

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Intelligent Transportation & Monitoring Wireless)
LLC and AMTS Consortium, LLC)
)
Petition for Declaratory Ruling and Motion for)
Stay of Auction No. 65)
)

ORDER

Adopted: May 9, 2006

Released: May 9, 2006

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (“Bureau”) has before it a petition for declaratory ruling and motion for stay of Auction No. 65 submitted on May 1, 2006, by Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC (together, the “Havens Parties”).¹ The Petition seeks an interpretation of the rules governing 800 MHz Air-Ground Radiotelephone Service licenses, for which an auction, Auction No. 65, is scheduled to begin on May 10, 2006, and requests that the auction be delayed until at least 21 days after any such ruling is released. For the reasons set forth below, we deny the request for declaratory ruling and dismiss the motion for stay as moot.

II. BACKGROUND

2. On February 22, 2005, the Commission released the *Air-Ground Order*, in which it adopted a flexible regulatory approach to determine the future band configuration of the four megahertz of dedicated spectrum in the 800 MHz commercial Air-Ground Radiotelephone Service.² Based on the band configuration proposals submitted by interested parties in the proceeding, the Commission decided to assign nationwide air-ground licenses under one of three alternative band configurations, implementing the band plan receiving the highest gross aggregate bid in an auction.³ In light of specific circumstances

¹ Petition for Declaratory Ruling and Motion for Stay and Rescheduling of Auction 65 of Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, submitted electronically on May 1, 2006 (“Petition”). Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC are each controlled by Warren C. Havens. See FCC Form 175 for Auction No. 65 filed by Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC. Short-form applications and other information concerning Auction No. 65 may be viewed at: <http://wireless.fcc.gov/auctions/65/>.

² Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review — Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, WT Docket Nos. 03-103 and 05-42, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403 (2005) (“*Air-Ground Order*”).

³ *Air-Ground Order*, 20 FCC Rcd at 4405-06 ¶ 1, 4418-22 ¶¶ 24-32.

relating to this spectrum, the Commission prohibited any party from obtaining a controlling interest, either at auction or by a post-auction transaction, in more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz air-ground band.⁴ The Commission also requested comment on competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service.

3. On December 9, 2005, the Commission released the *Air-Ground Reconsideration Order* and R&O, in which it resolved petitions for reconsideration of the *Air-Ground Order* and adopted competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service.⁵

4. On February 21, 2006, the Bureau released its *Auction 65 Procedures Public Notice* announcing the filing deadline for short-form applications (FCC Form 175), minimum opening bids and other procedures for Auction No. 65.⁶ The *Auction 65 Procedures Public Notice* described procedures pursuant to which this auction will offer nationwide commercial licenses in the 800 MHz band in three alternative band configurations, and that licenses in only one of the three mutually incompatible band configurations will be awarded.

5. On May 4, 2006, the Bureau released a public notice explaining that the computerized competitive bidding system for Auction No. 65 has been programmed to recognize -- from the information provided in potential bidders' short form applications -- any bids that would run afoul of the Commission's rule that prohibits an individual or entity from holding, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum.⁷ Specifically, the *Auction 65 Supplemental Procedures PN* explains that the system used in Auction No. 65 will not assign both licenses to any single applicant or to multiple applicants that, based on their short-form auction applications (FCC Form 175), share a common controlling interest. Accordingly, since the Havens Parties report on their short-forms that they share a common controlling interest, the Auction No. 65 system will prevent them from both becoming winning bidders in that auction.⁸

⁴ *Id.*, 20 FCC Rcd at 4423-27 ¶¶ 37-44. This eligibility restriction may be found at section 22.853 of the Commission's rules. 47 C.F.R. § 22.853. For purposes of this prohibition, the Commission explained that it would apply the definitions of "controlling interests" and "affiliate" currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules. See *Air-Ground Order*, 20 FCC Rcd at 4427 ¶ 44.

⁵ Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review — Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, WT Docket Nos. 03-103 and 05-42, *Order on Reconsideration and Report and Order*, 20 FCC Rcd 19663 (2005) ("*Air-Ground Reconsideration Order and R&O*").

