

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

In the Matter of)	In Response to
)	Public Notice
Rules and Policies Concerning)	DA 05-1076
FM Broadcast Auction #62)	Released April 15, 2005 ¹

COMMENTS

Hodson Broadcasting, a sole proprietorship formed by Richard Dean Hodson (hereafter called "Hodson") respectfully submits the following "Comments" in response to the *Public Notice* in the above-captioned undertaking. The *Notice* solicits input and feedback from parties, regarding procedures and policies which will govern Auction #62.

Hodson previously participated in Auction #37, which was the first open FM auction since Congress legislated that the Commission switch from comparative hearings to competitive bidding for commercial broadcast licenses in the mid 1990's. Hodson specified 35 of the 288 FM Allotments offered in that auction on its FCC Form 175, and actively bid throughout 34 of 62 rounds, before having to drop out, due to all selected allocations becoming too cost prohibitive. Hodson believes that through its experience with the Commission's competitive bidding

¹The *Public Notice* (DA 05-1076) was dated April 14, 2005, but wasn't available online at the Commission's website, www.fcc.gov, in the Daily Business Files section until the following day. The *PN* directed that comments are due on or before April 29, 2005, and reply comments are due on or before May 6, 2005. Thus, this submission by Hodson Broadcasting is timely and properly filed.

practices and unsuccessful acquisition of any frequency in Auction #37 because of limited monetary resources, it can offer feasible and beneficial solutions to assure those designated entities (i.e. small, minority, and female owned businesses) similarly and financially situated as Hodson, do indeed receive a fair opportunity to acquire and operate commercial FM spectrum. The new entrant bidding credits are helpful, but is just not enough assistance by itself to overcome capital-rich broadcast conglomerates, or wealthy investors that participate for the sole purpose of marketing their frequencies post-auction for profit, with absolutely no intention to build or manage these facilities over the long term. Hodson strongly encourages delegated authorities and staff policymakers at the Commission to utilize this occasion to adamantly advance and implacably improve commercial FM broadcast opportunities for new entrants, entrepreneurs, and designated small businesses, as mandated by Section 257 of the 1996 Telecom Act.² Because Hodson is also a small, struggling, start-up, sole proprietorship broadcast business, which oftentimes is neglectfully sandwiched

²See Title I, Part II-Development of Competitive Markets, Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 257(a) and (b), 110 Stat. at 77 ("1996 Telecom Act"). In subsection (a), Elimination of Barriers, Congress mandates that the Commission identify and eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services, while subsection (b), National Policy, directs "In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." Furthermore, the Regulatory Flexibility Act (5 U.S.C. § 603(c)) requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may, among others, include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

between more resourceful NCE entities, such as National Public Radio and Calvary Satellite Network on the one hand, and commercial conglomerates, such as Clear Channel and Infinity, on the other, it is extremely important that the Commission not only marginally entertain, but earnestly and effectually support initiatives and other practical ideas presented by individual enterprises, minority endeavors, and/or very small commercial ventures, as decreed by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-03, 241, 110 Stat. at 857-58, 864-65; and the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164.

Competitive bidding events, although imposed by Congress, are not very conducive or favorable to small businesses or broadcast entrepreneurs. This prejudicial process clearly contradicts Public Laws noted supra, plus other FCC directives codified in the Communication Act of 1934, as amended, which requires that the Commission regulate and expedite new broadcast services in the public interest.³

³See 47 U.S.C. § 151. The FCC was created "[f]or the purpose of regulating interstate...communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination...a *rapid, efficient*, Nation-wide...wire and radio communication service with adequate facilities at *reasonable charges*...(italics added). Competitive bidding through the Commission has not had a history of being either rapid nor efficient. As an example, Auction #37 was postponed three different times in 2001, before it was indefinitely put on hiatus for three additional years. When this auction was finally conducted in November 2004, the outcome clearly demonstrated a egregious inefficiency to promote diversity, competition, and localism. Reviewing the statistics for Auction #37, Hodson finds that there were 697 initial applicants, with 456 of those deemed eligible to participate, and only 110 bidders eventually secured construction permits. This translates to a dismaying and appalling 15.78% success rate for all entities which completed a FCC Form 175 with the Commission. This meager percentile statistic alone clearly does not foster or advance the Commission's overall public interest directives. Moreover, auctions generally do not promote "reasonable charges," as this procedure effectively stifles limitless participation by designated small business entities with financially challenged portfolios. For numerous years, the Commission's position has been to distribute licenses to those applicants which value the spectrum the most. This reasoning should not hinge entirely on monetary value alone, which certainly and currently is the case.

