

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

In the Matter of)
)
Request for Postponement of Auction No. 62)
)

ORDER

Adopted: January 23, 2006

Released: January 23, 2006

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

I. INTRODUCTION AND BACKGROUND

1. We have before us a request submitted by Fireside Media (“Fireside”) for postponement of the Commission’s upcoming auction of FM radio construction permits (Auction No. 62), which began as scheduled on January 12, 2006.¹ In its *Request*, Fireside asks that the start of the bidding be postponed until the Commission resolves its pending request for relief from withdrawal payment obligations that Fireside incurred as a result of its withdrawal of high bids during the Commission’s previous FM auction (Auction No. 37).² The basis for both the *Request* and the underlying *Petition for Reconsideration* is Fireside’s belief that the Commission has “no rational basis” for assessing withdrawal payments upon Fireside in the absence of “wrongdoing or misconduct” by Fireside during Auction No. 37. Fireside claims that holding the auction as scheduled will cause it irreparable harm because it would be denied its right to seek reconsideration of its bid withdrawal payment obligation.³ For the reasons discussed below, we dismiss Fireside’s *Request* and decline to postpone the start of the bidding in Auction No. 62.

2. Prior to Auction No. 37, pursuant to statutory requirement, the Wireless Telecommunications and Media Bureaus (“Bureaus”) jointly released a public notice outlining the terms, conditions, and procedures for the Commission’s initial auction of FM radio construction permits.⁴ As with most other auctions, the Bureaus announced that each bidder would be permitted limited ability to withdraw high bids submitted during the auction – namely, each bidder could withdraw bids in no more than two rounds during the course of the auction. The *Auction No. 37 Procedures PN* also clearly warned potential bidders that: “Withdrawals during the auction will be subject to the bid withdrawal payments specified in

¹ Urgent Request for Postponement of FM Auction No. 62 As Presently Scheduled to Commence January 12, 2006 and Addendum to Fireside Media’s Existing Appeal of DA 04-3694 of Fireside Media (filed Jan. 10, 2006) (“*Request*”).

² See *Petition for Reconsideration of Bidder Withdrawal Payment Penalties Assessed Against Fireside Media Upon Conclusion of FM Auction No. 37, Under FCC Notice DA 04-3694 of Fireside Media* (filed Jan. 3, 2005) (“*Petition for Reconsideration*”). See *FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, Public Notice*, 20 FCC Rcd 1021 (WTB/MB 2004) (“*Auction No. 37 Closing PN*”).

³ See *Request* at 2-3, 6.

⁴ See *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*, 19 FCC Rcd 10570 (WTB/MB 2004) (“*Auction No. 37 Procedures PN*”).

47 C.F.R. § 1.2104(g).⁵ The *Auction No. 37 Procedures PN* included two paragraphs which described how the interim and final payments required by Section 1.2104(g) of the Commission's competitive bidding rules are calculated.⁶ The *Auction No. 37 Procedures PN* noted that section 1.2104(g)(1) provides that in instances in which bids have been withdrawn on a construction permit that is not won in the same auction, the Commission will assess an interim withdrawal payment.⁷

3. Fireside applied to participate in Auction No. 37 and was found qualified to participate in the auction.⁸ During the course of the auction, Fireside withdrew high bids that it had submitted on four construction permits, and three of those permits remained unsold at the end of Auction No. 37.⁹ As a result, Fireside became liable for bid withdrawal payments upon the close of the auction pursuant to section 1.2104(g). On December 1, 2004, the Wireless Telecommunications and Media Bureaus jointly released a public notice announcing the close of the bidding in Auction No. 37.¹⁰ Among other things, that public notice identified winning bidders in Auction No. 37 and quantified the interim withdrawal payment amounts for those bidders that withdrew high bids submitted during the auction.¹¹

4. Auction No. 62 was initially scheduled to begin on November 1, 2005.¹² In order to provide additional time for bidder preparation and planning in the aftermath of Hurricane Katrina, on September 21, 2006, the Commission rescheduled Auction No. 62 to begin on January 12, 2006.¹³ Fireside did not

⁵ *Id.*, 19 FCC Rcd at 10602-04.

⁶ *Id.*

⁷ "The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed after subsequent auction of the construction permit. Assessing an interim bid withdrawal payment ensures that the Commission receives a minimal withdrawal payment pending assessment of any final withdrawal payment." *Id.*, citing 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, 15302 ¶ 15 (2000).

⁸ See Auction of FM Broadcast Construction Permits; 456 Qualified Bidders to Participate in Auction No. 37, *Public Notice*, 19 FCC Rcd 19773 (WTB/MB 2004).

⁹ In particular, Fireside withdrew high bids on the following construction permits: Whitehall, MT (FM185), Breckenridge, TX (FM277) Manville, WY (FM352), and Eureka, MT (FM 171). Subsequent to its withdrawal on the Eureka, MT permit, another bidder placed a winning bid in an amount lower than the bid that Fireside had withdrawn.

