



Federal Communications Commission
Washington, D.C. 20554

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Matinee Radio, LLC
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In re: **FM Broadcast Auction No. 37**
New(FM), Marfa, Texas
Facility ID No. 164597
File No. BNPH-20050103AAU

New(FM), Groveton, Texas
Facility ID No. 164596
File No. BNPH-20050103AAW

New(FM), Albany, Texas
Facility ID No. 164214
File No. BNPH-20050103AAX

New(FM), Goldsmith, Texas
Facility ID No. 164215
File No. BNPH-20050103AAY

New(FM), Magdalena, New Mexico
Facility ID No. 164213
File No. BNPH-20050103AAZ

Applications for Construction Permits

Dear Counsel:

We have before us a Petition for Declaratory Ruling ("Petition") filed by Matinee Radio, LLC ("Matinee") on February 23, 2005. Matinee was the winning bidder for the five above-referenced FM broadcast construction permits in FM Broadcast Auction No. 37 ("Auction No. 37"). Matinee seeks a declaratory ruling that, for purposes of determining eligibility for the Commission's new entrant bidding credit, an applicant's attributable interests are to be considered only as they exist as of the Form 175 filing deadline for an auction, and that subsequent changes in attributable interests in media of mass communications held by the applicant or its attributable interest holders should not be considered. We find that our new entrant bidding credit rules, as explained in prior decisional law as well as the Auction No. 37 public notices, are sufficiently clear, and accordingly deny Matinee's Petition.

BACKGROUND

Matinee claims eligibility for a 35 percent new entrant bidding credit, because neither it nor any of its attributable interest holders held attributable interests in any media of mass communications as of the August 6, 2004, Auction No. 37 Form 175 filing deadline. Four days after that deadline, a corporation comprised of Matinee interest holders consummated a transaction to purchase a broadcast construction permit. Matinee did not amend its Form 175 “short form” auction filing window application to reflect this transaction. Narrowly reading part of one Auction No. 37 public notice, Matinee insists that because its shareholders did not consummate the purchase transaction until after August 6, 2004, the new station cannot be attributed to Matinee’s attributable interest holders, and that it is eligible for the full 35 percent new entrant bidding credit, rather than the 25 percent bidding credit available to those with attributable interests in three or fewer media of mass communications.

Matinee filed its Form 175 application to participate in Auction No. 37 on August 6, 2004, the last day for filing such applications. In its Form 175, Matinee claimed eligibility for a 35 percent new entrant bidding credit, as neither it nor any of its attributable interest holders had attributable interests in any media of mass communications.¹

In the public notice setting forth procedures to be followed for Auction No. 37, the Media Bureau and Wireless Telecommunications Bureau (collectively the “Bureaus”) made the following statements regarding eligibility for the new entrant bidding credit:

The interests of the bidder, and of any individuals or entities with an attributable interest in the bidder, in other media of mass communications shall be considered when determining a bidder’s eligibility for the New Entrant Bidding Credit. The bidder’s attributable interests shall be determined as of the short-form application (FCC Form 175) filing deadline – August 6, 2004. Bidders intending to divest a media interest or make any other ownership changes, such as resignation of positional interests, in order to avoid attribution for purposes of qualifying for the New Entrant Bidding Credit must have consummated such divestment transactions or have completed such ownership changes by no later than the short-form filing deadline – August 6, 2004.²

Matinee is controlled by Matinee Broadcasting Corporation (“MBC”), the sole managing member with a 51 percent voting membership interest in Matinee. MBC is owned and controlled by four individuals, each of whom is an officer, director, and voting shareholder of MBC: Robert Walker (“Walker”), Katy Gaffney (“Gaffney”), William M. Smith (“Smith”), and Mark Eckenrode (“Eckenrode”). These four individuals collectively hold the remaining 49 percent voting membership interests in Matinee. Thus, the entities holding attributable interests in Matinee are Walker, Gaffney, Smith, Eckenrode, and MBC. Walker and Smith are also officers, directors, and shareholders of Palm Broadcasting Company (“Palm”). On October 30, 2003, the Media Bureau granted an application to assign the construction permit of KTXF(FM), Karnes City, Texas, from North American Broadcasting

¹ See 47 C.F.R. §§ 73.5007, 73.5008.

² *Public Notice*, “Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004 – Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” 19 FCC Rcd 10570, 10584 (MB/WTB 2004) (“*Auction No. 37 Procedures Public Notice*”).

