



PUBLIC NOTICE

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AUCTION OF FM BROADCAST CONSTRUCTION PERMITS

Status of FCC Form 175 Applications to Participate in Auction No. 37

Report No. AUC-04-37-M (Auction No. 37)

The Federal Communications Commission (“Commission”) has received 697 FCC Form 175 (short-form) applications to participate in the upcoming auction of 288 FM broadcast construction permits (“Auction No. 37”) scheduled to begin on Wednesday, November 3, 2004.¹ The applications have been reviewed for completeness and compliance with the Commission’s rules, and have been classified into the categories listed below.

Application Categories:

ACCEPTED FOR FILING 362 applications
INCOMPLETE 309 applications
REJECTED 26 applications

Accepted: Applications accepted for filing are listed alphabetically in Attachment A. **These applicants will become qualified bidders upon receipt of the required upfront payment due by 6:00 p.m. ET on September 24, 2004.**² With respect to the FCC Form 175 application, these applicants need take no further action except as may be necessary to maintain the accuracy of their applications.³ Attachment A also includes FCC account numbers that were automatically created by the FCC software system for each applicant and indicates the construction permits selected by each applicant on its FCC Form 175 filing.

¹ The Commission has before it an Application for Review filed July 12, 2004 by the Minority Media and Telecommunications Council (“MMTC”). MMTC seeks review of the *Auction No. 37 Procedures Public Notice* released June 10, 2004, by the Media Bureau (“MB”) and the Wireless Telecommunications Bureau (“WTB”) (collectively, the “Bureaus”), announcing procedures for the upcoming auction of FM Broadcast construction permits. On July 19, 2004, MMTC also filed a motion for stay of Auction No. 37. MMTC requests a stay of Auction No. 37 until the Commission addresses the issues raised in its Application for Review of the *Auction No. 37 Procedures Public Notice*. The Commission will respond to these filings in a separate order.

² See 47 C.F.R. § 1.2106.

³ See 47 C.F.R. § 1.65. See also “Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, DA 04-1699 (rel. June 10, 2004) (“*Auction No. 37 Procedures Public Notice*”).

Incomplete: Applications found to be incomplete are listed alphabetically in Attachment B. Applicants whose FCC Form 175 applications have been deemed incomplete will receive overnight correspondence indicating what information is required to make the applications acceptable for filing. **These applicants may become qualified bidders only if they: (1) make the required upfront payments by 6:00 p.m. ET on Friday, September 24, 2004; and (2) resubmit their applications by 6:00 p.m. ET on Friday, September 24, 2004, to correct the deficiencies indicated.** Applicants also must maintain the accuracy of their FCC Form 175 applications as required by the Commission's rules.⁴ Applicants are advised that Attachment B includes FCC account numbers that were automatically created by the FCC software system for each applicant.

The filing window for resubmitting FCC Form 175 applications is now open. Corrected applications must be filed no later than **6:00 p.m. ET on Friday, September 24, 2004.** This will be the only opportunity to cure FCC Form 175 defects; late resubmissions will not be accepted. In addition, if an application remains incomplete or otherwise deficient after the resubmission deadline has passed, the application will be dismissed.

Rejected: Applications classified as rejected are listed alphabetically in Attachment C. Applicants whose applications have been classified as rejected are disqualified from participation in Auction No. 37. In Auction No. 37, rejected short-forms applications include applications in which the applicant has checked the box labeled "noncommercial educational" in response to the "applicant status" question on the FCC Form 175. The Commission concluded in the *Second Report and Order in Reexamination of the Comparative Standards for Noncommercial Educational Applicants* that any application for an NCE station that is mutually exclusive with any application for a commercial broadcast station will be returned as unacceptable for filing.⁵ The applications for noncommercial educational FM broadcast stations identified in Attachment C are mutually exclusive with applications for FM commercial broadcast stations, and therefore are excluded from further Auction No. 37 participation.

Rejected short-form applications include an application in which the applicant has been determined to be a current defaulter. Current defaulters are ineligible to participate in Auction No. 37.⁶

Attachment D: Applications listed alphabetically in Attachment D involve a split market new entrant bidding credit eligibility situation.⁷ The permit(s) identified indicate the FM allotment(s) for which the applicant is ineligible for the new entrant bidding credit.

