



Federal Communications Commission
Washington, D.C. 20554

February 9, 2006

DA 06-321

In Reply Refer to:
1800B3-TSN

L.T. Simes, II and Raymond Simes
P.O. Box 2870
West Helena, AR 72390

Re: FM Broadcast Auction No. 37
L.T. Simes II and Raymond Simes
New(FM), Friars Point, Mississippi
Facility ID No. 164256
File No. BNPH-20050103AAV
Application for Construction
Permit

Dear Applicants:

Before the Audio Division is a Form 301 application (the "Simes Application") filed by L.T. Simes, II, and Raymond Simes (collectively, the "Simes") for a new FM broadcast station at Friars Point, Mississippi.¹ On March 11, 2005 (the "March Letter"), we informed you that, based on our review of the Simes Application, there was reason to believe that you did not qualify for the 25 percent new entrant bidding credit you claimed against your winning bid for the Friars Point construction permit. In the March Letter, we requested that you provide evidence and/or argument in support of your claim for the 25 percent new entrant bidding credit.

On April 1, 2005, Mr. L.T. Simes, II, on behalf of the Simes, responded to our March Letter. In his response, Mr. Simes claims that he accurately represented in the Simes' Form 175 application that neither partner had an attributable interest in more than three media of mass communications; that the Friar's Point allotment was in "another state, in a different Arbitron market and separated by the Mississippi River"; that the process of determining bidding credit eligibility was "flawed" in that engineering information was not required as part of Form 175; and that the Simes "detrimentally relied" on the Commission's "approving" the 25 percent bidding credit, and are thus "in jeopardy of losing all three (3) stations."

The Simes applied for four FM allotments in Auction No. 37: Cotton Plant, Arkansas; Elaine, Arkansas; Friars Point, Mississippi; and New Albany, Mississippi. They were the successful bidders for the Friars Point, Mississippi allotment. The Simes claim a 25 percent new entrant bidding credit against their winning auction bid for the Friars Point permit, having certified in both their Form 175 auction filing window application and their Form 301 post-auction application that they have attributable interests in only two other

¹ File Nos. BNPH-20050103AAV (FM159).

media of mass communication.² In a September 13, 2004, informational letter,³ the Commission noted that the Simes were not eligible to claim the new entrant bidding credit against their Auction No. 37 bids for the construction permit at Elaine, Arkansas, because it was in the same area as one of the stations in which the Simes have an attributable interest.⁴ In the Simes Acceptance Letter, however, the staff inadvertently indicated that the Simes could claim a 25 percent new entrant bidding credit for the other three FM permits.

An applicant may claim a 25 percent new entrant bidding credit when it has attributable interests in no more than three media of mass communications, as noted by Mr. Simes.⁵ However, our rules also provide that an applicant may not claim a new entrant bidding credit if the station for which it is applying is in the same area as a medium of mass communication in which it has an attributable interest.⁶ FM broadcast stations are considered to be in the “same area” if there is overlap between their principal community (70 dB μ) contours.⁷ This is true notwithstanding that the stations may be in different states and/or Arbitron Metros. The new entrant bidding credit eligibility requirements, including the “same area” restriction, were specifically enunciated in several pre-auction public notices.⁸ Furthermore, applicants are charged with knowledge of the auction rules,⁹ and the burden of providing information and demonstrating qualifications by the applicable deadlines falls upon the applicants.¹⁰

In a pre-auction filing window public notice, the Commission directed applicants to file, with Exhibit C to their FCC Form 175 applications, certification and support establishing their eligibility to claim a new

² See, e.g., Exhibit A to Form 175 filed by Raymond Simes in FM Broadcast Auction No. 37. Raymond Simes disclosed a 10 percent interest in station KCLT(FM), West Helena, Arkansas, and a 50 percent interest in KAKJ(FM), Marianna, Arkansas. L.T. Simes, II, disclosed a 45 percent interest in KCLT(FM) and a 50 percent interest in KAKJ(FM).

³ Letter to Mr. Raymond Simes, Ref. No. 1800B3-TSN (WTB Sept. 13, 2004) (“Simes Acceptance Letter”).

⁴ Public Notice, “Auction of FM Broadcast Construction Permits - 456 Bidders Qualified to Participate in Auction No. 37,” 19 FCC Rcd 19773, 19872 (MB/WTB 2004). See also 47 C.F.R. §§ 73.5007(a), (b) (no bidding credit if any of an applicant’s commonly owned mass media facilities serve the same area as the proposed broadcast station).

⁵ 47 C.F.R. § 73.5007(a).

⁶ Id., §§ 73.5007(a), (b).

⁷ Id. §§ 73.5007(b)(2)(ii), 73.5007(b)(3)(ii).

⁸ See, e.g., 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, 10586, 10615 (MB/WTB 2004) (“Auction 37 Procedures Public Notice”); Public Notice, “Auction of FM Broadcast Construction Permits – Status of FCC Form 175 Applications to Participate in Auction No. 37,” 19 FCC Rcd 17938, 17939 n.7 (MB/WTB 2004).

