

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

Sainte Partners II, LP)
) Low Power Television Auction No. 81
)

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 2005

Released: September 20, 2005

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this order, we consider an application for review filed by Sainte Partners II, LP (Sainte) requesting reversal of a reconsideration order issued pursuant to delegated authority, as well as Sainte's request that we stay the beginning of competitive bidding in the Low Power Television Auction No. 81. For the reasons described below, we dismiss Sainte's application for review as untimely filed and deny the stay request.

II. BACKGROUND

2. Sainte filed an application to participate in Auction No. 81, together with associated engineering proposals. On February 28, 2005, the Media Bureau and the Wireless Telecommunications Bureau (hereinafter collectively referenced as the "Bureaus") released a public notice which announced *inter alia* that each of the named applicants to participate in Auction No. 81 was required to submit the applicant's FCC registration number (FRN) on or before March 18, 2005.¹ The same public notice specifically cautioned all Auction No. 81 applicants that a failure to submit an FRN by the specified deadline would result in the dismissal of the applicant's engineering proposals and in the applicant's ineligibility to participate in the auction. Sainte failed to submit its FRN by the specified deadline.² On April 13, 2005, the Bureaus by public notice dismissed all of the engineering proposals submitted by applicants that failed to submit an FRN, including two engineering proposals filed by Sainte.³ On May 12, 2005, Sainte filed a petition for reconsideration, requesting reinstatement of its two dismissed engineering proposals and acceptance of Sainte's FRN, submitted on May 12, 2005, 55 days after the announced deadline of March 18, 2005. In a decision released on July 8, 2005, the Chiefs of the Media Bureau's Video Division and the Wireless Telecommunications Bureau's Auctions and Spectrum Access Division denied Sainte's

¹ See "Applicants for Low Power Television Construction Permits to be Awarded in Auction No. 81 Must Submit Supplemental Information by March 18, 2005," 20 FCC Rcd 4127 (Media and Wireless Telecom. Burs. 2005) (*FRN Public Notice*). The *FRN Public Notice* described the procedures and provided instructions for submission of the Auction No. 81 applicant's FRN. See also Low Power Television Auction No. 81 Scheduled for September 14, 2005; Auction No. 81 Applicants Must Provide Supplemental Information by March 18, 2005; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, 20 FCC Rcd 4129 (Media and Wireless Telecom. Burs. 2005).

² Sainte's Application for Review at 3.

³ See "Low Power Television Auction No. 81 Scheduled for September 14, 2005, Auction Inventory Revised," 20 FCC Rcd 7878 (Media and Wireless Telecom. Burs. 2005).

reconsideration petition.⁴ On August 10, 2005, Sainte filed an application for review, requesting grant of its petition for reconsideration and reinstatement, reinstatement of its two dismissed engineering proposals, and restoration of Sainte's eligibility to participate in Auction No. 81.⁵ Also on August 10, 2005, Sainte filed a Request for Stay of Auction No. 81.⁶

III. DISCUSSION

3. Any person aggrieved by any action taken under delegated authority is permitted by 47 U.S.C. § 155(c)(4) to file an application for review within the time specified and in such manner as the Commission may prescribe. The Commission prescribed the time period for filing applications for review in 47 C.F.R. § 1.115. According to 47 C.F.R. § 1.115(d),⁷ an application for review must be filed within thirty days of public notice of such action, as that date is defined by 47 C.F.R. § 1.4(b).⁸ For calculating Sainte's filing deadline, the release of the *Reconsideration Decision* on July 8, 2005 constituted public notice of the action taken by the two divisions on delegated authority.⁹ Because the thirty-day period for filing an application for review began on July 9, 2005, Sainte was required to file its application for review no later than August 8, 2005.¹⁰ Sainte did not file its application for review until August 10, 2005, two days late.

4. Contrary to the assertion made in its pleading,¹¹ we find that Sainte's application for review was late-filed, and thus does not comply with Section 1.115(d). We are not persuaded that the

⁴ Letter to Gregg P. Skall, Esq., DA 05-1919 (Video and Auctions Divs. July 8, 2005) (*Reconsideration Decision*). After its release, a copy of this decision was sent by facsimile to Mr. Skall on July 8, 2005.

⁵ Sainte's Application for Review at 9-10.

⁶ Sainte Request for Stay of Auction No. 81.

⁷ In pertinent part, 47 C.F.R. § 1.115(d) provides: "[T]he application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). . . ."

⁸ In pertinent part, 47 C.F.R. § 1.4(b)(2) provides:

Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by . . . Commission . . . staff pursuant to delegated authority is the *day after the day* in which public notice of that action is given. . . . [I]t is immaterial whether the first day is a "holiday." For purposes of this section, the term *public notice* means the date of any of the following events: . . .
(2) For non-rulemaking documents released by the Commission or staff . . . the release date.

(emphasis in original.)

⁹ As specified in 47 C.F.R. § 1.4(b)(2), the release date is the public notice date for non-rulemaking documents. Applications of Transit Mix Concrete and Material Co., *Memorandum Opinion and Order*, 16 FCC Rcd 15005, 15008 ¶ 8 (2001) (*Transit Mix*). "Applications for Review must be filed within thirty days of public notice, which means the release date for non-rulemaking document." Charles T. Crawford, *Order*, 17 FCC Rcd 2014, 2018 ¶ 11 (2002). "Filings after this time period are untimely and are dismissed without consideration." *Transit Mix*, 16 FCC Rcd at 15008 ¶ 8.

