

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

Auction of FM Broadcast Construction Permits
Scheduled for November 1, 2005
Comment Sought on Reserve Prices or
Minimum Opening Bids and Other Auction
Procedures for Auction No. 62

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Report No. AUC-05-62-A
DA 05-1076

To: Commission's Secretary, Office of the Secretary
Attn: Wireless Telecommunications Bureau, Auctions and Spectrum Access Division

**JOINT COMMENTS OF
WILDCAT COMMUNICATIONS, LLC AND CONNOISSEUR MEDIA, LLC**

By their counsel, Wildcat Communications, LLC ("Wildcat") and Connoisseur Media, LLC ("Connoisseur") hereby submit Joint Comments in response to the Commission's Public Notice regarding FM Auction No. 62, released April 14, 2005.¹ By this Public Notice, the Commission announced the upcoming auction of 173 FM construction permits scheduled to commence on November 1, 2005. The Public Notice also requested comment on the Commission's proposed auction procedures and the minimum opening bid amounts set for the various allocations being offered. As discussed below, while the Commission has proposed a few slight changes from its past broadcast auction procedures, the proposed changes are insufficient to address the problem of withdrawn bids encountered by many bidders – including Wildcat and Connoisseur – during the Commission's recently concluded FM Auction No. 37. The procedures proposed in the *Auction Public Notice* would continue to permit bidders to

¹ Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005, Public Notice, DA 05-1076, released April 14, 2005 (hereinafter "*Auction Public Notice*.”)

withdraw a standing high bid and do nothing to address the inability of the previous high bidder for the permit to regain its previous position. Wildcat and Connoisseur, having experienced the effects of the current procedures in Auction No. 37, suggest a slight modification of the Commission's proposed rules for Auction No. 62 in order to reach a balance between the desire to allow bidders the flexibility to withdraw bids, the need to ensure that other applicants have a legitimate opportunity to acquire a particular permit, and the need to prevent the "gaming" of the system by withdrawing bidders.

Background

Throughout the later rounds of FM Auction No. 37, various applicants withdrew their standing high bids on allotments, sometimes withdrawing bids on multiple allotments in multiple rounds. While arguably a safety valve to permit a bidder that has overextended itself in the bidding to back out of an ill-advised high bid, many of the bids withdrawn in Auction No. 37 were withdrawn during the late stages of the auction, at a time when other bidders – some of whom were previously the high bidders on these same allotments – had already reduced their eligibility commensurate with their activity level and could not reinstate their previous high bid for the now-available allocation.

These situations arose where a bidder, having been outbid by a party that would later withdraw its bid, moved their eligibility to another allocation or reduced their eligibility to reflect that they were no longer actively bidding on that particular permit. Later, when the party who had topped their bid withdrew its bid in a subsequent round, thereby returning the allotment to the pool of available construction permits, no other competing applicants had sufficient eligibility remaining to bid on the returned permit. Parties like Wildcat and Connoisseur, who

would have liked to restore their previous high bids, could not do so as they had already reduced their eligibility to a point where they could not bid on these now “open” channels.

The result of this scenario, which was repeated in the late rounds of Auction No. 37, were two-fold. First, an applicant that had been the highest bidder for the permit was unable to recapture its position once the standing high-bidder withdrew its bid, despite the fact that the permit was returned to the auction and offered at the same price that the previous high bidder had offered earlier in the auction. Consistent with the Commission’s auction procedures, when a high bidder withdrew its high bid, the allotment reverted to the FCC. The FCC, in turn, offered the permit for sale to all remaining eligible bidders in the next round. Rather than simply restoring the previous high bidder, or at least offering the previous high bidder the opportunity to recapture its position, however, the Commission simply put the permit back on the block at the same price offered by the previous high bidder. Second, given that few, if any, applicants had sufficient remaining eligibility to bid on allotments returned to the pool of available permits late in the auction, the ultimate result of these numerous withdrawn bids was that thirty construction permits remained unsold at the conclusion of Auction No. 37. These permits remained unsold despite the fact that bidders remained willing to purchase the permits, but for the fact that they had been forced to reduce their eligibility.² Moreover, in many cases, if a bidder wanted to

² Either during, or following the conclusion of Auction No. 37, several parties that were forced to reduce their eligibility and were unable to recapture their standing high bid following the return of an allotment to the available pool requested that the Commission restore their bids as the previous high bidder and allow them to acquire the unsold permit. In particular, Wildcat requested that its previous high bid for FM059, Walden, Colorado, be restored, and Connoisseur requested that its previous high bids for FM195 Flasher, North Dakota, and FM194 Cannon Ball, North Dakota, be restored. According to the *Auction Public Notice*, two other parties, Glory Communications, Inc. and Talkline Communications, have also requested that their previous high bids be restored. Despite these pending requests, the Commission has included these allotments among those offered for sale in Auction No. 62. Wildcat and Connoisseur respectfully request that the

regain its position on the now-available allotment, the only possible way to free up sufficient eligibility was for the applicant to itself withdraw a bid on another permit for which it was the standing high bidder, thereby incurring potential liability for its own withdrawal of a bid.

