



Federal Communications Commission
Washington, D.C. 20554

DA 01-144
January 19, 2001

J. Dominic Monahan, Esq.
Luvaas, Cobb, Richards & Fraser, P.C.
777 High Street, Suite 300
Eugene, Oregon 97440-2787

Re: ROB ALLEN HAUSER
Request for Refund of Upfront Payment
For MX Group FM 130 in Closed Broadcast
Auction No. 25

Dear Mr. Monahan:

This letter is in response to your Request for Refund of Upfront Payment ("Request") filed April 20, 2000, on behalf of Mr. Rob Allen Hauser, the winning bidder in MX Group FM 130 in the Closed Broadcast Auction No. 25. For the reasons set forth below, we deny your Request.

The Commission received three mutually exclusive long-form applications for construction permits for MX Group FM 130 – FM Channel 249A at Pullman, Washington. Those applications were filed by Radio Palouse, Inc. ("Radio Palouse"), Lamonica Media, LLC ("Lamonica Media"), and Mr. Hauser. The Mass Media Bureau and the Wireless Telecommunications Bureau issued a *Public Notice*¹ on July 9, 1999 announcing that these applicants would be eligible to participate in an auction to begin on September 28, 1999.²

The *July 9th Public Notice* stated that, in order to participate in the auction, all applicants would have to submit a FCC Form 175 (short-form application) by the deadline of August 20, 1999.³ The *Broadcast First Report & Order* stated that if only one acceptable short-form application was received for a particular construction permit, the auction would be cancelled for that construction permit.⁴ The *July 9th*

¹ Closed Broadcast Auction, Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, Minimum Opening Bids and Other Procedural Issues, *Public Notice*, 14 FCC Rcd 10632 (1999) ("*July 9th Public Notice*").

² *Id.* at 10633, 10692.

³ *Id.* There is no application fee required when filing a FCC Form 175. Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, Minimum Opening Bids and Other Procedural Issues, *Public Notice*, 64 Fed. Reg. 39995, 39998, ¶ 33 (1999).

⁴ Implementation of Section 309 (j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15980, ¶ 154. (1998) ("*Broadcast First Report & Order*").

Public Notice also stated that “if an applicant were to submit a short-form application but fail to timely tender an upfront payment, it would retain its place in the MX Group but, having purchased no bidding eligibility, would not be eligible to bid.”⁵ It further stated that if “. . . two or more parties file short-form applications in their MX Group, but only one submits an upfront payment, mutual exclusivity would exist for auction purposes (since multiple short-form applications are tendered) and, in such case, the party making its upfront payment is not entitled to both a refund and the grant of a construction permit.”⁶

In this case, short-form applications were submitted by Mr. Hauser, Radio Palouse, and Lamonica Media. Subsequently, the auction staff issued a *Public Notice*⁷ on September 3, 1999 accepting for filing Mr. Hauser’s short-form application and listing as incomplete the short-form applications of Radio Palouse and Lamonica Media. The *September 3rd Public Notice* stated that applicants with incomplete short-form applications could become qualified to bid in the auction only if they made the required upfront payment by 6:00 p.m. on Monday September 13, 1999, and resubmitted complete applications by 5:30 p.m. on September 14, 1999. Radio Palouse did not resubmit its short-form application before the deadline.⁸ Lamonica Media did resubmit its short-form application before the deadline.⁹ Thus for MX Group FM 130, the Commission received two acceptable short-form applications, one from Mr. Hauser and the other from Lamonica Media. However, Lamonica Media failed to submit an upfront payment and therefore, Lamonica Media was not qualified to bid in the auction.¹⁰

In the first round of bidding for Auction No. 25, Mr. Hauser placed the minimum opening bid equal to his upfront payment (\$25,000) on FM Channel 249A, Pullman, Washington. As the highest and only bidder in MX Group FM 130, Mr. Hauser was awarded the license.¹¹ In his Request, Mr. Hauser argues that because he was the only qualified bidder for the construction permit for Channel 249A at Pullman, Washington, the Commission was precluded from assigning the permit through competitive bidding.¹²

⁵ *July 9th Public Notice*, 14 FCC Rcd at 10647.

⁶ *Id.*

⁷ Closed Broadcast Auction, Status of Applications to Participate in the Auction, *Public Notice*, 14 FCC Rcd 14113 (1999) (“*September 3rd Public Notice*”).

⁸ Closed Broadcast Auction, 224 Qualified Bidders, *Public Notice*, DA 99-1912, Attachment C (1999) (“*September 17th Public Notice*”).

⁹ Mr. Hauser concedes in his Request that Lamonica Media “did submit a curative amendment.” *See* Request for Refund of Upfront Payment filed on Apr. 20, 2000, at 1-2 (“Request”).

¹⁰ *September 17th Public Notice*, DA 99-1912, Attachment C.

¹¹ Mr. Hauser was not required to bid. Had he chosen not to bid, his upfront payment would have been returned but no construction permit would have been issued. *See July 9th Public Notice*, 14 FCC Rcd at 10647.

