

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

In the Matter of
Petition for Reconsideration and Motion for Stay
of Paging Systems, Inc.

ORDER

Adopted: April 21, 2005

Released: April 21, 2005

By the Acting Chief, Wireless Telecommunications Bureau:

1. We have before us a Petition for Reconsideration1 and Motion for Stay2 filed by Paging Systems, Inc. ("PSI"), asking that the Wireless Telecommunications Bureau ("Bureau"): (i) reconsider an order issued by the Auctions and Spectrum Access Division (the "Division"); (ii) set aside the results of Auction No. 57; (iii) re-open the application process for an applicant that failed to qualify to participate in the auction; and (iv) allow bidders to select additional markets in a newly instituted auction of the licenses available in Auction No. 57. Further, PSI asks that the Bureau stay the processing of long-form applications submitted by winning bidders in Auction No. 57 until its Petition is resolved.3 For the reasons set forth below, we deny PSI's Petition and its related Motion to Stay.

I. BACKGROUND

2. On April 4, 2004, the Bureau released its Public Notice seeking comment on the procedures to govern Auction No. 57, which offered 20 licenses in the Automated Maritime Telecommunications System ("AMTS") service in the 217/219 MHz bands.4 After review of comments, the Bureau released a public notice announcing the filing deadline for short-form applications (FCC Form 175), minimum opening bids and other procedures for Auction No. 57.5 On August 4, 2004, the Bureau released its Auction No. 57 Status Public Notice, which announced that five short-form applications to participate in Auction No. 57 had been submitted.6 The Auction No. 57 Status Public Notice identified three

1 Petition for Reconsideration by Paging Systems, Inc. (filed Oct. 14, 2004) ("Petition").

2 Motion for Stay by Paging Systems Inc. (filed Oct. 14, 2004).

3 Motion for Stay at 1.

4 "Auction of Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004, Comment Sought on Reserve Process or Minimum Opening Bids and Other Auction Procedures," Public Notice, 19 FCC Rcd 6274 (2004) ("Auction No. 57 Comment Public Notice"); 47 U.S.C. § 309(j)(3)(E)(i).

5 "Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Auction Procedures," Public Notice, 19 FCC Rcd. 9518 (2004) ("Auction No. 57 Procedures Public Notice"); see 47 U.S.C. § 309(j)(3)(E)(i) (obligation of the Commission to "ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed before issuance of bidding rules, to permit notice and comment on proposed auction procedures").

6 "Automated Maritime Telecommunications System Spectrum Auction; Status of FCC Form 175 Applications to Participate in the Auction," Public Notice, 19 FCC Rcd 14874 (2004) ("Auction No. 57 Status (continued...)")

applications as “accepted for filing” and two applications as “incomplete.”⁷ Among those accepted for filing were applications filed by Telesaurus-VPC, LLC (“Telesaurus”) and AMTS Consortium, LLC (“Consortium”).⁸ According to the Telesaurus and Consortium short-form applications, these entities have different ownership structures, although Warren C. Havens is a controlling interest for each entity.⁹ A third application submitted by Mobex was also accepted for filing. PSI and Thomas K. Kurian were provided with an opportunity to address deficiencies in their respective applications and resubmit them.¹⁰ After review of the resubmitted applications, the Division accepted those two applications.¹¹

3. Shortly before the August 20, 2004 upfront payment deadline, Mobex submitted several filings seeking a delay of the auction schedule and disqualification of the short-form applications filed by Telesaurus and Consortium.¹² In these filings, Mobex requested that the Bureau issue a declaratory ruling on whether two commonly controlled entities can participate in the same auction.¹³ Mobex asked that the Bureau dismiss the two short-form applications that are each controlled by Mr. Havens,¹⁴ and stay the deadline for submission of upfront payments until thirty days after the Bureau resolves the Request for a Declaratory Ruling.¹⁵ Mobex further requested that the Bureau stay the start date for bidding in Auction No. 57 until thirty days after the Commission has lifted the requested stay of the deadline for submission of upfront payments.¹⁶

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Public Notice”). The five applications were received from (i) AMTS Consortium, LLC; (ii) Telesaurus-VPC, LLC; (iii) Mobex; (iv) Thomas K. Kurian; and (v) Paging Systems, Inc. *See id.*

⁷ *Id.* Applicants that had incomplete applications were provided with an opportunity to address the deficiencies with their applications. *See* 47 C.F.R. § 1.2105(b)(2).