Company to Palm.³ Palm did not consummate this transaction until August 10, 2004, four days after the short form filing deadline for Auction No. 37. Thus, as of August 10, 2004, individuals with attributable interests in Matinee held an attributable interest in a medium of mass communications.⁴

DISCUSSION

Matinee, narrowly reading a single sentence of the *Auction No. 37 Procedures Public Notice*, contends that it is still entitled to claim a 35 percent new entrant bidding credit, because Palm did not consummate the KTXF(FM) transaction until four days after the Auction No. 37 filing deadline, and Matinee's attributable interests "shall be determined as of the short-form application . . . filing deadline – August 6, 2004."⁵ Matinee further argues that, to the extent that the Commission disputes its "reasonable understanding"⁶ of this "clear statement,"⁷ the policy is ambiguous, and thus the Commission may not "penalize" it by reducing its bidding credit by ten percent.⁸ By focusing only on this one sentence, however, Matinee disregards not only settled precedent, but subsequent Auction No. 37 public notices. Properly read in context, it can be seen that there is no ambiguity and that Matinee's reading is in error.

A similarly narrow reading was attempted in *Liberty Productions, a Limited Partnership* ("*Liberty*"),⁹ in which an applicant in Closed Broadcast Auction No. 25 ("Auction No. 25") received a substantial post-Form 175 filing deadline loan from a lender with attributable interests in media of mass communications.¹⁰ In Auction No. 25, the Bureaus released a procedures public notice containing language substantially similar to that in the *Auction No. 37 Procedures Public Notice*.¹¹ Petitioner Liberty Productions, like Matinee, attempted to avoid the diminishment of its bidding credit by narrowly construing this same public notice language.¹² The Commission rejected this interpretation. It held that

³ File No. BAPH-20030826APJ.

⁴ 47 C.F.R. § 73.5008(b).

⁵ See *supra* note 2.

⁶ See, e.g., Petition at 4.

⁷ See, e.g., *id.* at 3.

⁸ *Id.* at 6.

⁹ 16 FCC Rcd 12061, *stay denied*, 16 FCC Rcd 18966 (2001), *aff'd sub nom, Biltmore Forest Broadcasting FM, Inc. v. F.C.C.*, 321 F.3d 155 (D.C. Cir.), *cert. denied*, 540 U.S. 981 (2003).

¹⁰ The lender's attributable interests were attributed to the borrower because of the "equity/debt plus" rule, which attributes the attributable interests of a lender who holds a greater than 33 percent debt interest in an auction bidder. See 47 C.F.R. § 73.5008(c). See also *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 12541 (1999).

¹¹ See *Public Notice*, "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," 14 FCC Rcd 10632, 10639 (1999) ("The bidder's attributable interests shall be determined as of the short form (FCC Form 175) filing deadline – August 20, 1999.").

¹² 16 FCC Rcd at 12077.

“[t]hat statement, read in context, does not reflect that eligibility for the New Entrant Bidding Credit is unaffected by subsequent ownership changes,” pointing to the sentence immediately following that statement which, like that in the *Auction No. 37 Procedures Public Notice*, advised applicants wishing to claim the bidding credit to divest attributable interests by the short form filing deadline.¹³ “Read together, [these statements] clearly reflect that a bidder could not qualify for, or upgrade a previously claimed bidding credit, based upon ownership or positional changes occurring after the short-form filing deadline.”¹⁴ The Commission thus held that the impact of post-Form 175 filing deadline changes that might *diminish* a bidding credit previously claimed on Form 175 was not expressly addressed in the procedures public notice.¹⁵

The Commission in *Liberty* then held that the issue of diminished bidding credits in Auction No. 25 was directly addressed in a later public notice, released after the Form 175 filing deadline. Specifically, that public notice advised bidders that “if ownership changes result in the diminishment or loss of a New Entrant Bidding Credit due to the attributable interests of new attributable interest holders,” the bidder claiming the credit must clearly state such information in an amendment to its Form 175 application.¹⁶ The Commission thus concluded that Liberty’s bidding credit should be reduced from 35 percent to zero.¹⁷ *Liberty* clearly rejected the very interpretation of the Public Notice language upon which Matinee relies, and clearly established that applicant changes could result “in the diminishment or loss of the new entrant bidding credit claimed on the Form 175 application.”¹⁸ Accordingly, we conclude that Matinee’s argument is without merit.