In addition, several of the bids withdrawn in Auction No. 37 occurred under suspicious circumstances, raising the possibility of anti-competitive behavior. For example, on several occasions, bids were withdrawn immediately after a previous high bidder had reduced its bidding credit eligibility and thus would be unable to regain its position as the high bidder after the withdrawal. In one particular instance, a party outbid its sole competitor, waited two rounds (during which the previous high bidder maintained its eligibility by using its activity waivers), and then, once the previous high bidder reduced its eligibility level, the standing high bidder immediately withdrew its bid. In another instance, a party withdrew its bid in the penultimate round of the auction after 37 rounds as the standing high bidder and after all other applicants had reduced their eligibility, making it impossible for any other applicant, including the previous high bidder, to pursue the permit. In that case, the applicant bid aggressively on two construction permits in the same market, a market in which the Commission's multiple ownership rules would only permit it to acquire one additional authorization. Once it had driven up the price for both allotments and cleared out the competition, the applicant then withdrew its bid for one of the two permits just before the conclusion of the auction and once it was clear that the competing applicants had no remaining eligibility. As the experience of Auction No. 37 shows, the Commission's auction procedures must be modified to protect applicants from anti-competitive behavior and to ensure the efficient operation of the Commission's auctions.

Commission remove these three allotments from Auction No. 62 until it has resolved the pending requests.

Discussion

By its *Auction Public Notice*, the Commission proposes a few slight changes to the auction procedures employed in FM Auction No. 37. Most relevant to the issue of withdrawn bids, the FCC proposes to conduct Auction No. 62 in two stages and proposes to permit bidders to withdraw bids only in one round. Neither of these proposed modifications, however, will adequately address the situation described above in which a bidder with the previous high bid is unable to recapture its previous position due to reduced eligibility.

First, the Commission proposes to employ a two-stage auction, requiring bidders to be active on at least 75% of their eligibility in the first round, and 95% of their eligibility in the second round.³ While this would appear to allow bidders to keep some eligibility in reserve in case a desired allotment is returned to the pool of available permits following a withdrawal, in fact, withdrawals are most likely to occur in the final rounds of the auction at a time when bidders are active on 95%-100% of their eligibility. The two-stage process may permit applicants a degree of flexibility in early rounds, but having 5% of one's eligibility available in the later rounds of the auction is unlikely to be sufficient to permit a bidder to recapture its position on a withdrawn permit returned to the auction in a late round. Moreover, in order to ensure that they are active on a sufficient amount of their eligibility, bidders are more likely to reduce their eligibility in the later rounds to exactly match the number of bidding credits required for just those allotments on which they are the standing high bidder, or for which they are actively bidding. Thus, just as in Auction No. 37, if an applicant is outbid on a particular permit, it will shift its eligibility elsewhere or reduce its bidding credits so that it is active on 100% of its eligibility. If, several rounds later, a competing applicant withdraws its bid and returns a sought-

³ *Auction Public Notice* at 3-4.

after permit to the auction, a bidder will face the same dilemma of watching the sought-after permit remain unsold at the price the applicant had previously bid, or else abandoning a current position on another permit in order to free up enough eligibility to recapture its position on the returned permit (and thereby incurring potential liability for a withdrawn bid of its own).

Second, the Commission proposes to allow bidders to withdraw bids in only one round of bidding. According to the *Auction Public Notice*, bidders would be permitted to withdraw bids for as many allotments as they wish in a single round.⁴ Here again, while this rule change would limit the number of times that a bidder can withdraw high bids, it does nothing to help the competing applicant to regain its previous position as high bidder for the returned permit.

In order to prevent the potential anti-competitive effects of a withdrawn bid and to encourage the sale of all permits offered in the auction, Wildcat and Connoisseur suggest a slight modification of the Commission's proposed auction procedures to allow the previous high bidder to regain its position (if it so chooses) as the high bidder for a permit that is returned to the auction as a result of a withdrawn bid. Specifically, in the event that a party withdraws its standing high bid (thereby returning the permit to the auction), any competing applicant that had been the previous high bidder for that permit and who had reduced its bidding credit eligibility after having been outbid for the permit in question, should have its bidding credits corresponding to that permit restored so that it can reassume its position as the high bidder.

Thus, by way of example, in an auction with five permits offered for sale (each requiring ten bidding credits), if Applicant 1 with 50 bidding credits is actively bidding for all five permits, and is outbid on License A and then reduces its eligibility to 40 credits, and if the new high bidder for License A withdraws its high bid in a later round, then Applicant 1 should have its ten

⁴ *Auction Public Notice* at 4-5.

bidding credits restored, so that it can regain its previous position as standing high bidder when the License A is returned to the pool of available allotments.