⁸ *See Auction No. 57 Status Public Notice*, 19 FCC Rcd 14874.

⁹ *See* FCC Forms 175 of Telesaurus-VPC, LLC and AMTS Consortium, LLC for Auction No. 57 (filed July 19, 2004). Pursuant to Section 1.2105(a)(2)(viii), each application disclosed a bidding arrangement with the other commonly controlled bidder. *See id.*, Exhibit B.

¹⁰ *Auction No. 57 Status Public Notice*, 19 FCC Rcd at 14874-75, 14880, Attachment B; *see also* 47 C.F.R. § 1.2105(b)(2), FCC Form 175 resubmitted by Thomas K. Kurian on August 5, 2004 and FCC Form 175 resubmitted by Paging Systems, Inc. on August 5, 2004.

¹¹ “Automated Maritime Telecommunications System Spectrum Auction,” *Public Notice*, 19 FCC Rcd 20452, 20459, Attachment A (rel. August 27, 2004) (“*Auction No. 57 Qualified Bidders’ Public Notice*”).

¹² Mobex filed: (i) Motion for Stay – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Motion to Stay Auction”); (ii) Request for Declaratory Ruling – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Request for Declaratory Ruling”); (iii) Motion for Stay – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Motion to Stay Upfront Payment Date”); and (iv) Informal Request for Action – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Motion to Dismiss”).

¹³ Request for Declaratory Ruling at 1.

¹⁴ Motion to Dismiss at 1.

¹⁵ Motion to Stay Upfront Payment Date at 1.

¹⁶ Motion to Stay Auction at 1. Telesaurus VPC LLC, AMTS Consortium, and Warren Havens (the “Responders”) filed pleadings in opposition, and Mobex responded. The Responders pleadings in opposition included: (i) Opposition to the Mobex § 1.41 Request to Dismiss the Applications of Telesaurus VPC LLC and AMTS Consortium LLC to Participate in Auction No. 57, dated September 8, 2004 (“Opposition to Motion to Dismiss”); (ii) Opposition to Request for Declaratory Ruling, AMTS Auction 57, dated September 7, 2004 (“Opposition to Request for Declaratory Ruling”); and (iii) Opposition to the Two Motions for Stay, AMTS Auction 57, dated September 7, 2004 (“Opposition to Motions for Stay”). In response, Mobex filed: (i) Reply to Opposition

(continued...)

4. One day prior to the start of Auction No. 57 and over a month after the short form applications became available for public review, PSI submitted a letter to the Division seeking a response to Mobex's requests.¹⁷ Mobex, however, did not submit an upfront payment and thus was not qualified to participate in Auction No. 57.¹⁸

5. On September 15, 2004, the Division issued an *Order* that denied the relief sought by Mobex and supported by PSI.¹⁹ In its ruling the Division stated that the two applicants commonly controlled by Mr. Havens had complied with all disclosure requirements in the Commission's Part 1 rules, and that there was no prohibition in the Part 1 rules that barred two commonly controlled applicants from participating in an auction.²⁰ The Division explained that there are many legitimate business reasons to participate in the auction in this fashion, that the Bureau has safeguards in place to address concerns regarding anti-competitive bid withdrawals or defaults, and that the commonly controlled entities do not have any informational advantage relative to other bidders.²¹ The Division also noted that, consistent with the Part 1 disclosure requirements,²² Consortium and Telesaurus had each disclosed that: (i) Havens is the controlling interest for both applicants; (ii) Havens manages both applicants; and (iii) there is a joint bidding agreement between the two applicants.²³

6. Auction No. 57 began on September 15, 2004, as scheduled and closed on September 15, 2004. The Commission issued a *Public Notice* announcing the results of Auction No. 57, and identifying the winning bidders.²⁴ PSI now asks that the Bureau set aside the results of Auction No. 57, allow Mobex another opportunity to submit a short-form application, and permit the other applicants an opportunity to select additional markets.²⁵ PSI concedes that unwinding an auction in this manner would constitute "extraordinary relief."²⁶ Mr. Havens, along with Consortium and Telesaurus, opposed the Petition and

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to Request for Declaratory Ruling, Automated Maritime Telecommunications System, Auction No. 57, dated September 14, 2004; (ii) Reply to Opposition to Motions for Stay, Automated Maritime Telecommunications System, dated September 14, 2004; and (iii) Reply to Opposition to Informal Request for Action, Automated Maritime Telecommunications System, dated September 14, 2004. Although it made this filing electronically with the Commission less than one day before the start of the bidding in Auction No. 57, Mobex chose to serve the other bidders via regular mail.