¹² Request at 2 (citing Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd at 8724, 8751, ¶ 54 (1999) (“*Broadcast MO&O*”).

Section 309(j) of the Communications Act requires the Commission to assign any initial license or construction permit through an auction when mutually exclusive short-form applications are accepted for filing.¹³ In other words, if the Commission has received more than one acceptable short-form application for the same license or construction permit, the statute requires that the Commission conduct an auction. The Commission received two acceptable, mutually exclusive short-form applications for a construction permit for channel 249A at Pullman, Washington: one from Mr. Hauser and one from Lamonica Media. In light of these competing short-form applications for the same license, the Commission was required to assign the license through an auction.¹⁴ The factual circumstances present in this case were clearly addressed in the *July 9th Public Notice*. Because both Mr. Hauser and Lamonica Media submitted acceptable short-form applications, mutual exclusivity existed, regardless of the fact that Lamonica Media did not purchase bidding eligibility by timely tendering an upfront payment.¹⁵

Mr. Hauser argues that a statement in the *Broadcast MO&O* supports his Request. Specifically, Mr. Hauser relies on the statement that the Commission would “. . .conduct competitive bidding for any broadcast permit only where competing applicants have submitted acceptable short-form applications for any broadcast permit and have been found qualified to bid.”¹⁶ This statement is taken out of context. In the *Broadcast MO&O*, the Commission considered and rejected a suggestion to adopt a “post-auction” evidentiary procedure to determine whether a winning bidder was the sole qualified applicant and therefore entitled to a grant of license without remittance of its winning bid.¹⁷ In the context of rejecting this “post-auction” procedure, the Commission stated that because all prospective bidders were found qualified to bid before being allowed to participate in an auction it was unnecessary and redundant to adopt a “post-auction” procedure.¹⁸ In this sentence, the Commission was not addressing the determination of mutual exclusivity because mutual exclusivity is a “pre-auction” determination. Thus, the cited language is not useful in a discussion of mutual exclusivity, and does not alter the Commission’s statutory obligation to use

¹³ Section 309(j)(1) mandates the use of competitive bidding if “mutually exclusive applications are accepted for any initial license or construction permit.” 47 U.S.C. § 309(j)(1); *see also Benkelman Telephone Company v. Federal Communications Commission*, 220 F. 3d 601 (2000) (rejecting an argument that the Commission’s procedures artificially created artificial or phantom mutual exclusivity).

¹⁴ 47 U.S.C. § 309(j)(1); *see also Broadcast First Report and Order*, 13 FCC Rcd at 15974, 15980, ¶¶ 142, 154; *Broadcast MO&O*, 14 FCC Rcd at 8751, ¶¶ 54-55 n. 77, 78; 47 C.F.R. § 73.5002(a)(b); 47 U.S.C. § 309(j)(1); *July 9th Public Notice*, 14 FCC Rcd at 10646-10648. The *September 3rd Public Notice* listed applicants who were disqualified from participation in Auction No. 25 because mutually exclusive applications were not filed for their respective MX Groups. *September 3rd Public Notice*, 14 FCC Rcd at 14114, 14151-14153 (1999); *see also KDTV*, DA 00-627, 15 FCC Rcd at 5570 (2000) (finding that Univision’s application was the only acceptable short-form application on file, and in the absence of mutual exclusivity, should not have been sent to auction).

¹⁵ Upfront payments are not application fees nor are they attributed to specific licenses, but instead they are translated to bidding units to define a bidder’s maximum bidding eligibility in any single round of bidding. *July 9th Public Notice*, 14 FCC Rcd at 10648.

¹⁶ *Broadcast MO&O*, 14 FCC Rcd at 8751, ¶ 54.

¹⁷ *Id.* at 8750-8752, ¶¶ 52-56.

¹⁸ *Id.*

competitive bidding.

Mr. Hauser's Request is an untimely attempt to revise the rules after the auction has been conducted.¹⁹ The *July 9th Public Notice* anticipated and clearly addressed the factual circumstances that developed for MX Group FM 130.²⁰ All of the bidders in Auction No. 25, including Mr. Hauser, had notice of the auction procedures that would apply.²¹ Because acceptable, mutually exclusive short-form applications for FM Channel 249A at Pullman, Washington were filed, Mr. Hauser has failed to establish that a refund would be appropriate.

Accordingly, IT IS ORDERED, that the Request for Refund of Upfront Payment filed by Rob Allen Hauser, IS DENIED.

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹⁹ See 47 C.F.R. §§ 1.401-1.430; *see also* Closed Broadcast Auctions Scheduled for September 28, 1999; Comment Sought on Minimum Opening Bids and Other Auction Procedures, *Public Notice*, 14 FCC Rcd at 8189, 8198 (1999) ("*May 17th Public Notice*").

²⁰ See *July 9th Public Notice*, 14 FCC Rcd at 10646-10648.

²¹ *Id.* at 10632; *May 17th Public Notice*, 14 FCC Rcd at 8189.