Matinee’s attempt to argue that *Liberty* may be “readily distinguished from the circumstances presented here”¹⁹ is unavailing. Matinee contends that, in *Liberty*, the applicant claiming the bidding credit made ownership changes, specifically by bringing in a lender with attributable mass media interests after the Form 175 filing deadline. Here, argues Matinee, no new owners or even investors were brought in; rather, Matinee’s existing attributable interest holders subsequently acquired an attributable interest. Therefore, argues Matinee, the *Liberty* decision applies only when there are ownership or positional changes after the Form 175 filing deadline, and thus did not put Matinee on notice that this specific post-Form 175 filing deadline change would reduce its claimed bidding credit.²⁰ However, *Liberty* does not stand for the narrow proposition that only certain post-Form 175 filing window changes will result in a loss or diminishment of the new entrant bidding credit. Rather, *Liberty* establishes that an applicant’s bidding credit status is not “frozen” as of the Form 175 filing deadline, and can in fact be lost or diminished after the deadline.²¹

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 12078.

¹⁷ *Liberty*, *supra* note 9, 16 FCC Rcd at 12079.

¹⁸ *Public Notice*, “Auction of FM Broadcast Construction Permits – 456 Bidders Qualified to Participate in Auction No. 37,” 19 FCC Rcd 19773, 19777 (MB/WTB 2004) (“*Auction No. 37 Qualified Bidders Public Notice*”).

¹⁹ Petition at 5.

²⁰ *Id.* at 14.

²¹ *Liberty*, 16 FCC Rcd at 12078.

Moreover, Matinee is both misguided and in error when it states that neither the *Auction No. 37 Procedures Public Notice* nor “any subsequent Commission statements” gave notice that post-Form 175 filing deadline changes – of any sort – could lead to a reduction in the new entrant bidding credit.²² As explained above, the Commission’s policy on post-Form 175 filing deadline bidding credit diminutions was conclusively settled in *Liberty*. Moreover, the *Auction No. 37 Qualified Bidders Public Notice* did not limit the potential reduction of claimed new entrant bidding credits to those applicants making “ownership changes.” Rather, that public notice clearly referred to “any changes affecting eligibility for the new entrant bidding credit, insofar as it [sic] results in the diminishment or loss of the new entrant bidding credit claimed on the Form 175 application”²³ Further, the Bureaus stated in the *Auction No. 37 Qualified Bidders Public Notice* that “[c]hanges that cause a loss of or reduction in eligibility for a new entrant bidding credit should be reported *immediately*,”²⁴ and that, in such cases, “the Commission will make appropriate adjustments in the new entrant bidding credit prior to the computation of down and final payment amounts due from any affected winning bidders.”²⁵

Clearly, the consummation of a transaction wherein attributable interest holders acquire a new attributable interest a mere four days after the Auction No. 37 Form 175 filing deadline (and over two months before release of the *Auction No. 37 Qualified Bidders Public Notice* and three months prior to the auction itself) falls into the category of “any change” that would affect eligibility for or diminishment of the new entrant bidding credit. Just as clearly, Matinee did not file the required amendment under Section 1.65. We are troubled by Matinee’s apparent attempt to manipulate the new entrant bidding credit rule. The Commission has made clear that it will address such conduct on a case-by-case basis.²⁶ We find it particularly illuminating that other Auction No. 37 bidders promptly reported changes in attributable interests, bidding credit eligibility, and reductions in originally claimed new entrant bidding credits.²⁷ To

²² Petition at 6.

²³ *Auction No. 37 Qualified Bidders Public Notice*, 19 FCC Rcd at 19777 (emphasis added).

²⁴ *Id.* (emphasis added).

²⁵ *Id.*

²⁶ See *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 8724, 8767-68 (1999) (addressing assertion that Commission must establish a rule preventing applicants from divesting attributable interests pre-auction to qualify for the new entrant bidding credit, only to re-acquire them after the auction: “The Commission cannot . . . anticipate in advance every possible way in which a small number of prospective bidders may conceive to try to manipulate our broadcast auction rules in general and any special measures, such as bidding credits, in particular. Given our past experience with conducting auctions, we are confident that this number of bidders should be quite limited. Accordingly, we believe it appropriate to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the new entrant bidding credit.”).

²⁷ For example, applicant World Radio Link, Incorporated (“WRL”) filed a post-Form 175 filing deadline amendment to its Form 175 application, reporting that one of its attributable interest holders, after the short-form filing deadline, acquired an attributable interest in a medium of mass communications. Consequently, WRL’s bidding credit eligibility was reduced from 35 percent to 25 percent. During Auction No. 37, bidders Aurora Communications, Inc. (“Aurora”) and RuDex Broadcasting, Limited (“RuDex”) amended their Form 175 applications to reflect a loan received from a third party holding attributable interests in media of mass communications, subsequently losing their claimed bidding credits. Aurora’s and RuDex’s amendments were reported to other Auction No. 37 bidders via the Commission’s auction “bulletin board.” WRL, Aurora, and

allow Matinee to retain its full 35 percent bidding credit despite its failure to report a similar change would be manifestly unfair to those applicants who read, understood, and followed the auction procedures.