¹⁷ See Letter from Audrey P. Rasmussen to Marlene H. Dortch (filed Sept. 14, 2004).

¹⁸ *Auction No. 57 Qualified Bidders' Public Notice* at Attachment C.

¹⁹ Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification, *Order*, 19 FCC Rcd 20482 (2004) ("*Division Order*").

²⁰ *Id.*, 19 FCC Rcd at 20485 ¶ 8.

²¹ *Id.*, 19 FCC Rcd at 20485-87 ¶¶ 9, 15.

²² 47 C.F.R. §§ 1.2105 (a)(2)(viii-ix), 1.2105(c)(1).

²³ See Forms 175 of Telesaurus and Consortium, Exhibits A and B.

²⁴ "Automated Maritime Telecommunications System Spectrum Auction Closes, Winning Bidders Announced, Down Payments Due October 1, 2004, FCC Forms 601 and 602 Due October 1, 2004, Ten-Day Petition to Deny Period," *Public Notice*, 19 FCC Rcd 18252, 18258 (2004) ("*Auction No. 57 Winning Bidders Public Notice*").

²⁵ Petition at 8; Motion at 2. With regard to PSI's request that the Bureau unwind the auction and limit participation in a reauction only to those entities that had qualified to participate in Auction No. 57, we note that short-form application filing deadlines are not "cut-off dates" that provide applicants with protection from additional competition in auctions or give protected status to applicants with accepted applications. See *Elleron Oil Company, Order*, 13 FCC Rcd 17246 (WTB 1998).

²⁶ Motion at 2.

Motion for Stay, and PSI replied.²⁷ Subsequently, four months after the pleading cycle had ended, Mr. Havens submitted a letter arguing that PSI's Petition is defective on procedural grounds.²⁸ PSI moved to strike Mr. Havens's letter as an unauthorized pleading.²⁹

II. DISCUSSION

A. PSI Petition for Reconsideration

7. In its Petition, PSI argues that Auction No. 57 was "anti-competitive" because the Division allowed two commonly controlled entities to participate in Auction No. 57.³⁰ To support its position, PSI cites Mobex's decision to not participate in Auction No. 57 and an economic analysis provided by Dr. John Morgan.³¹ According to PSI, Dr. Morgan's analysis supports its belief that the presence of commonly controlled entities in an auction creates a disincentive for other bidders to participate.³² PSI also points out that in Auction No. 57 the commonly controlled bidders did not compete against each other.³³ Furthermore, PSI argues that Section 1.937(d) of the Commission's rules provides for the dismissal of a conflicting application submitted by the same applicant.³⁴

8. On October 27, 2004, Mr. Havens, Telesaurus and Consortium (the "Common Entities") filed their Opposition to Petition for Reconsideration.³⁵ In their Opposition to the Petition, the Common Entities argue that PSI: (i) lacks standing to seek reconsideration;³⁶ (ii) seeks nothing more than a second opportunity to acquire the licenses offered in Auction No. 57; and (iii) wants to delay the rollout of

²⁷ Opposition to Motion to Dismiss; Opposition to Request for Declaratory Ruling; Reply of Paging Systems, Inc. (filed Dec. 7, 2004).

²⁸ Letter from Warren Havens to Howard Davenport, Auctions and Spectrum Access Division, WTB (dated March 7, 2005).

²⁹ Motion to Strike of Paging Systems, Inc. (dated March 10, 2005). We dismiss both Mr. Havens's March 7th letter and PSI's Motion to Strike as untimely under Section 1.106 of the Commission's rules. See 47 C.F.R. § 1.106(f)-(h) (establishing deadlines for petitions for reconsideration and related pleadings).

³⁰ Petition at 4; see also Motion at 4.

³¹ Petition at 4, Exh. 1.

³² Petition at 5.

³³ Petition at 6.

³⁴ 47 C.F.R. § 1.937(d).

³⁵ Opposition to Petition for Reconsideration, filed October 27, 2004 (Opposition to Petition).