⁴ See 47 C.F.R. § 1.65; 47 C.F.R. § 1.2105(c)(6) (any applicant that makes or receives a prohibited communication shall report such communication in writing to the Commission no later than five business days after the communication occurs).

⁵ 18 FCC Rcd 6691, 6700 (2003). This procedure has been codified at 47 C.F.R. § 73.5002(b).

⁶ 47 C.F.R. § 1.2105(a)(2)(x); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5692 ¶8 (1997). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15317, n.142 (2000); Debt Collection Improvement Act of 1996 (DCIA), 31 U.S.C. § 3711 *et seq.*

⁷ The new entrant bidding credit is not available to an applicant if it, and/or any individual or entity with an attributable interest in the applicant, have an attributable interest in any existing media of mass communications in the "same area" as the proposed broadcast facility. 47 C.F.R. § 73.5007(b). See 47 C.F.R. § 73.5007(b)(1)-(2) for the specific service definitions of "same area."

UPFRONT PAYMENT DEADLINE

Upfront payments and accompanying FCC Remittance Advice (FCC Form 159) for Auction No. 37 are due in the proper account at Mellon Bank, Pittsburgh, Pennsylvania, **no later than 6:00 p.m. ET on Friday, September 24, 2004. In order to meet the Commission's upfront payment deadline, an applicant's payment must be credited to the Commission's account by the deadline.**⁸ **Payments must be made by wire transfer in accordance with the instructions provided in the *Auction No. 37 Procedures Public Notice*.**⁹ No other payment method is acceptable for this auction. Applicants are reminded to use their FCC Registration Number ("FRN"), not their FCC Account Numbers, on the FCC Form 159. Applicants must fax a completed FCC Form 159 (revised February 2003) to Mellon Bank at (412) 209-6045 at least one hour before placing the order for the wire transfer (but on the same business day).

Applicants that have filed applications deemed to be incomplete, as noted in this public notice, must submit timely and sufficient upfront payments before the Commission will review their submitted applications. If no upfront payment is made, or the application remains incomplete following its resubmission, the application will be dismissed. If the applicant has provided its FRN and wire transfer instructions from the payor of record, any upfront payment made prior to dismissal will be refunded in a timely manner upon request.

Applicants are responsible for obtaining confirmation from their financial institution that Mellon Bank has timely received their upfront payment and deposited it in the proper account. We remind applicants that to avoid untimely upfront payments they should discuss arrangements (including transfer times and bank closing schedules) with their financial institution several days before making the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. Detailed information regarding upfront payments including additional requirements for "former defaulters" can be found in the *Auction No. 37 Procedures Public Notice* under Section II.E and Section III.D.

Note: Applicants are reminded to submit the same FRN with all future payments.

OTHER IMPORTANT INFORMATION

Qualified Bidders: Approximately two weeks after the upfront payment deadline, following Commission review of resubmitted FCC Form 175 applications, and correlation of payments and applications, a public notice listing all applicants qualified to bid in the auction will be released. The same public notice will also include instructions for participating in the mock auction and bidding schedules for both the mock auction and the first day of the auction.

Due Diligence: Potential bidders are reminded that they are solely responsible for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the broadcast construction permits being offered in this auction. The FCC makes no representations or warranties about the use of this spectrum for particular services. Potential bidders are strongly encouraged to conduct their own research prior to Auction No. 37 in order to determine the existence of pending proceedings that might affect their decisions regarding participation in the auction. Potential bidders are also strongly encouraged to review all underlying Commission orders, such as the specific *Report and Order* amending the FM Table of Allotments and allotting the FM channel(s) on which they plan to bid.¹⁰ Participants in

⁸ See Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Patrick Shannon, Esq., Counsel for Lynch 3G Communications Corporation, 18 FCC Red 11552 (2003).

⁹ See *Auction No. 37 Procedures Public Notice* at 21-24.

¹⁰ See 47 C.F.R. § 73.202.

Auction No. 37 are strongly encouraged to continue such research during the auction. For further details regarding due diligence, please refer to the *Auction No. 37 Procedures Public Notice* under Section I.B.3.