⁶ "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 65," *Public Notice*, DA 06-299 (rel. February 21, 2006) (71 Fed. Reg. 11645, March 8, 2006) ("*Auction No. 65 Procedures Public Notice*"). The Bureau had previously sought comment on proposed procedures for Auction No. 65, consistent with the requirements of the Communications Act of 1934, as amended, and the Commission's rules. See *Auction 65 Comment Public Notice*.

⁷ "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Clarification of Treatment of Bids by Bidders Sharing a Controlling Interest," *Public Notice*, DA 06-984 (rel. May 4, 2006) ("*Auction 65 Supplemental Procedures PN*").

⁸ See *id.* n. 4.

III. DISCUSSION

A. Request for Declaratory Ruling

6. The Havens Parties pose four questions relating to the 800 MHz Air-Ground Service eligibility restriction, which is found at Section 22.853 of the Commission's rules.⁹ Each question in the Petition is followed by additional argument concerning rules established by the Commission's *Air-Ground Order*, which the Havens Parties now believe warrant further clarification. The Havens Parties concede that they did not participate in the rulemakings that established these services rules, and only recently became interested in this auction and the 800 MHz Air-Ground Service. As explained below, to the extent that the Havens Parties seek clarification on how the Auction No. 65 Procedures will apply the Air-Ground eligibility restriction to their auction participation, the *Auction No.65 Supplemental Procedures PN* provides that clarification. However, to the extent that the Havens Parties seek a definitive pre-auction ruling concerning eligibility to hold an Air-Ground license based on the type of factual information that is not required to be submitted until after the auction (and only then, by the winning bidders), such questions are premature. Accordingly, the request for declaratory ruling is denied.

1. Questions One and Four

7. The Petition first asks whether the term "controlling interests" as used in Section 22.853 of the Commission's rules is intended to include all "affiliates" as defined by Section 1.2110.¹⁰ The Petition cites a passage from the *Air-Ground Order* which states that the Commission "will apply the definitions of 'controlling interests' and 'affiliate' currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules."¹¹ The Petition continues by stating that this language "appears to mean but does not clearly state that the definitions of 'controlling interests' and 'affiliates' in ... Sections 1.2110(c)(2) and 1.2110(c)(5) will be used" for purposes of applying the eligibility restriction.¹² The Havens Parties' fourth question also seeks clarification of language in the *Air-Ground Order* concerning the Commission's intent underlying its decision to apply the definitions of "controlling interests" and "affiliate" set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules in applying the Air-Ground eligibility restriction.¹³

8. While these questions on their face appear to ask for an interpretation of the Commission's *Air-Ground Order* and service rules, we note that, as the Havens Parties acknowledge, the *Air-Ground Order* and Section 22.853 of the Commission's rules expressly:

- prohibit anyone from holding a "controlling interest" in licenses authorizing the use of more than three megahertz of this spectrum.
- apply the definitions of "controlling interests" and "affiliate" in Sections 1.2110 (c)(2) and (c)(5) of the Commission's rules.

These provisions provide great detail about what constitutes a controlling interest, including specific guidance on when entities are deemed to have control on the basis of their affiliation.

⁹ See Petition at 6-10.

¹⁰ See Petition at 7-8.

¹¹ Petition at 7, citing *Air-Ground Order*, 20 FCC Rcd at 4427 ¶ 44.

¹² Petition at 7.

¹³ See Petition at 9-10.

9. However, to the extent that the Havens Parties merely seek an explanation of how the procedures of Auction No. 65 will apply to them, the Bureau's *Auction No. 65 Supplemental Procedures PN* stated that the auction procedures would not assign both licenses to them because they both report on their auction applications that they are controlled by Warren Havens.¹⁴ Accordingly, we do not need to look further behind the words of the *Air-Ground Order* and Section 22.853 of the Commission's rules and the request for a declaratory ruling is denied.