³⁶ In light of our affirmation of the Division's *Order*, we need not address Mr. Haven's challenge to PSI's standing. We question whether PSI has standing here. Under section 1.106 of the Commission's rules, PSI must show that its interests are adversely affected by the action taken by the Bureau and that it did not have the opportunity to participate in the earlier stages of the proceeding. 47 C.F.R. § 1.106(b)(1). We note that in such inquiries the Commission frequently relies upon the three-pronged standing test under which a party must establish: (1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested. See, e.g., AT&T Corp., *Order on Reconsideration*, 16 FCC Rcd 21,750, 21,753-21,754 ¶ 7 (2001). PSI contends that it "became cautious," and that Mobex declined to participate because of concerns that participation by the commonly controlled applicants would render the auction anticompetitive. Nevertheless, we note that PSI did participate in the auction, and while it indicated it intended to bid on seven of the B block licenses, PSI submitted an upfront payment sufficient to win either only one of the five most-populated licenses that it had selected or the two smallest licenses (in terms of population) it had selected. Ultimately PSI won the only license on which it bid and it had no bidding eligibility to bid on another license without withdrawing its high bid. Thus, PSI has not shown that it would satisfy the legal standard to establish standing.

competitive services.³⁷ The Common Entities also contend that the Commission should investigate whether PSI has constructed and operated its stations as required by Section 80.385(c) of the Commission's rules.³⁸ The Common Entities claim that if PSI succeeds, all future auctions will be susceptible to attack by any entity that is unhappy with the results of the auction.³⁹ Further, the Common Entities claim that after committing to the Great Lakes B-block license, PSI lacked bidding eligibility to bid on any more licenses and thus lacks standing to file the Petition since it won that license and could not have won any other licenses.⁴⁰ The Common Entities also claim that under Section 1.106(b)(1) of the Commission's rules, PSI, as a non-party to the proceeding, must demonstrate that PSI could not have participated earlier in the proceeding.⁴¹ The Common Entities disagree with PSI's assertion that Section 1.937(d) of the Commission's rules bars the applications submitted by Consortium and Telesaurus because those applications conflict.⁴² The Common Entities contend that the Consortium and Telesaurus applications do not conflict in any way, and point out that Consortium and Telesaurus are different legal entities. Finally, the Common Entities assert that a grant of the Petition would not be in the public interest.⁴³

9. In its Reply, PSI claims that as a qualified bidder that supported Mobex's requests for relief, it has standing to seek reconsideration of the Division's *Order*.⁴⁴ While PSI concedes that there is no *per se* prohibition in the Commission's Part 1 competitive bidding rules that would disallow two commonly controlled entities from participating in a spectrum auction, it believes that Section 1.937(d) prohibits conflicting or commonly controlled applications.⁴⁵

1. PSI's Theoretical Economic Analysis

10. To support its Petition, PSI essentially presents the same arguments made by Mobex that the Division rejected in its *Order* when Mobex had sought to delay Auction No. 57.⁴⁶ PSI tries to renew Mobex's claims by providing an analysis prepared by Dr. Morgan, which also contends that the participation of commonly controlled bidders creates a disincentive for other bidders to participate in an auction.⁴⁷ PSI argues that Dr. Morgan's theory is supported by Mobex's decision to not participate in Auction No. 57 and PSI's alleged decision to limit its participation in Auction No. 57. First, we note that since PSI concedes that the participation of commonly controlled entities is not prohibited by our competitive bidding rules, PSI is in effect arguing that the rules are flawed because they do not prohibit such participation. We disagree. To the extent that additional participating bidders represent increased auction competition, the efficiency of the auction may be enhanced, since additional bidders may increase the likelihood that the auction will assign licenses to the parties which value them most highly. An

³⁷ Opposition to Petition at 3-10.

³⁸ Opposition to Petition at 3, 8, n. 6; 47 C.F.R. § 80.385(c).

³⁹ Opposition at 4.

⁴⁰ Opposition to Petition at 6, 8.

⁴¹ 47 C.F.R. § 1.106(b)(1); Opposition to Petition at 8.

⁴² 47 C.F.R. § 1.937(d); Opposition to Petition at 10.

⁴³ Opposition to Petition at 5.

⁴⁴ PSI Reply to Opposition to Petition for Reconsideration, filed Nov. 5, 2004.