Without this modification, the Commission's return of the permit for sale in the auction is meaningless, as none of the remaining applicants will be able to bid for the returned permit – as demonstrated by the thirty permits that remained unsold at the conclusion of Auction 37, some of which had multiple bidders up until the final rounds. Enabling the previous high bidder to regain its position is efficient and serves the public interest as it avoids the need for an additional, time-consuming auction when there are bidders ready, willing, and able to purchase the permits as part of first auction and are prevented from doing so only by the Commission's auction rules – having lost eligibility sufficient to bid on the now available channels. Indeed, the Commission's practice of returning construction permits to the pool of available allotments at the previous bid amount following the withdrawal of a high bid seems intended to allow the previous high bidder to return to its previous position. It is only by virtue of the auction's 95%-100% activity rule and the need to reduce eligibility as the auction progresses that the previous high bidders are, as a practical matter, unable to reassume their positions.

In addition to being administratively inefficient, unnecessarily delaying the sale of a construction permit to a subsequent auction also delays the initiation of new service to the public. One of the primary goals of Section 309(j) of the Communications Act of 1934, as amended, which authorizes the Commission to award broadcast authorizations by competitive bidding, is to promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public ...without administrative or judicial delays.”⁵ The Commission reiterated this goal in its First Report and Order adopting competitive bidding procedures, stating

⁵ 47 U.S.C. § 309(j)(3).

that, “we . . . consider expedition of service to the public to be of paramount significance. Delay in awarding a construction permit frustrates the public interest and denies communities new or expanded broadcast service.”⁶

Perhaps of greater concern than a delay in the introduction of new service, however, is the potential gaming of the Commission’s auction processes. Based on Wildcat and Connoisseur’s experience in Auction No. 37, late round withdrawals could have an anti-competitive effect by effectively bidding up a permit to a level at which the competition fades away, waiting for those bidders to be forced to reduce their eligibility, and then withdrawing the bid, so as to leave the allotment unsold at the conclusion of the auction. In this way, an applicant could delay or prevent a competitor’s entry into a market. While a party that withdraws its bid will face potential liability for the difference between the amount of the withdrawn bid and the subsequent purchase price, this is not a significant enough deterrent to prevent such potentially anti-competitive behavior.

Moreover, not all auctions are created equal. For example, a bidder that was eligible for a New Entrant Bidding Credit in the first auction will likely be deprived of that benefit in the second auction (due to the fact that the applicant holds one or more broadcast authorizations by the time of the second auction) and thus, may be unwilling to pay the same gross amount it offered in the first auction. Without the modification proposed above, an unscrupulous applicant could bid up the price of a permit in the first auction, in which its competitor is eligible for a New Entrant discount, withdraw its bid in the late rounds and force the permit to be auctioned in

⁶ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order, MM Docket No. 97-234, 13 FCC Rcd 15920 (1998) at ¶165.

a second auction, in which its competitor is not eligible for a discount. The end result is that a withdrawing party can game the Commission's systems so as to discourage a competitor from buying a permit in its market, or at the very least depriving the competitor of the benefit of the New Entrant Bidding Credit by delaying the sale of the permit until a subsequent auction.

Making it possible for the previous high bidder to regain eligibility to bid on a channel where the high bid is withdrawn, as suggested above, is consistent with the Commission's Rules governing competitive bidding procedures. Section 1.2109(b) of the Commission's Rules provides that when a winning bidder defaults after the close of an auction, the Commission may award the subject permit to the next highest auction bidder, without the need to re-auction the permit.⁷ The same logic should be explicitly incorporated into the Commission's auction procedures so that the previous high bidder is at least permitted a realistic opportunity to regain its position as the standing high bidder for an allotment that is returned to the auction.⁸ An applicant's withdrawal of its high bid during the closing rounds of an auction, under circumstances that effectively preclude other entities from bidding on the permit, raises the same concerns that would be raised if the applicant had defaulted after the close of the auction. Accordingly, a similar remedy should be made available.

⁷ 47 C.F.R. § 1.2109(b).

⁸ Wildcat and Connoisseur, as well as the other parties noted in the *Auction Public Notice*, have submitted that the Commission should allow them to acquire the permits in Auction No. 37 where the high bidders withdrew their bids. While the parties believe that the Commission has the authority to allow such purchases, it is believed that, by making it explicit in the rules, gamesmanship in the auction process will be reduced.

Conclusion

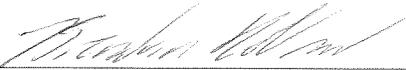
For the reasons discussed above, Wildcat and Connoisseur request that the Commission modify its auction procedures for Auction No. 62 to restore the previous high bidder's bidding credits corresponding to the permit returned to the auction. Allowing the previous high bidder the ability to recapture its position following the withdrawal of the previous high bid in this manner is efficient, serves the public interest, and is consistent with the Commission's existing auction rules.

Respectfully submitted,

WILDCAT COMMUNICATIONS, LLC

and

CONNOISSEUR MEDIA, LLC

By: 

David D. Oxenford
Brendan Holland

Its Attorneys

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000

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