Acknowledging that the FM band's spectrum is quasi-monopolistic in nature to begin with, potential opportunities for new commercial entrants has been severely hampered over many years, in contrast to AM or television broadcast possibilities, as a result of both the *NPR*⁴ court appeals and the universal Congressional auction edict for commercial broadcast spectrum services.

To assist balancing the FM broadcast playing field, in relation to small and minority commercial entrepreneurs, Hodson again adamantly recommends certain changes concerning the Commission's broadcast auction procedures and regulations, this time for Auction #62, that will truly help enable small, start-up broadcast businesses to effectively compete and hopefully succeed. First, restructuring the New Entrant Bidding Credits⁵ from its current 35/25/15 percentile to just a 45/30 percentile ratio would be quite beneficial for first-time, limited or privately financed, broadcast owners that have either minimal (five or less) or do not have any medium of mass communication interests, which better defines and serves the Bidding Credit's intention. Another similarly suggested alteration would repeal the provision contained in Section 1.2110(f)(2)(iii) of the Commission's Rules for the 15% tier, because businesses with \$40 million or more in triennial revenue really

⁴See *National Public Radio, Inc. et al., v. FCC*, 254 F.3d 226 (D.C. Cir. 2001). After Hodson thoroughly examined the *NPR* brief, *Id.* at 229, 232., it was blatantly obvious that throughout the Circuit Court's opinion, both Judge Tatel and Randolph appeared overly transfixed in the context of §309(j)(2), with the term "issued". Perhaps a better phrasing would be, "...shall not apply to Commission licenses or construction permits-...", omitting the word "issued" entirely and thus simplifying the general language of the rule.

⁵47 C.F.R. §§ 1.2110(f)(2) and 73.5007(a)

don't require or even remotely justify any type of new entrant bidding credit adjustments. However, as a generous compromise to the supra statement, in Hodson's newly proposed 30% tier, a company could have attributable interest in five or less mass media facilities nationwide, with each outlet possessing no more than \$4 million in annual receipts, and must provide financial documentation of such status to the Commission, on the strict qualifying condition that this winning bidder lacks any mass communication presence (i.e. other radio, AM or FM; television, whether broadcast, satellite, or cable distribution platform; and/or newspaper) within 250 kilometers (155 miles) of the auctioned community coordinates. If *any* of their facilities have over \$4 million in gross revenue, they would be automatically deemed ineligible for the 30% Bidding Credit. If this same business controls or has interest in any broadcast license within 250 kilometers of the vacant allotment, then they must select an available FM allocation which meets the 250 kilometer provision, if they wish to participate in Auction #62.

Only those beginning broadcast entities with up to \$1 million in total or annual revenues and no license interests or market presence whatsoever, would be entitled to the restructured 45% tier, plus exempt from the bid withdrawal payment provisions codified in 47 C.F.R. § 1.2104(g). These designated small business concerns would also be allowed, at their discretion, to utilize the installment payment plan, pursuant to Section 1.2110(g) of the Commission's Rules, for Auction #62. Furthermore, when a selected small business entity that qualifies for the 45% tier submits their Form 175 application, the specified

discount (45%) should also be applied to that fledgling entity's total upfront payment, yet they would receive the full amount of related bidding unit eligibility. As an attractive alternate installment payment methodology for these small business concerns, the winning bidder for one or more construction permits in Auction #62 would ante up, after factoring in the 45 percentile reduction in the overall gross amount pledged and the previously submitted upfront payments, enough funding so that the Commission has 20% of the net bid on the auction participant's construction permit(s) within 30 business days after the close of the auction, before the Commission will approve the construction permit (CP) application (Form 301) for that particular FM Allotment. To allow these disadvantaged start-ups a better chance to succeed in the broadcasting business and assist with the hardships and financial strain of facility build-outs, the Commission would collect the 80% balance over the eight year license duration, under the following payment schedule. Another 10% would be required when the license to cover application (Form 302-FM) is tendered. At each anniversary throughout the term of the broadcast license, ten percent more would be due each year until the commencement of the eighth year, when the obligation would be paid in full.

Hodson further proposes that another bidding credit be instituted, which can be combined with the New Entrant Bidding Credit, if certain criteria are met. This new credit would be referred to as the "Original Petitioner Bidding Credit," and would be defined as follows: if the winning bidder for any FM Allotment in Auction #62 is also the same