⁴⁵ Reply to Opposition to Petition for Reconsideration at 3. Finally, PSI disagrees that its Petition is of such a frivolous nature that it requires the imposition of sanctions. Reply to Opposition to Petition for Reconsideration at 6-8.

⁴⁶ See *Division Order*, 19 FCC Rcd 20482.

⁴⁷ Petition at 5.

increase in the number of bidders may provide more price information to other participants in an auction and reduces opportunities for collusion and other anticompetitive conduct.⁴⁸ Moreover, the Commission's Part 1 competitive bidding rules are intended to ensure the transparency of the Commission's auction process.⁴⁹

11. We do not find Dr. Morgan's theoretical analysis to be a persuasive argument against permitting bidders with common controlling interests to participate in our auctions. Dr. Morgan suggests that when a controlling interest creates a second bidding entity, other bidders may be deterred from entering an auction because they regard an increased number of competitors as reducing their own chances of winning.⁵⁰ His analysis relies on a mathematical model that assumes that all bidders' valuations are independent and all bidders are alike (or have symmetry), which are inconsistent with some of the basic characteristics of the FCC's auction process.⁵¹ Therefore we do not agree with Dr. Morgan's conclusion that bidders will be deterred from participating strictly because of the number of other bidders. Entities participating in FCC auctions are likely to make decisions about whether to participate based on more complete information about the role of additional bidders, since the Commission's Part 1 competitive bidding rules require the disclosure of any affiliations or bidding agreements among applicants.⁵² Auction participants are free to evaluate for themselves the extent to which a bidder affiliated with another bidder may represent an independent competitive entity, and are unlikely to be deterred simply because nominally there is an additional bidder participating, as Dr. Morgan argues.⁵³

12. We have been presented with no evidence that would undermine our conclusion that the presence of two commonly controlled entities is both permissible and does not adversely affect the interest of other bidders. In Auction No. 57, Consortium was the winning bidder of five licenses, Telesaurus was the winning bidder of three licenses, Mr. Kurian was the winning bidder of one license, and PSI was the winning bidder of one license.⁵⁴ No one has provided any evidence of anticompetitive bidding activity in Auction No. 57. The Commission's rules are designed to allow small and very small business entities, such as Consortium and Telesaurus, sufficient latitude to decide how best to structure their businesses and participate in a spectrum auction in terms of raising capital, assembling technical

⁴⁸ Cf. Cramton and Schwartz, "Collusive Bidding in the FCC Spectrum Auctions," *Contributions to Economic Analysis & Policy*, 1:1 ("in simple settings with few goods and few bidders, bidders have the incentive to reduce demands.").

⁴⁹ See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Seventh Report and Order*, 16 FCC Rcd 17546, 17550 ¶ 12 (2001) ("By requiring applicants to update pending applications to reflect ... prohibited collusive agreements and communications, the Commission has sought to ensure the integrity and transparency of its auction processes.").

⁵⁰ Petition, Exhibit 1 at 1.

⁵¹ See Petition, Exhibit 1, n. 3 and p. 3-4. Dr. Morgan uses an auction model commonly referred to as a symmetric independent private values framework. See, e.g., Wolfstetter, Elmar. *Topics in Microeconomics*, Cambridge University Press, 1999. This model assumes independent values and symmetry among bidders, which we regard as not representative of the current context. Absent these assumptions, such models can yield very different results. The Commission's rules permit participation by entities that have bidding or other agreements with each other as well as entities under common control, provided required disclosures are made.

⁵² See 47 C.F.R. §§ 1.2105, 1.2112.

⁵³ We also note the inconsistency within Dr. Morgan's model between the assumption that the values of commonly controlled entities are independent (see note 51, *supra*) and the assumption that the controlling entity benefits fully and directly from bidding activity of the newly-created entity. Petition, Exhibit 1 at 5.

