

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

In the Matter of)
)
Emergency Motions of Small Business)
in Telecommunications for Stay of the)
800 MHz Specialized Mobile Radio (SMR))
Service Auctions)

ORDER

Adopted: July 19, 2000

Released: July 19, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

1. We have before us two Emergency Motions for Stay filed by Small Business in Telecommunications ("SBT") on April 24, 2000,¹ in response to two public notices released by the Wireless Telecommunications Bureau ("Bureau") on March 23, 2000.² The *800 MHz Public Notices* sought comment on the establishment of reserve prices or minimum opening bids and the procedures to be used for the auction of licenses for the 800 MHz SMR General Category and Upper Band Frequencies ("Auction No. 34") and the Lower 80 SMR channels ("Auction No. 36"). SBT requests a stay of Auctions No. 34 and 36. For the reasons set forth below, we deny SBT's Motions.

2. SBT argues that Auctions No. 34 and 36 should be stayed until either a final decision is rendered in *Small Business in Telecommunications v. FCC*,³ or incumbent systems from the upper 200

¹ In the Matter of Public Notice entitled "Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service General Category Frequencies in the 851-854 MHz Band Scheduled for August 23, 2000," Emergency Motion for Stay, filed by SBT (April 24, 2000); In the Matter of Public Notice entitled "Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Frequencies in the Lower 80 Channels Scheduled for September 13, 2000," Emergency Motion for Stay, filed by SBT (April 24, 2000) (collectively, "Motions for Stay"). Because SBT presents identical arguments in its two motions, the Bureau responds to both motions by this single *Order*.

² "Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service General Category Frequencies in the 851-854 MHz Band Scheduled for August 23, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures," *Public Notice*, DA 00-667 (rel. March 23, 2000); "Auction of Additional Licenses for 800 MHz Specialized Mobile Radio (SMR) Service to be Included in Auction No. 34 Scheduled for August 23, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues," *Public Notice*, DA 00-877 (rel. April 18, 2000); "Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Frequencies in the Lower 80 Channels Scheduled for September 13, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures," DA 00-668, *Public Notice* (rel. March 23, 2000) (collectively, "*800 MHz Public Notices*").

³ *Small Business in Telecommunications v. FCC*, No. 99-1543 (D.C. Cir. filed Dec. 29, 1999). SBT seeks judicial review of the Commission's *800 MHz Second Report and Order* released on July 10, 1997, and the *800 MHz Report and Order on Reconsideration*, released on October 8, 1999. See Amendment of Part 90 of the

channels in the 800 MHz SMR service are relocated, whichever is later.⁴ SBT contends that it is likely to prevail in its pending legal challenge, thereby rendering the Commission's auction of the upper 200 channels invalid, and necessitating a "re-auction" of those channels. Based on that assertion, SBT further contends that its members will be harmed by being compelled to choose between participating in Auctions No. 34 and 36, or participating in what SBT assumes will be a re-auction of the upper 200 channels. SBT also argues that if we do not stay Auctions No. 34 and 36, current EA licensees in the upper 200 channels will be harmed if they choose not to participate, and upon re-auction of the upper 200 channels do not obtain the same license they previously held.⁵ In addition, SBT claims that a stay of Auctions No. 34 and 36 would be in the public interest because it may prove wasteful to conduct these auctions if SBT's pending legal challenge subsequently renders the auctions invalid.⁶

3. SBT relies on the four-prong test for issuance of a stay set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*⁷ Under the *WMATC* test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.⁸ Upon examination of SBT's Motions for Stay, we find that SBT's arguments fail to meet this standard. SBT has neither demonstrated that it is likely to prevail on appeal, nor has it made a substantial case under the other criteria for issuance of a stay. We reject SBT's highly speculative assertion that it is likely to prevail in its judicial appeal. SBT's assumptions are based on nothing more than its belief in the merits of its own case. Such unsubstantiated speculation provides an insufficient basis to justify a stay of Auctions No. 34 and 36. In addition, we note that completion of Auctions No. 34 and 36 will have no effect on the power of the court to decide SBT's appeal and order appropriate relief in the event that SBT overcomes the presumption of validity that supports the Commission's regulations and prevails on the merits.⁹

Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, FCC 97-223, 12 FCC Rcd. 19079 (1997) ("*800 MHz Second Report and Order*"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, FCC 99-270, 14 FCC Rcd. 17556 (1999) ("*800 MHz Order on Reconsideration*").

⁴ Motions for Stay at 1.

⁵ Motions for Stay at 5.

⁶ See Motions for Stay at 8. SBT also claims that a stay would be in the public interest because the delay would allow potential bidders to obtain additional information with which to eventually proceed to auction. *Id.*

⁷ See *Washington Metro Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*WMATC*"). See also *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Jobbers*").

⁸ *WMATC*, 559 F.2d at 843.

⁹ See *FCC v. Radiophone, Inc.*, 516 U.S. 1301, 116 S.Ct. 283 (1995)(Justice Stevens vacating a stay of an auction).

