

MULLANEY ENGINEERING, INC.
9049 SHADY GROVE COURT
GAITHERSBURG, MD 20877

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)
)
Auction of FM Broadcast Construction) DA 05-1076
Permits Scheduled for November 1, 2005)
FM Auction No. 62)



To the Commission:

COMMENTS

Mullaney Engineering, Inc. (“MEI”), hereby submits its comments in response to the Public Notice released by the Commission on April 14, 2005, in DA 05-1076 (“PN”), which solicits comments concerning the reserve prices or minimum opening bids and other auction procedures for Auction 62. During the previous FM Auction (#37) MEI acted as a the bidding agent, and therefore has direct experience in the procedures which are now being proposed. Based upon past experience, MEI does not expect favorable action on any of its suggestions, but has still decided to submit them nevertheless so as to establish a formal written record.

Minimum Opening Bid

At present, the minimum opening bid is based in part upon the number of persons encompassed within a potential coverage radius. That radius of coverage varies depending upon the class of FM station being evaluated (A, B1, B, C3, C2, C1, C0 or C). However, in all cases, it appears that the FCC is assuming a “perfect” circle of coverage. Unless the proposed allotment is located in an area which has relatively flat terrain out to a distance of 16 km (such as the State of Florida) the assumption of a perfect circle of coverage is a

gross over simplification. This over simplification will result in the FCC's predicted population for that allotment being higher or lower than it really should be. In Auction 37, more than one allotment had a minimum price of \$20,000, where in reality, if actual terrain dependent coverage were used, the minimum price should have been closer to \$200,000. Given the computer databases (terrain & population) now available at the FCC, it should only take a few minutes to compute the actual coverage and resulting service population for all 173 allotments proposed to be included in Auction 62. Failure to properly set a realistic minimum opening bid makes it possible for the allotment to be sold at a price **much lower** than it should be and is contrary to the intent of Congress.

New Entrant Bidding Credit

It is assumed that the availability of the New Entrant Bidding Credit is in fact intended to help level the playing field between the new startup business (including minority and women owned businesses) and the well established broadcaster with multiple facilities. If this is indeed the original intention of Congress, Auction 37 clearly established that a 35% discount is **woefully inadequate**. A much **larger** discount for a new entrant or startup entity is necessary, especially when bidding against broadcasters with existing facilities in the **same** area.

The potential pool of entities which qualify for a 35% or 25% bidding credit should be **expanded to include** licensee's of **daytime only AM broadcast facilities** serving the same area. In the alternative, a daytime only AM licensee serving the same area, should be permitted to commit to an "after-the-fact" divestiture if it is a winning bidder.

Entities which have held an attributable interest in **more than three** media facilities **within the prior 3 years** before the date on which the form 175 is required to be filed should not qualify for any bidding credit. After all the bidding credit is called a “**New Entrant Bidding Credit**”. Under the present rules, it is possible for the existing owner of multiple broadcast facilities to sell everything before filing its 175 form thereby obtaining a 35% bidding credit. However, there appears nothing to prevent that former broadcaster from then subsequently buying back those same or other similar facilities after the auction is closed.

The use of a bidding credit by a winning bidder should be eliminated **once** that entity has an attributable interest in **more than three media facilities**. In Auction 37 it appears that the bidding credit was applied on all such allotments acquired by a single entity in the auction notwithstanding the fact that the **final** attributable interest (after including auction allotments) exceeded three media facilities. If the entity has no attributable interests at the beginning of the auction it would be limited to using its bidding credit on the three most expensive allotments acquired in that auction.

Simultaneous Multiple-Round Auction Design

Keeping the bidding open on all construction permits until bidding stops on every construction permit unduly increases the administrative costs for the new entrant bidder the Commission is hoping to encourage into the industry. If one assumes that the new entrant is seeking just one or two of the allotments, they are forced to continue monitoring each round of the bidding despite the fact that their allotment may not have had any activity for ten or more rounds. MEI proposes that any allotment which has no subsequent additional activity during the next six rounds is automatically closed.

Given that many of the allotments in Auction 37 went for final bids which were many times the initial opening bids it would appear prudent for the Commission to permit bid increases in amounts of at least 200 percent. This would be one way to speed the auction along.

Remove Conflicted Channels From Auction

No FM allotment should be offered at auction if that allotment is subject to an on-going rule making or is still the subject of a petition for reconsideration. Nor should any allotment be offered which requires foreign concurrence and that concurrence has not been received by the time the initial public notice announcing the channels to be included in the auction is released. **Appendix A** attached hereto is a list of some 18 of the allotments proposed in Auction 62 which have conflicts according to the data contained in the Commission's only technical data base ("CDBS"). For the FCC to rely on its disclaimer of *due diligence - buyer beware* is disingenuous. The American taxpayer is entitled to a fair price but certainly never intended its government to be offering to sell the American public swamp land. Removal of the conflicted channel until it is no longer subject to change is not a significant burden on the FCC or the American taxpayer especially given the many years that have already gone by.