10. Alternatively, to the extent that the Havens Parties now seek a ruling in advance of the auction about how certain service rules will be applied to the particular circumstances of individual applications, we find that such questions are premature. The Havens Parties appear to misunderstand the nature of the Commission's review of short-form applications and the role of short-form applications in the license assignment process. The *Auction 65 Procedures Public Notice* clearly explains:

An application to participate in an FCC auction, referred to as a short-form application or FCC Form 175, provides information used in determining whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits. The short-form application is the first part of the Commission's two-phased auction application process. In the first phase of this process, parties desiring to participate in the auction file streamlined, short-form applications in which they certify under penalty of perjury as to their qualifications. Eligibility to participate in bidding is based on the applicant's short-form application and certifications as well as its upfront payment In the second phase of the process, winning bidders file a more comprehensive long-form application.¹⁵

Consequently, while eligibility to participate in an auction and a participant's status as a winning bidder at the close of the auction represent a preliminary determination that an applicant appears to be qualified based on information provided on the short-form application, neither constitutes a final determination of eligibility to hold an Air-Ground license under the Commission's rules.¹⁶

11. As the Bureau explained in addressing a similar petition (and associated motion for stay) filed by another entity controlled by Mr. Havens in advance of Auction No. 39, eligibility to participate in an auction and eligibility to hold a license are two different issues that are determined at different stages of the licensing process.¹⁷ In rejecting the Havens-controlled entity's challenge to another applicant's eligibility to hold a license and its associated motion for stay of the auction in that instance, we observed that:

A determination that an applicant is eligible to participate in an auction . . . is merely indicative that the applicant has passed the Commission's initial screening process. It

¹⁴ *Auction 65 Supplemental Procedures PN*.

¹⁵ *Auction 65 Procedures Public Notice* at ¶ 43.

¹⁶ *See Auction 65 Supplemental Procedures PN*.

¹⁷ *See Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, Order*, 17 FCC Rcd 19746, 19749 – 50 ¶ 7 (Wireless Telecomm. Bur. 2002).

does not preclude the Commission from subsequently determining that the applicant is ineligible ... for grant of a license. This is true because the Commission adopted a two-phased approach to the review of auction applications and winning bidders' qualifications.¹⁸

Accordingly, to the extent that the Havens Parties are now seeking a ruling in advance of the auction about how the rules may be applied to the circumstances of any particular winning bidders at the close of Auction No. 65 or whether particular entities are qualified to hold Air-Ground licenses, such questions are premature and the request for a declaratory ruling is denied.¹⁹

2. Question Two

12. The Havens Parties' second question asks whether the eligibility restriction prohibits all bidding agreements among Auction No. 65 applicants. In posing this question, the Havens Parties fail to acknowledge the passage in the *Auction 65 Procedures Public Notice* which provides detailed guidance to applicants in Auction No. 65 that have such agreements and discusses the disclosure requirements set forth in the rules concerning such agreements.²⁰ Again, to the extent that the Havens Parties ask how the Auction No. 65 procedures will apply to their circumstances, the Bureau has already answered that question.²¹ In addition, with respect to permitted agreements between auction applicants, we note that while our finding of an applicant's qualification to participate in an auction constitutes a preliminary determination that the applicant will be able to hold the license -- based on the information provided in the short form application -- we do not make any kind of final assessment of that applicant's eligibility to meet all of the requirements to hold a license as set forth in the rules for the relevant service until after the auction closes, based on the more detailed information that the long form application process provides. Thus, we are able to avoid the delay and inefficiency that would attend such an examination of each bidder prior to the auction. Accordingly, to the extent the Petition is requesting such a pre-auction evaluation with respect to the Havens Parties' compliance with the Section 22.853 eligibility restriction, we believe that such a request is premature.

3. Question Three

13. The Petition's third question is predicated on a negative response to the second question and asks whether Section 22.853 would prevent qualified bidders with a bidding agreement from becoming the provisionally winning bidder on the two licenses being offered in any of the band plans. As mentioned above, the *Auction 65 Procedures Public Notice* explicitly contemplates participation in the auction by applicants that have entered into agreements and which have been properly disclosed. Also as noted above, the Bureau's *Auction No. 65 Supplemental Procedures PN* has stated that the system used in Auction No. 65 will not assign both licenses to any single applicant or to multiple applicants (such as the Havens Parties) that, based on their short-form auction applications, share a common controlling interest.²² As discussed in that public notice, for Auction No. 65 at the end of each bidding round, the

¹⁸ *Id.* (citation omitted). We note that other Havens-controlled entities also sought a stay of Auction No. 57, but subsequently withdrew that request. See Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification, *Order*, 19 FCC Rcd 20482 (WTB 2004).