Prohibition of Collusion: Applicants are reminded that Sections 1.2105(c) and 73.5002(d) of the Commission's rules prohibit applicants for any of the same geographic license areas from communicating with each other during the auction about bids, bidding strategies, or settlements unless they have identified each other as parties with which they have entered into agreements under Section 1.2105(a)(2)(viii).¹¹ For Auction No. 37, this prohibition became effective at the short-form application filing deadline on Friday, August 6, 2004, and will end on the post-auction down payment deadline, which will be announced in a future public notice.¹² **This prohibition applies to all applicants regardless of whether such applicants become qualified bidders or actually bid.**¹³ For purposes of this prohibition, Section 1.2105(c)(7)(i) defines applicant as including all controlling interests in the entity submitting a short-form application to participate in the auction, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity.¹⁴ If parties had agreed in principle on all material terms of a bidding agreement(s), those parties must have been identified on the short-form application under Section 1.2105(c), even if the agreement had not been reduced to writing. If parties had not agreed in principle by the filing deadline, an applicant should not have included the names of those parties on its application, and must not have continued negotiations.¹⁵

The Bureaus have encouraged applicants competing for construction permits in any of the same designated markets not to use the same individual as an authorized bidder.¹⁶ A violation of the anti-collusion rule could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between the bidders he or she is authorized to represent in the auction. A violation could similarly occur if the authorized bidders are different individuals employed by the same organization (e.g., law firm or consulting firm). In such a case, at a minimum, applicants should take precautionary steps to prevent communication between authorized bidders.¹⁷

In addition, Section 1.65 of the Commission's rules requires an applicant to *maintain* the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application.¹⁸ Thus, Section

¹¹ 47 C.F.R. §§ 1.2105(a)(2)(viii), 1.2105(c)(1), 73.5002(c). See also *Auction No. 37 Procedures Public Notice* at 6-8 for a discussion of the anti-collusion rules in Auction No. 37 and the application of geographic license areas to the FM broadcast service. See also *Part 1 Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15297-98, ¶¶ 7-8 (2000).

¹² 47 C.F.R. § 1.2105(c)(1).

¹³ See, e.g., Letter to Robert Pettit, Esquire, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 16 FCC Rcd 10080 (WTB 2000) (declining to except an applicant's controlling interest from coverage by the anti-collusion rule, even though the applicant never made an upfront payment for the auction and was not listed as a qualified bidder).

¹⁴ 47 C.F.R. § 1.2105(c)(7)(i).

¹⁵ See "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," *Public Notice*, 11 FCC Rcd 9645 (1995).

¹⁶ See *Auction No. 37 Procedures Public Notice* at 7.

¹⁷ See *In re Application of Nevada Wireless for a License to Provide 800 MHz Specialized Mobile Radio Service in the Farmington, NM-CO Economic Area (EA-155) Frequency Band A*, *Memorandum Opinion and Order*, 13 FCC Rcd. 11973, 11977, ¶ 11 (1998) ("Nevada Wireless").

¹⁸ 47 C.F.R. § 1.65.

1.65 requires auction applicants that engage in communications of bids or bidding strategies that result in a bidding agreement, arrangement or understanding not already identified on their short-form applications to promptly disclose any such agreement, arrangement or understanding to the Commission by amending their pending applications. In addition, Section 1.2105(c)(6) requires all auction applicants to report prohibited discussions or disclosures regarding bids or bidding strategy to the Commission in writing immediately, but in no case later than five business days after the communication occurs, even if the communication does not result in an agreement or understanding regarding bids or bidding strategy that must be reported under Section 1.65.¹⁹

Applicants that are winning bidders will be required to disclose in their long-form applications the specific terms, conditions, and parties involved in all bidding consortia, joint ventures, partnerships, and other arrangements entered into relating to the competitive bidding process.²⁰ Any applicant found to have violated the anti-collusion rule may be subject to sanctions.²¹ In addition, applicants are reminded that they are subject to the antitrust laws, which are designed to prevent anti-competitive behavior in the marketplace. If an applicant is found to have violated the antitrust laws in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount and may be prohibited from participating in future auctions.²²

Ex Parte Rule: Applicants should also be aware that the Commission has generally exempted auction proceedings from the strict requirements of the *ex parte* rule found in Section 1.1208 of the Commission's rules.²³

Two Day Mock Auction: All applicants found to be qualified bidders will be eligible to participate in a two day mock auction on Thursday and Friday, October 28-29, 2004. We encourage all qualified bidders to take advantage of this mock auction to become familiar with the FCC Automated Auction System. In the *Qualified Bidders Public Notice*, the Bureau will announce the bidding schedule for the mock auction and give details about participation. The mock auction will be conducted over the Internet, and telephonic bidding will be available as well. As a contingency plan, bidders may also dial in to the FCC Wide Area Network.