entity which initially petitioned the Commission to place that particular allocation on the FM Table of Allotments, then that bidder would receive *at least a 10% reduction*, from the amount of their gross bid for that specific frequency only, if in the event this petitioner/bidder secures several other winning allocations that they did not initiate. Hodson steadfastly submits that this Original Petitioner Bidding Credit is a novel concept and is truly important on several levels. The Commission is fully aware on how difficult it can be to amend the FM Table, with some proceedings taking decades to resolve because of counterproposals, interferences concerns, and the like. That patient petitioner, if successful, must then await many additional years to have that FM Channel scheduled for a competitive bidding event, which still offers no guarantee that all the time, effort, and money invested in their endeavor for frequency usage will ever be rewarded. It's no wonder almost all petitioners, even though required to submit an expression of continued interest during comments in their rule making, neglect to pursue this interest into their respective auction. Matter of fact, in Auction #37, Hodson was one of only four known bidders that earnestly attempted to follow through with what they petitioned the Commission for, and started so many years ago (in Hodson's case, it has been over seven years). The Original Petitioner Bidding Credit would be a courteous first step in remedying this outrageous oversight, and would begin to compensate those designated petitioning entities persistent and hopeful enough to hang in there, in spite of such difficulties encountered over the years with the Commission's current system and process of FM Table

amendments and competitive bidding events.

Regarding default criteria guidelines,⁶ Hodson agrees with current applicant certification and former defaulter statements, but must directly differ on the 150% down payment as a blanket requirement for all former defaulters, as Section 1.2106(a) of the Commission's Rules currently instructs. Instead, if the required statement reflects a previous defaulter has cured outstanding infractions and has remained debt free for at least a decade,⁷ then that bidder would just pay the standard fare in lieu of the higher upfront payment. Speaking of upfront payments, bidding units, and minimum opening bids, the Commission staff needs to reevaluate the allotment inventory and reconsider the pricing structure. Because this is an auction and prices are naturally designed to spiral upwards for those channels of higher interest and demand, the Commission should both encourage baseline participation from any qualified party without discrimination, plus permit the marketplace to determine the final price without restriction. As an example, nineteen of the 173 allocations (11%) are listed with minimum opening bids of \$100,000 or more. This almost automatically assures that a designated entity will not be participating in these markets. Hodson recommends that no allocation should open at more than \$50,000, and any that are listed above that threshold should be reduced accordingly. A large

⁶47 C.F.R. §§ 1.2105(a)(2)(x) and (xi), 1.2106(a)

⁷See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1228-29, at ¶105. (Commission established applicant misconduct, even if flagrant, should be disregarded when good rehabilitative evidence exists and a decade or more of time has elapsed since incident.)

majority of these allotment communities are receiving their first aural transmission service and will be broadcasting to populations of under 10,000. To generate the largest bidder involvement with this category of construction permits and affirm that these unserved citizens do indeed get new service in such rural and remote areas, further modifications in the minimum opening bids need to be made. Hodson highly avers that an upfront payment not to exceed \$5,000, regardless of the FM Class, as long as that allotment meets both of these two conditions (first aural transmission service in the community and that community has 10,000 or less residents). Hodson would also seriously support the Commission's suggestion in Section II.B. (page 6 of *Public Notice*) to serve the public interest "by having no minimum opening bid amount or reserve price."

Because of the thorough distribution, infiltration, and penetration of FM broadcast stations and licenses already amongst the top 25 national radio broadcast business conglomerates (i.e. Clear Channel, Infinity, Cumulus, etc.), these entities should be prohibited from participating in Auction #62. However, since this position may be misconstrued as unfair or prejudicial, another option to achieve a similar result is available. First advanced by the FCC's Advisory Committee on Diversity for Communications in the Digital Age, which was established by the Commission to examine current opportunities and develop recommendations for policies and practices that will enhance the ability of minorities and women to participate in telecommunications and related industries, an amended resolution was adopted on October 4,

2004, urging the FCC to utilize and enforce its existing designated entity rules in as many auctions as appropriate, including setting aside certain C-Block broadband PCS spectrum for bidding in Auction #58 by only entrepreneurial companies. This type of fruitful mentality and progressive philosophy needs to also be incorporated into Auction #62. Hodson exhorts that the Commission select and set aside 35 of the 173 (about 20%) FM construction permits offered in this upcoming auction, for exclusive bidding by verified designated entities only. Hodson suggests that these 35 specific allocations be chosen from Class A Allotments from across the nation, having minimum opening bids listed in Attachment A of \$30,000.00 or less.⁸

Additionally, as previously specified in Hodson's modified 30% tier, any regional/local broadcast entities with attributable interest in any broadcast license (AM, FM, LPFM, TV, or LPTV) within 250 kilometers of a specified vacant FM Allotment, would be ineligible to bid on that particular allocation. This pair of stipulations is paramount because more than two-thirds of the allotment inventory in Auction #62 are situated in communities with populations of 10,000 or less, where