¹⁹ All applicants must certify on their short-form applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license. 47 C.F.R. § 1.2105(a)(2)(v). Bidders are responsible for ensuring that they remain in compliance with all applicable rules both during and after the close of the auction.

²⁰ See *Auction 65 Procedures Public Notice* at ¶ 11 *et seq.*

²¹ See *Auction 65 Supplemental Procedures Public Notice*.

²² *Id.*

FCC Auction System will determine which combination of licenses comprising a single band plan has the highest aggregate gross bid amount by considering all of the bids that have been placed in the auction subject to the restriction that neither a single bidder nor multiple bidders sharing a common controlling interest, as disclosed on their short-form auction applications, can have more than one provisionally winning bid.²³ We reiterate, however, that actions of and within the bidding system are not a final determination of eligibility to become a provisionally winning bidder or hold Air-Ground licenses.

B. Motion for Stay of Auction No. 65

14. In their Motion for Stay, the Havens Parties ask that the start date of Auction No. 65 be postponed until at least 21 days after the Commission releases a declaratory ruling addressing the questions the Havens Parties raise in their Petition, or in the alternative, 21 days after release of a public notice addressing any new, amended or dismissed short-form applications resulting from such a declaratory ruling. Because we deny the Havens Parties' request for a declaratory ruling, we dismiss the Motion for Stay as moot.²⁴

15. In any event, the Havens Parties' motion would be grantable only if they could show that: (i) they are likely to prevail on the merits; (ii) they 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.²⁵ The Havens Parties fail to meet the standard for a stay of Auction No. 65. The Havens Parties have failed to demonstrate that they would suffer irreparable harm in the absence of a stay. An injury qualifies as "irreparable harm" only if it is both certain and great, it must be actual and not theoretical.²⁶ Thus, to demonstrate irreparable harm, the Havens Parties must provide "proof indicating that the harm it alleges is certain to occur in the near future."²⁷ The Havens Parties have supplied no such proof. As noted above, the Commission's rules can be unambiguously applied to their short-form applications to participate in Auction No. 65.²⁸ Moreover, the Bureau's *Supplemental Procedures PN* explains how the previously-announced procedures for Auction No. 65 will apply to applicants with a common controlling interest disclosed on their short-form applications.

16. Finally, we do not agree with the Havens Parties' contention that a postponement of Auction No. 65 would serve the public interest. We believe that the public interest is best served by maintaining the current auction schedule. Two of the primary goals of the Commission's auction program are to ensure the development and rapid deployment of new technologies, products, and services for the benefit

²³ *Id.*

²⁴ See, e.g., *Sainte Partners II, LP, Memorandum Opinion and Order*, 20 FCC Red 14723 (WTB 2005).

²⁵ 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).

²⁶ *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. 1985).

²⁷ *Id.*

²⁸ See *FCC v. Radiofone, Inc.*, 516 U.S. 1301 (Stevens, Circuit Justice 1995) (vacating stay of FCC spectrum auction on ground that allowing auction to go forward would not defeat the power of Court of Appeals to grant appropriate relief in the event respondent overcomes the presumption of validity that supports the FCC regulations).

of the public without delays, and promote the efficient and intensive use of the electromagnetic spectrum.²⁹ These goals can best be met by moving forward with the Auction No. 65 license assignment process and by maintaining the announced auction schedule.³⁰

IV. CONCLUSION

17. Accordingly, it is ORDERED, pursuant to Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), and Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition for Declaratory Ruling and Motion for Stay and Rescheduling of Auction 65 of Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC on May 1, 2006 IS HEREBY DENIED, to the extent discussed above, and IS OTHERWISE DISMISSED.

18. It is FURTHER ORDERED that copies of this Order will be sent to the Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC and their representatives by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁹ 47 U.S.C. § 309(j)(3)(A) and (D).

³⁰ *See, e.g.*, Motion of Ranger Cellular and Miller Communications, Inc. for a Stay of Auction No. 45, 17 FCC Rcd 9320, 932 (WTB 2002) (explaining that if parties' general arguments for granting a stay were accepted, subsequent spectrum auctions would be at risk of substantial postponement pending review of the myriad issues that parties raise in attempts to circumvent auctions for their individual purposes).