Electronic Bidding: Applicants are reminded that qualified bidders are eligible to bid either electronically or telephonically. Applicants should specify their bidding preference on the FCC Form 175.

Bidders can access the FCC Automated Auction System over the Internet. Access to the system via the Internet requires, at a minimum, the following hardware and software:

- CPU: Pentium 133 or above
- RAM: 32 MB (64 MB recommended)
- Monitor: VGA or above
- Mouse or other pointing device
- Operating System: Microsoft® Windows™ 95™, 98™, 2000™, ME™, NT™, XP™
- Web Browser, either of the following:

¹⁹ 47 C.F.R. § 1.2105(c)(6); *see also Part 1 Seventh Report and Order*, 16 FCC Rcd at 17555 ¶ 17.

²⁰ 47 C.F.R. § 1.2107(d).

²¹ *See* 47 C.F.R. §§ 1.2105(c), 1.2107(d), and 1.2109(d).

²² 47 C.F.R. § 1.2109(d).

²³ 47 C.F.R. § 1.1208; *see* "Commission Announces that Mutually Exclusive 'Short-Form' Applications (Form 175) to Participate in Competitive Bidding Process ('Auctions') Are Treated as Exempt for Ex Parte Purposes," *Public Notice*, 9 FCC Rcd 6760 (1994).

- ◆ Microsoft® Internet Explorer 4.0 or higher (recommended). Your browser must have either Microsoft VM or Java Plug-In Version 1.3.1_08 installed.
- ◆ Netscape® Communicator™ 4.0 or higher, with Java Plug-In Version 1.3.1_08.

Java Plug-In Version 1.3.1_08 is available for downloading at
<http://java.sun.com/products/archive/index.html>

As a contingency plan, bidders can also access the FCC Automated Auction System by dialing in to the FCC's Wide Area Network. Bidders dialing in to the FCC's Wide Area Network will need:

- Modem: 28.8 Kbps Hayes© compatible modem or faster (56 Kbps recommended)
- Point-to-Point Protocol (PPP) Dialer: Use the Dial-Up Networking feature included with the operating system

Long-Form Applications: All applicants should be aware that at the long-form application stage, they will be subject to the more extensive reporting requirements contained in the Commission's Part 1 ownership disclosure rule.²⁴

CONTACT INFORMATION

For questions about payment or instructions for wiring upfront payments, contact Gail Glasser, Auctions Accounting Group, at (202) 418-0578.

For specific questions about an applicant's incomplete status, the applicant should contact the staff reviewer identified in the correspondence sent to the applicant by overnight mail.

For technical assistance with using the FCC Automated Auction System, contact the FCC Technical Support Hotline at (202) 414-1250 (V) or (202) 414-1255 (TTY). The FCC Technical Support Hotline is generally available Monday through Friday from 8:00 a.m. to 6:00 p.m. ET. *All calls to the FCC Technical Support Hotline are recorded.*

For further information concerning this proceeding, contact:

Auctions and Spectrum Access Division, WTB:

For legal questions: Kenneth Burnley at (202) 418-0660

For bidding and auction procedures: Jeff Crooks at (202) 418-0660

For bidding and general filing status: Linda Sanderson at (717) 338-2888

Audio Division, MB:

For legal and service rule questions: Lisa Scanlan or Tom Nessinger at (202) 418-2700

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²⁴ See 47 C.F.R. §§ 1.2112(b)(2), 73.5005(a). See also Instructions for Form 301, Application for Construction Permit for Commercial Broadcast Station, Instructions for Section I: General Information, paragraph G: Item 10: Auction Authorization for auction-related exhibit filing requirements.