⁵⁴ *Auction No. 57 Winning Bidders Public Notice*, 19 FCC Rcd at 18258.

expertise, and developing bidder strategy.⁵⁵ Further, as the Division noted previously, the Commission's rules contain safeguards to protect against anticompetitive bidding activity, such as strategic withdrawals or defaults.⁵⁶

13. Moreover, as the Division previously found, there is no requirement that bidders compete against all other bidders in an auction.⁵⁷ The Part 1 competitive bidding rules allow bidders to have joint bidding agreements, joint marketing agreements, and post auction agreements concerning market structure that might allow auction participants to behave in a manner similar to commonly controlled applicants.⁵⁸ Moreover, we decline to draw any conclusions from the decision of Mobex to not participate in Auction No. 57.⁵⁹ While PSI ascribes a basis for Mobex's decision not to bid in Auction No. 57, we find it significant that PSI fails to acknowledge that Mobex's previously stated reasons for seeking delay of the start of Auction No. 59 were unrelated to arguments about the participation in the auction by commonly controlled entities.⁶⁰ Accordingly, we conclude that PSI's claims that the Division's decision will result in anticompetitive auction outcomes lacks merit and, therefore, affirm the *Division Order*.

2. Analysis of Section 1.937(d)

14. PSI also argues that Section 1.937(d) provides for the dismissal of conflicting applications such as the applications submitted by Consortium and Telesaurus.⁶¹ PSI contends that Section 1.937(d) applies to short-form applications. We disagree. Commission precedent is clear that Section 1.937 prohibits the filing of "repetitious license applications," or conflicting long-form applications.⁶² Clearly, Section 1.937 applies only to those instances where an applicant has filed repetitive or conflicting applications for a radio service while another application by the same applicant for a license in the same radio service has either already been decided or is pending for decision by the Commission.⁶³ Here, the applications in question are not for radio services licenses, but rather an opportunity to participate in a

⁵⁵ See Implementation of Section 309(j) of the Communications – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2388-2400 (1994) (establishing preferences for designated entities, including small businesses).

⁵⁶ *Division Order*, 19 FCC Rcd at 20486 ¶ 12 (discussing safeguards in Section 1.2104(g) of the Commission's rules and other procedures established by the Bureau prior to Auction No. 57 to protect against anticompetitive bidding behavior).

⁵⁷ *Id.*, 19 FCC Rcd at 20485 ¶ 10.

⁵⁸ 47 C.F.R. §§ 1.2105 (a)(2)(viii-ix), 1.2105(c)(1).

⁵⁹ Compare Comments of Mobex Communications, Inc. (filed April 23, 2004) (Mobex's statement prior to the short-form deadline suggesting Mobex's possible problems in securing financing to participate in Auction No. 57) with Reply to Opposition to Declaratory Ruling of Mobex (dated Sept. 14, 2004) (statement by Mobex after it failed to submit an upfront payment implying that Mobex chose not to participate on account of perceived unfairness in the auction process).

⁶⁰ Comments of Mobex Communications, Inc. (filed April 23, 2004) (suggesting problems in securing financing); see also *Auction No. 57 Procedures Public Notice*, 19 FCC Rcd at 9528.

⁶¹ Petition at 6.

⁶² See Amendment of Section 1.937 of the Commission's Rules Concerning Repetitious or Conflicting Applications, *Report and Order*, 18 FCC Rcd 7190 ¶ 1 (2003). "Section 1.937 and its antecedents were adopted to achieve sound administrative process by barring applicants from immediately re-litigating matters already decided." *Id.*, 18 FCC Rcd at 7191 ¶ 2. See also 47 C.F.R. § 1.907 (definition of "application").

⁶³ See Applications of Interactive Control Two, Inc, Wincom Corp., U.S. Telemetry-New Brunswick, Inc., U.S. Telemetry-Lancaster, Inc. For Consent to the Assignment of Licenses for Stations KIVD0063 and KIVD0247 in the 218-219 MHz Service, *Order on Reconsideration*, 16 FCC Rcd. 18948, 18953 (2001).

spectrum auction. Moreover, the applications that PSI views as “conflicting” do not seek to relitigate a radio service licensing issue previously decided by the Commission. Rather, as the Division observed previously, Telesaurus and Consortium have different ownership structures, which may facilitate implementation of different business plans, financing requirements or marketing needs, avoid transactional costs in the secondary market, or meet other business needs.⁶⁴ In short, Section 1.937(d) does not apply to short-form applications, and provides no support for PSI’s claims.