4. Moreover, we find that SBT has failed to demonstrate that it would suffer irreparable harm in the absence of a stay. An injury qualifies as “irreparable harm” only if it is “both certain and great; it must be actual and not theoretical.”¹⁰ Therefore, to demonstrate irreparable harm, SBT must provide “proof indicating that the harm [it alleges] is certain to occur in the near future.”¹¹ SBT has supplied no such proof. SBT’s argument is premised on speculation that potential bidders will be unable to participate in more than one auction and thus will be required to choose between participating in Auctions No. 34 or 36 and participating in what SBT assumes will be a required re-auction of the upper 200 channels of the 800 MHz SMR service. This dilemma is wholly manufactured by SBT and is without substantiation. In both its May 18, 2000 *Public Notice*¹² and June 23, 2000 *Public Notice*,¹³ the Bureau advised prospective participants in Auctions No. 34 and 36, that in formulating their business strategies they should take into account the impact of pending proceedings on the availability of spectrum for EA licensees. As a general matter, we expect that applicants bidding on licenses subject to litigation take such litigation into account in determining their bidding strategies, lowering the level of risk that results from bidding on licenses subject to pending proceedings.

5. Further, we find that grant of SBT’s Motions for Stay would not serve the public interest, because doing so would defeat the underlying policy objective of section 309(j), which requires the Commission to promote the “rapid deployment of new technologies, products and services for the benefit of the public.”¹⁴ If we were to accept SBT’s general arguments for granting a stay of Auctions No. 34 and 36, subsequent spectrum auctions would be at risk of substantial postponement while courts review the myriad issues parties raise in attempts to circumvent auctions for their individual purposes. As noted above, SBT’s insubstantial arguments on the merits do not warrant the extraordinary relief it seeks.

6. Finally, citing the *800 MHz Order on Reconsideration*,¹⁵ SBT contends that Auctions No. 34 and 36 should be stayed so that the Commission can “fulfill its promise” that the lower 230 channels would not be auctioned until the relocation of incumbents from the upper 200 channels has been completed.¹⁶ SBT mischaracterizes the Commission’s statement. The statement upon which SBT relies is located in a “Background” section of the *800 MHz Order on Reconsideration*¹⁷ and does not constitute

¹⁰ See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹¹ *Id.*

¹² Auction of Licenses For 800 MHz Specialized Mobile Radio (SMR) Service in the General Category Band (851-854 MHz) and Upper Band (861-865 MHz), Auction Notice and Filing Requirements for 1,053 Licenses in the 800 MHz SMR Service For the General Category Auction, *Public Notice*, DA 00-1100 (rel. May 18, 2000).

¹³ Auction of Licenses For 800 MHz Specialized Mobile Radio (SMR) Service Frequencies in the Lower 80 Channels, Auction Notice and Filing Requirements for 2,800 Licenses in the 800 MHz SMR Service Frequencies Lower 80 Channels, *Public Notice*, DA 00-1388 (rel. June 23, 2000).

¹⁴ 47 U.S.C. § 309(j)(3)(A).

¹⁵ *800 MHz Order on Reconsideration* at ¶ 29.

¹⁶ Motions for Stay at 6.

¹⁷ *800 MHz Order on Reconsideration* at ¶ 29.

a decision by the Commission, but is merely a summary of a Commission statement in the *800 MHz Second Report and Order*.¹⁸ The *800 MHz Second Report and Order* states that the licensing of the lower channels would not occur until “incumbents have had the *opportunity* to relocate to the lower channels.”¹⁹ Prior to Auction No. 34 incumbents on the upper 200 channels will have had approximately 18 months to relocate their systems. Prior to Auction No. 36, those incumbents would have had approximately 20 months to relocate their systems. Although we recognize that upper channel incumbents are currently in the second phase of the three-phase process the Commission established, we believe that 18 to 20 months provides a reasonable opportunity for incumbents to relocate.

7. Moreover, the Commission’s statement in the *800 MHz Second Report and Order* was not a decision regarding the timing of the auction of the lower 230 channels. The Commission simply observed, as a practical matter, that affording incumbents on the lower channels greater flexibility in modifying their systems was appropriate because geographic licensing would not begin on those channels until upper channel incumbents had an opportunity to relocate to the lower channels.²⁰ Thus, there is no merit to SBT’s contention that by going forward with Auctions No. 34 and 36, the Commission would be reversing a previous decision. We do not view the incumbent relocation process as an obstacle to proceeding with Auctions No. 34 and 36. Instead, we believe that these auctions will facilitate the relocation process by providing EA licensees with additional relocation spectrum and incumbents with a more certain picture of their relocation options.

8. Accordingly, IT IS ORDERED pursuant to sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and the authority delegated pursuant to section 0.331 of the Commission's rules, as amended, 47 C.F.R. § 0.331, that the Emergency Motions for Stay filed by Small Business in Telecommunications on April 24, 2000, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O’Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

¹⁸ See *800 MHz Order on Reconsideration* at ¶ 29; *800 MHz Second Report and Order* at ¶¶ 66-67.

¹⁹ See *800 MHz Second Report and Order* at ¶ 66 (emphasis added).

²⁰ *Id.*