We also reject Matinee's argument that, because the Commission's pronouncements in this area were supposedly ambiguous, we may not "penalize" it by reducing its bidding credit from 35 to 25 percent. First, for the reasons stated above, we reject as frivolous Matinee's contention that Commission policies in this regard are ambiguous. Second, while Matinee cites a number of cases for the proposition that the Commission may not "penalize" an applicant unless its rules are completely clear, each of these cases is distinguishable from the case before us. With one exception, each case Matinee cites involves the actual or potential dismissal of an application, or the potential denial of a license renewal – situations in which an applicant or licensee would lose its application or license.²⁸ The lone exception is the *Mercury PCS II, LLC* case,²⁹ which involved a potential forfeiture of \$650,000 for violations of the Commission's anti-collusion rules.

By way of contrast, in the instant case not only does Matinee *not* face dismissal or denial of its application, it does not even face the possibility of paying its full gross high bids. The "penalty" of which Matinee complains involves, not whether Matinee receives a discount from its gross high bids, but rather how deep a discount it receives. This is entirely dissimilar from the types of penalties faced by the parties in the cases Matinee cites. Here, there is no argument regarding the acceptability or grantability of Matinee's applications. Accordingly, *Salzer*³⁰ is inapposite, and Matinee's reliance on it and similar cases to establish alleged defects in the Commission's explication of new entrant bidding credit policies is therefore misplaced. Under the circumstances present here, the Commission is not subject to a letter-perfect standard regarding the application of its bidding credit rules.

CONCLUSION

We find no merit in Matinee's contentions. Matinee should have read and understood the Auction No. 37 public notices to require that it amend its Form 175 application to reflect the fact that its attributable interest holders acquired an attributable interest in a medium of mass communications four days after the August 6, 2004, filing deadline, and that the acquisition would cause a reduction of its new entrant bidding credit originally claimed on Form 175. We find that, given the holding in *Liberty* that

RuDex's Auction No. 37 filings may be accessed through the Commission's auctions Public Access Website, <http://auctionfiling.fcc.gov/form175/search175/index.htm>.

²⁸ *Bamford v. F.C.C.*, 535 F.2d 78 (D.C. Cir. 1976) (application for FM broadcast construction permit denied); *Salzer v. F.C.C.*, 778 F.2d 869 (D.C. Cir. 1985) ("*Salzer*") (low-power television applications dismissed); *Maxcell Telecom Plus, Inc. v. F.C.C.*, 815 F.2d 1551 (D.C. Cir. 1987) (cellular "fill-in" application dismissed); (*Satellite Broadcasting Company, Inc. v. F.C.C.*, 824 F.3d 1 (D.C. Cir. 1987) (OFS microwave application dismissed); *McElroy Electronics Corp. v. F.C.C.*, 990 F.2d 1351 (D.C. Cir. 1993) (cellular license applications dismissed); *Trinity Broadcasting of Florida, Inc. v. F.C.C.*, 211 F.3d 618 (D.C. Cir. 2000) (renewal application denied); *Abundant Life, Inc.*, 12 FCC Rcd 11724 (1997) (FM broadcast application dismissed for failure to pay hearing fees); *East River Electric Power Cooperative*, 18 FCC Rcd 15977 (2003) (site-based SMR license applications dismissed); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) (potential denial of license renewal applications); *CBS, Inc.*, 69 F.C.C.2d 1082 (1978) (potential designation of license renewal applications for hearing).

²⁹ 13 FCC Rcd 23755 (1998).

³⁰ *Salzer*, *supra* note 28, 778 F.2d at 875.

post-Form 175 filing deadline changes may cause reductions in a claimed new entrant bidding credit, Matinee's contrary interpretation of the Auction No. 37 public notices was not reasonable, nor is there ambiguity as to our rules in this regard. Because we find that those rules were clear, we find no controversy or clarification requiring relief under Section 1.2 of the Commission's rules.³¹

Accordingly, Matinee's Petition for Declaratory Ruling IS DENIED. Matinee's final auction payments are subject to a 25 percent new entrant bidding credit, rather than the 35 percent bidding credit it claims.

Sincerely,

Peter H. Doyle, Chief
Audio Division
Media Bureau

³¹ 47 C.F.R. § 1.2.