⁸Although the final selection would be at the Commission's discretion, Hodson advocates the following thirty-five CPs for the designated entities/new entrant group: (1) FM002, Yakutat, AK; (2) FM003, Ashland, AL; (3) FM006, Salome, AZ; (4) FM011, Boonville, CA; (5) FM017, Lost Hills, CA; (6) FM019, Tecopa, CA; (7) FM023, Silverton, CO; (8) FM031, Jacksonville, GA; (9) FM040, Gilman, IL; (10) FM042, Olpe, KS; (11) FM050, Blackduck, MN; (12) FM052, Kelliher, MN; (13) FM057, Wheatland, MO; (14) FM058, New Albany, MS; (15) FM064, Darby, MT; (16) FM079, Rugby, ND; (17) FM085, Whitefield, NH; (18) FM088, Las Vegas, NM; (19) FM098, Old Forge, NY; (20) FM106, Butte Falls, OR; (21) FM110, Farmington Township, PA; (22) FM115, Burke, SD; (23) FM116, Tiptonville, TN; (24) FM117, Breckenridge, TX; (25) FM127, Mertzon, TX; (26) FM131, Rocksprings, TX; (27) FM136, Torrey, UT; (28) FM138, Charlotte Amalie, VI; (29) FM139, Brighton, VT; (30) FM141, Royal City, WA; (31) FM143, Sister Bay, WI; (32) FM145, Arnoldsburg, WV; (33) FM154, Hanna, WY; (34) FM162, Shoshoni, WY; and (35) FM171, Wright, WY. Seven of these noted frequencies were previously offered, but went unsold in Auction #37.

small broadcast businesses are willing to commence local operations if given a fair chance, provided they are not outbid and cast aside by capital-rich, publicly-traded, broadcast entities that would have the ability to easily subsidize their new auction acquisitions, and further apathetically yet greedily increase their license portfolios, plus continue the bottleneck of commercial FM frequencies from allowing other voices into the marketplace. Observing the record, these amalgamated corporations have already successfully done this repeatedly in almost all of the top 100 Arbitron radio markets, and have no intention of subsidizing absent government intervention. Only license divestitures, as Hodson has twice thoughtfully argued within the multiple ownership proceeding and recently supported by Senator John McCain (R-AZ), would seriously and effectually enable entrepreneurs to even get on the commercial FM playing field in these already high entry barrier laden, spectrum scarce metropolitan markets.

Hodson opposes the two stage auction design proposition advanced by the Commission, as bidders would be completely confused and disorientated by whether it's 75% or 95% activity level, plus having to determine the complex four-thirds or twenty-nineteenths reduced activity scenario. As the saying goes, "If it's not broken, don't fix it!" There is nothing faulty with the single stage, 100% activity level, simultaneous multiple round auction design that was utilized in Auctions #37 and #25. So why change it now?

Hodson fully supports the online bidding system via the Internet, 10% bid increment amounts, random number assignments for tied

provisionally winning bids, bid removals during the current round without penalty, and the simultaneous stopping rule (*without* utilizing any of the option trio [modified stopping rule, keep auction open, or special stopping rule] chronicled in Section II.F. [p. 9 of *PN*]). Moreover, Hodson agrees with both the Commission's positions of modifying the total automatic or proactive rule waivers, from the prior five activity rule waivers to the proposed three, and changing the number of bid withdrawal rounds from the former two, to the suggested one (*without* limitations or prejudice within the specified bidding round that the participant chooses to use it in).

On the subject of bid withdrawals, there is a volatile issue that needs to be formally addressed within the procedures *PN*, to preserve the integrity of Auction #62 and the sincerity of the bidding participants. What Hodson is referencing is the potential for previous bidders from Auction #37 that withdrew bids, where those frequencies remained unsold and are now in Auction #62, to utilize bidding gamesmanship and dishonesty to inflate the price, and thus reduce the final amount that they owe to the Commission, minus the 3% interim withdrawal funds already collected by the Commission. A quick and simple remedy for this situation is to prohibit those entities from bidding on the particular allocations in which they formerly withdrew. If they were honestly interested in these frequencies, they would have purchased them in the last auction. Allowing these parties to participate in Auction #62 by bidding on FM Channels that they don't have a record of withdrawing on, is not a problematic concern. However, permitting them to again bid

on formerly withdrawn frequencies will both remove opportunities from legitimate bidders, and likely result in more unclaimed allotments at the conclusion of the auction.

FM Broadcast Auction #62, if conducted conscientiously and correctly by the FCC, can fulfill 47 C.F.R. §§ 257 and 309(j) requirements to promote broadcast possibilities for disadvantaged small businesses, designated entities, and new entrants. Therefore, Hodson implacably requests that the Commission heed and adopt the worthy and workable positions presented in its thoughtful and inspired comments.

Respectfully submitted,

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