B. PSI’s Motion for Stay

15. PSI’s Motion for Stay seeks to stay the processing of long-form applications submitted by Auction No. 57 winning bidders. PSI’s motion is grantable if it can show that: (i) PSI is likely to prevail on the merits; (ii) PSI will suffer irreparable harm, absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest would favor a grant of the stay.⁶⁵ Based on the facts and arguments presented, PSI has failed to meet the standard for a stay of the post auction proceedings. PSI has not demonstrated that it is likely to prevail on the merits, that it will be irreparably harmed, and that other parties will not be harmed if the auction is stayed. Moreover, the public interest does not favor a stay. In response to the Motion for Stay, the Common Entities filed their joint Opposition to Motion for Stay.⁶⁶

1. Likelihood of Success

16. As demonstrated above, PSI has failed to show that it will likely prevail on the merits of its argument that two commonly controlled entities should not be permitted to participate in the same auction.

2. Irreparable Harm

17. An injury qualifies as “irreparable harm” only if it is both certain and great, it must be actual and not theoretical.⁶⁷ Thus, to demonstrate irreparable harm, PSI must provide “proof indicating that the harm it alleges is certain to occur in the near future.”⁶⁸ PSI has supplied no such proof. PSI fully participated in Auction No. 57 and won an AMTS license. It knew the terms under which Consortium and Telesaurus structured their respective companies: joint ownership, management, and bidding arrangements. Moreover, PSI has not demonstrated any conduct by the Common Entities acting collectively or separately during the auction that disadvantaged PSI in its participation in Auction No. 57. Thus, we find that PSI has not met the second prong of the test to support its requested stay.⁶⁹

3. Harm to Others

18. PSI concedes, as it must, that the suspension of processing long-form applications will delay the ultimate authorization for use of the spectrum.⁷⁰ Nevertheless, PSI argues that not resolving its

⁶⁴ See *Division Order*, 19 FCC Rcd at 20844 ¶ 9.

⁶⁵ *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

⁶⁶ Opposition to Motion for Stay by the Common Entities, filed Oct. 21, 2004.

⁶⁷ *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. 1985).

⁶⁸ *Id.*

⁶⁹ *Cf.* Motion of Ranger Cellular and Miller Communications, Inc. for a Stay of Auction No. 45, 17 FCC Rcd 9320 (WTB 2002).

⁷⁰ Motion to Stay at 5.

Petition is the greater harm. PSI cites the uncertainty which it believes would hang over successful bidders if its Petition is not first resolved. As noted above, we have resolved the Petition by this order. We believe that any delay in the post-auction process would harm other successful bidders and will delay the rollout of AMTS services to customers.⁷¹ In light of the foregoing, the Bureau believes that the public would not be served by a stay of the post-auction licensing process.

4. Public Interest Considerations

19. As noted above, we find no basis for overturning the results of Auction No. 57. To do so, would not only undermine the public interest in the finality of the auction process, but potentially would embolden future disappointed bidders and applicants to seek similar relief.⁷² We firmly believe that the public interest is best served by continuing with the license assignment process. One of the primary goals of the Commission's auction program is to ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public without delays, and promote the efficient and intensive use of the electromagnetic spectrum.⁷³ These goals can best be met by moving forward with the post-auction licensing process. Thus, we find that the public interest would not be served by the grant of PSI's Motion.

III. CONCLUSION

20. 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), 309(j)(3) and the authority delegated pursuant to section 0.331 of the Commission's rules, as amended, 47 C.F.R. §§ 0.131(c), 0.331, Petition for Reconsideration filed by Paging Systems, Inc. IS DENIED.

21. IT IS FURTHER ORDERED that the Motion to Stay Post-Auction No. 57 proceedings IS ALSO DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Catherine W. Seidel
Acting Chief
Wireless Telecommunications Bureau

⁷¹ Cf. Flexibility for Delivery of Communications By Mobile Satellite Service Providers in the 2 GHz Band, the L-band, and the 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rule Making*, 18 FCC Rcd 1962, 2085-86 ¶ 258 (2003) (denying request to stay proceeding, the Commission stated:

a stay in this proceeding disserves the public interest by delaying the introduction of new competition and services contemplated by this order. Stay of this proceeding would also set a precedent that pending proceedings could be easily stayed by the filing of a petition for rulemaking, or a subsequent reconsideration process if such a petition is denied, even when the legal requirements for a stay have not been met. The Commission cannot permit its processes to be paralyzed by filings that make no attempt to meet the high burden of a stay.”).

⁷² See *id.*

⁷³ See 47 U.S.C. § 309(j)(3)(A) and (D).