment.

In the Auction 94 Public Notice, no mention was made of Mr. Austin's appeal. It would represent administrative confusion for the Commission to attempt a new auction of the Baggs frequency, when, if there is any sense of justice or fairness left at the

Commission, Mr. Austin's application for review will be granted and a new bidder's funds will have to be returned.

Further, the Notice states that the subject "permits to be auctioned" are "FM channels added to the Table of Allotments, 47 C.F.R. § 73.202(b), pursuant to the Commission's established rulemaking procedures, and designated for use in the indicated communities." Notice at 2. However, the Baggs channel is not listed in the Table of Allotments. That is because a channel is removed from the Table when a long form application is filed, as occurred here. In order to auction off Channel 277 in Baggs to a new bidder, the Commission must first conduct a rulemaking proceeding to put Channel 277 back into the Table.

For these reasons, the Commission should removed Channel 277 from the list of frequencies to be auctioned by the Commission.

Respectfully submitted,
TED W. MR. AUSTIN, JR.

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