¹⁰ See *Auction No. 37 Closing PN*, 20 FCC Rcd 1021 (WTB/MB 2004).

¹¹ *Id.*, Attachment C. The *Auction No. 37 Closing PN* shows that this amount is comprised of a final withdrawal payment amount of \$8,250 for the Eureka permit, as well as three percent (3%) interim withdrawal payment amounts specified of \$1,710 for the Whitehall permit, \$4,613 for the Breckenridge permit, and \$2,745 for the Manville permit.

¹² See Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 7999 (WTB/MB 2005) ("*Auction No. 62 Comment Public Notice*"); See Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 10492 (WTB/MB 2005) ("*Auction No. 62 Procedures Public Notice*").

¹³ FM Broadcast Auction Start Date Rescheduled for January 12, 2006, *Public Notice*, 20 FCC Rcd 14720 (WTB/MB 2005).

file an application to participate in Auction No. 62 and thus is not a qualified bidder in the auction.¹⁴ On January 10, 2006, Fireside filed its *Request*.

II. DISCUSSION

5. We consider Fireside's *Request* to be an informal request for action under Section 1.41 of the Commission's rules.¹⁵ Fireside contends that it will suffer "irreparable damage" if the bidding goes forward because it will be "assessed crippling monetary penalties at the conclusion of Auction No. 62" unless its *Petition for Reconsideration* is first decided.¹⁶ We disagree. An injury qualifies as "irreparable harm" only if it is "both certain and great; it must be actual and not theoretical."¹⁷ Therefore, to demonstrate irreparable harm, Fireside must provide "proof indicating that the harm [it alleges] is certain to occur in the near future."¹⁸ Fireside has not supplied such proof. Fireside has not demonstrated any specific harm to it from proceeding with the current auction schedule.

6. Fireside does not explain how the timely start of Auction No. 62 will harm its ability to challenge the bid withdrawal payment imposed pursuant to section 1.2104(g)(1) as a result of its participation in Auction No. 37. Fireside's claim that the start of Auction No. 62 would prevent it from seeking reconsideration of its bid withdrawal payment obligation is erroneous. In the event that the permits on which Fireside withdrew its bids receive subsequent bids in Auction No. 62, those subsequent bids will not determine the issues raised in Fireside's *Petition for Reconsideration*, in which Fireside argues that the bid withdrawal payment provisions of section 1.2104(g)(1) should not apply to it.¹⁹ The subsequent bids in Auction No. 62 will only be used to calculate the amount of Fireside's bid withdrawal payment, should Fireside's *Petition for Reconsideration* be denied. In fact, if all of the permits on which Fireside withdrew its bids receive valid bids in Auction No. 62 that are equal to or greater than Fireside's withdrawn bids, then no final bid withdrawal payment will be assessed against Fireside, and its *Petition for Reconsideration* will be moot.

7. We also find that granting Fireside's *Request*, submitted just a few days prior to the scheduled start of the auction, would harm the applicants to participate in Auction No. 62 that have already undertaken numerous efforts to prepare for the auction, including developing business plans, assessing market conditions, and securing any needed financing, and those that have expended financial and other resources in the expectation that an auction would begin on January 12, 2006. As of the start of the bidding, 214 applicants were qualified to participate in the bidding.²⁰ Postponing the auction might place at risk applicants' financing arrangements, upset their strategic planning, and undermine the public benefit in having the auction at the earliest reasonable date. We find that Fireside's *Request* does not provide adequate justification to postpone the auction, and, accordingly, deny the *Request*.

¹⁴ *Request* at 2.

¹⁵ 47 C.F.R. § 1.41.

¹⁶ *See id.* at 2-3, 6.

¹⁷ *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹⁸ *Id.*

¹⁹ *Cf.* Motion of Ranger Cellular and Miller Communications, Inc. for a Stay of Auction No. 45, 17 FCC Rcd 9320 (WTB 2002) (stay of auction denied where completion of auction would have no effect on the requesting parties' ability to have their appeal decided and obtain appropriate relief if they prevail on the merits).

²⁰ Auction of FM Broadcast Construction Permits, 214 Bidders Qualified to Participate in Auction No. 62, *Public Notice*, DA 05-3204 (WTB/MB rel. Dec. 21, 2005).

8. Finally, we find that the public interest does not warrant a postponement of Auction No. 62. We believe that the public interest is best served by maintaining the current schedule. 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.²¹ These goals can best be met by moving forward with the Auction No. 62 construction permit assignment process and by maintaining the announced auction schedule.²² Thus, we find that the public interest would not be served by the grant of Fireside Media's request for a postponement.

III. CONCLUSION

9. 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, that the Urgent Request for Postponement of Auction No. 62 filed by Fireside Media on January 10, 2006, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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

²¹ See 47 U.S.C. § 309(j)(3)(A) and (D).

²² See, e.g., *Ranger Cellular and Miller Communications*, 17 FCC Rcd at 9322 (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).