¹⁰ Beginning to count on July 9, the thirtieth day as prescribed by 47 C.F.R. § 1.4(b)(2) was Sunday, August 7, 2005. Pursuant to 47 C.F.R. §§ 1.4(e) and (j), Sainte's filing deadline was Monday, August 8, 2005.

¹¹ Sainte's statements on this topic are limited to two sentences in a footnote. "The Letter appeared on Public Notice July 11, 2005. Accordingly, this application for review is timely." Sainte Application for Review at 1 n.1. However, there was no Commission document entitled "Public Notice" issued for the Sainte Reconsideration Decision. If Sainte is asserting that the "Daily Digest" issued on July 11, 2005 is a Commission document entitled "Public Notice" for purposes of Section 1.4(b), Sainte's argument fails. *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 394, 395 (D.C. Cir. 1974) (finding significant, for purposes of determining a filing deadline, the
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public interest would be served by ignoring Sainte's failure to comply with the requirements of Section 1.115(d). The Commission has ruled previously that enforcement of the procedural rules, including periods for filing applications for review, is necessary in order to manage the agency decision-making process in an efficient manner.¹² Our enforcement of the Commission's procedural rules promotes orderliness and finality in the administrative process and thereby contributes to the public interest.¹³ Therefore, we conclude that Sainte's untimely application for review must be dismissed.¹⁴

5. In its request for stay, Sainte asks us to postpone the commencement of competitive bidding in Auction No. 81, or, at a minimum, the commencement of competitive bidding for the two mutually-exclusive groups to which Sainte's two engineering proposals were assigned, "until such time as Sainte's [engineering proposals] have been restored and Sainte is able to participate in Auction [No.] 81 or until it has exhausted its rights of appeal."¹⁵ Sainte's motion is grantable if it can show that: (i) Sainte is likely to prevail on the merits; (ii) Sainte 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.¹⁶ Sainte fails to meet the standard for a stay of Auction No. 81. Because Sainte's application for review is fatally flawed and is herein dismissed, we have already found that Sainte is not likely to prevail on the merits.¹⁷ Accordingly, we need not inquire further into the other factors necessary for a grant of a stay.¹⁸ For this reason, we hereby deny Sainte's stay request.¹⁹

IV. ORDERING CLAUSES

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Commission's rules of practice which "incorporate the thesis that 'public notice' of adjudicative action is public release of the text of the adjudicatory document in its entirety," and "not a mere news summary emanating from the Commission's Information Office.")(footnotes omitted.).

¹² See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 15 FCC Rcd 10565, 10566 ¶ 3 (2000).

¹³ The U.S. Court of Appeals for the District of Columbia Circuit counseled the Commission not to accept such untimely submissions. "[T]his Court has . . . gone so far as to discourage the Commission from entertaining late-filed pleadings It follows that the Commission did not abuse its discretion by dismissing the untimely arguments." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (citing *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 - 200 (D.C. Cir. 2003)).

¹⁴ Pursuant to Section 0.331(c), the Wireless Telecommunications Bureau may dismiss any application for review that does not comply with the filing requirements of Section 1.115(d).

¹⁵ Sainte Request for Stay of Auction No. 81 at 2.

¹⁶ See *Virginia Petroleum Jobbers Assn v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

¹⁷ Sainte is also unlikely to prevail if it should decide to challenge our dismissal of its Application for Review on untimeliness grounds. See *BDPCS, Inc. v. FCC*, 351 F.3d 1177.

¹⁸ See Powell Meredith Communications Company, *Memorandum Opinion and Order*, 19 FCC Rcd 12,672, 12,675-76 (2004) (upholding denial of motion for stay of auction where movant had not shown it would prevail on the merits).

¹⁹ On July 8, 2005, prior to the release of the *Reconsideration Decision* on the same day, Sainte submitted a Petition for Postponement of Auction No. 81 Remedial Filing Window Deadline. In light of the denial of Sainte's reconsideration petition on July 8th, Sainte's postponement petition was rendered moot. Accordingly, we hereby dismiss Sainte's postponement petition. On July 8, 2005, Sainte also submitted a Request for Waiver and Reinstatement. On August 1, 2005, Sainte by letter requested withdrawal of its waiver and reinstatement request. We hereby grant Sainte's withdrawal request.

6. ACCORDINGLY, IT IS ORDERED that, pursuant to 47 U.S.C. §§ 154(i), 155(c), 309(j) and 405, and 47 C.F.R. § 1.115, the Application for Review filed by Sainte Partners II, LP IS HEREBY DISMISSED for failure to comply with the requirements of 47 C.F.R. § 1.115.

7. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. §§ 154(i), 155(c), 309(j) and 405, and 47 C.F.R. §§ 1.41, 1.43, and 1.44, the Request for Stay of Auction No. 81 filed by Sainte Partners II, LP IS HEREBY DENIED.

8. These actions are taken under authority delegated pursuant to 47 C.F.R. §§ 0.131 and 0.331(c).

FEDERAL COMMUNICATIONS COMMISSION

Catherine W. Seidel
Acting Chief
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