Some of the allotments listed in Appendix A are still listed as "ADD" proposals which would indicate that the NPRM or allotment is not yet decided. Some are subject to a recently filed rule making or on-going docketed proceeding in which a channel change or site restriction is being contemplated. Allotment #090 at Beatty, NV, is listed for Ch. 261C. However, the Class C designation is the result of a one-step upgrade to the

original Class A allotment neither of which was built. Based upon a recent FCC decision, unbuilt upgrades revert to their original allotment class. Thus, Beatty is really a Class A allotment. Several of the auction allotments are in direct conflict with other existing vacant allotments. There are several allotments which are short spaced to Canada and for which the CDBS is silent as to what was limitation was negotiated. Allotment #139 at Brighton, VT, has a comment in CDBS stating that Canadian concurrence has **not yet been received.**

Given that the FCC imposes significant penalties on winning bidders which either withdraw their bids or fail to meet stringent deadlines it would not appear to be too much to ask that the FCC staff “first” eliminate obvious conflicts before asking the public to pledge thousands and even millions of dollars. For the FCC to rely on its disclaimer of *due diligence - buyer beware* is disingenuous

When announcing future auctions the staff should immediately **issue a temporary freeze** on the filing of any rule making or comments which propose a modification of an allotment being scheduled therein for auction. The freeze would be lifted upon finality of the grant of a construction permit application or upon a determination that the allotment was not acquired in that auction.

Filing of Form 175

Potential bidders indicating an intent to bid on **more than five** of the auction allotments should be required to **deposit 40%** of the sum of the minimum bids associated with **all** of the FM allotments they have indicated an intention to bid on. Such entities which decide to totally withdraw from the auction will not be given a refund of their initial deposit **until after** the close of the auction. This is intended to discourage the filing of form 175's by entities with no real intention to participate in the auction. It is understood that one bidding strategy is to identify all available channels so that competitors are unable to determine which allotments are really of interest. However, this practice has the potential of discouraging the truly "new entrant" from continuing in the auction if they believe there are hundreds of bidders for the allotment they seek.

Deadline to File Long Form 301

In Auction 37, the FCC required the winning bidders to submit their long form 301 applications by January 2, 2005. Given that many of the FM allotments were located in areas subject to winter weather (snow & ice) and given the month of December includes the traditional holiday period of Christmas & New Years this deadline was very poorly timed. Besides finding and negotiating for a parcel of property it is also necessary for the applicant to consider local zoning and FAA limitations when selecting a site. In order to encourage winning bidders to expeditiously complete their long form 301 construction permit applications the FCC could require an additional or larger down payment deposit if more than say **50 days** is required before the 301 application is filed. There is no doubt that once the applicant has enough cash invested it will be suitably motivated to complete the application process and complete the follow-on construction.

Closing

MEI hopes the Commission will review all of the comments submitted herein with an **open mind**. The request for deletion of certain of the FM auction allotments is being made now so that it can no longer be said that Mullaney Engineering once again failed to inform the staff of these obvious problems **prior** to adoption of the allotment list.

Respectfully submitted,

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By:



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APPENDIX - A
CONFLICTED ALLOTMENTS - FM AUCTION 62

FM #	CITY/STATE	PROBLEMS
FM003	ASHLAND, AL	LISTED AS ADD MX - WWWQ / Lic.
FM014	HORNBROOK, CA	MX - VAC / KENO, OR
FM030	ELLAVILLE, GA	MX - ADD / PLAINS, GA SHORT - ADD / MILNER, GA
FM038	HAILEY, ID	SHORT TO NON - 73.215 APP
FM044	WESTWOOD, KY	3KW ALLOTMENT
FM045	HODGE, LA	PENDING SITE RESTRICTION BY DOC 05-34
FM047	MACHIAS, ME	CANADIANS SHORT SPACING NEED NEGOTIATION LIMITATION
FM057	WHEATLAND, MO	MX - ADD / BOONVILLE, MO
FM066	ENNIS, MT	ALLOTMENT REF SHORT SPACED
FM082	McCOOK, NE	PENDING CHANNEL CHANGE BY DOC 05-45
FM083	GROVETON, NH	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION

FM085	WHITEFIELD, NH	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION
FM093	CANASERAGA, NY	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION
FM096	MINERVA, NY	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION
FM #	CITY/STATE	PROBLEMS
FM099	SARANAC LAKE, NY	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION
FM114	BRANDON, SD	MX - VAC / SIBLEY, IA SUBJECT TO RECON DOC 01-65
FM120	GIDDINGS, TX	SUBJECT TO PETITION FOR RECON 99-331 STATUS IS ADD
FM121	HUNT, TX	MX - ADD / INGRAM, TX
FM122	IOWA PARK, TX	MX - ADD / RANDLETT, OK
FM124	MADISONVILLE, TX	SUBJECT TO SITE CHANGE BY ADD / ROSEBUD, TX
FM126	MERIDIAN, TX	SUBJECT TO SITE CHANGE DOC 05-129
FM129	PEARSALL, TX	MX - VAC / VACPEARSALL, TX
FM132	ROCKSPRINGS, TX	RM PROPOSES UPGRADE

FM137	GLADE SPRING, VA	MX - WOLD-Lic.
FM139	BRIGHTON, VT	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION CANADIAN CONCURRENCE NOT RECEIVED
FM140	BRISTOL, VT	CANADIAN SHORT SPACING NEED NEGOTIATION LIMITATION
FM160	MEETEETSE, WY	MX - KHOC / Lic.
FM161	PINE HAVEN, WY	MX - VAC 259A / PINE HAVEN, WY