⁹ See Auction 37 Procedures Public Notice, 19 FCC Rcd at 10575.

¹⁰ See 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, 15324 (2000). See also 47 U.S.C. § 307(j)(5) (participation in auctions prohibited “unless such bidder submits such information and assurances as the Commission may require.”).

entrant bidding credit.¹¹ While they identified their two existing mass media interests in another portion of the Form 175 (in Exhibit A – Ownership), the Simes simply certified in Exhibit C to their general eligibility for the new entrant bidding credit, thus implying their entitlement to a 25 percent bidding credit for all four allotments selected in the application.¹² In the *Auction 37 Procedures Public Notice*, we specifically directed applicants claiming a 25 percent bidding credit to “identify and describe such media of mass communications” in addition to the required certification.¹³

The Simes attached to their post-auction Form 301 construction permit application for Friars Point a study demonstrating compliance with the Commission’s radio multiple ownership rules.¹⁴ Therein, the Simes multiple ownership study showed overlap of the 70 dB μ contours of KCLT(FM), in which the Simes have attributable interests, and the proposed new Friars Point FM broadcast station at the actual coordinates designated by the Simes.¹⁵ This overlap defeats the Simes’ claim of a 25 percent new entrant bidding credit against their winning bid for the Friars Point permit. As noted above, the Simes did not disclose this “same area” overlap (or, indeed, any overlap) in their Form 175 application, thus implicitly representing that they were eligible to claim the 25 percent new entrant bidding credit for all of the FM allotments on which they proposed to bid. The staff’s failure to note the Friars Point overlap in the Simes Acceptance Letter can thus be at least partly attributed to the Simes’ failure to disclose it. At most, the staff’s omission of this overlap from the Simes Acceptance Letter would constitute an inadvertent error, which may be corrected at any time.¹⁶

Moreover, applicants claiming new entrant status must include in their post-auction Form 301 application an exhibit demonstrating their eligibility for the bidding credit.¹⁷ Thus, any applicant’s eligibility

¹¹ See *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10585-86 (“An applicant claiming that it qualifies for a 25 percent new entrant bidding credit must provide a certification . . . and must identify and describe such media of mass communication.”) (emphasis added).

¹² See Exhibit C to Form 175 filed by Raymond Simes in FM Broadcast Auction No. 37. See also *supra* note 6.

¹³ Additionally, the Simes did not elect to specify preferred site coordinates for the Friars Point allotment, relying instead on the allotted coordinates. While the Simes claim the pre-auction application process is “flawed” by not requiring engineering information, such information is generally not necessary. Vacant allotments presume full class facilities with a transmitter at the specified allotment coordinates, with the Form 175 applicant having the option to specify preferred coordinates that differ from the allotment coordinates if desired. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15974-75 and n.153 (1998), *on recon.*, 14 FCC Rcd 8724, *on further recon.*, 14 FCC Rcd 14521(1999). However, this did not relieve applicants of their obligation to disclose any “same area” overlap with respect to new entrant bidding credit eligibility in Exhibit C to Form 175. See *Auction 37 Procedures Public Notice*, *supra* note 8, 19 FCC Rcd at 10585-86, 10614-15.

¹⁴ *Id.* § 73.3555(a).

¹⁵ Any prior contour overlap evaluation would have compared KCLT(FM) to the reference coordinates relied upon in the Simes’ Form 175 application.

¹⁶ See, e.g., *Zenith Electronics Corp. v. U.S.*, 884 F.2d 556, 560 (Fed. Cir. 1989) (“A number of cases have recognized the authority of an administrative agency to correct inadvertent, ministerial errors [citations omitted].”); *Robert Fetterman d/b/a RF Communications*, 16 FCC Rcd 8221, 8223 (2001).

¹⁷ *Public Notice*, “Auction of FM Broadcast Construction Permits – 456 Bidders Qualified to Participate in Auction No. 37,” 19 FCC Rcd 19773, 19781 (MB/WTB 2004) (“*Auction 37 Qualified Bidders Public Notice*”).

for the new entrant bidding credit is subject to further review once the applicant files Form 301. The Commission will make its final determination regarding an applicant's eligibility to hold a permit or license, including eligibility for the new entrant bidding credit, when it is ready to grant the permit or license. While the Simes, in their Form 301 application, merely reiterated the general bidding credit certification they made in their Form 175, the staff discovered the "same area" overlap during review of the multiple ownership exhibit to the Simes Application. Because the Simes Application now clearly shows a prohibited "same area" overlap, we must enforce our new entrant bidding credit rules and deny the bidding credit for the Friars Point allotment.

For the foregoing reasons, we find that the Simes do not qualify for a new entrant bidding credit against their final payment on the Friars Point, Mississippi allotment. When we announce, in a subsequent public notice, that the Friars Point allotment is ready for grant, we will calculate the Simes' final auction payment based on their gross winning auction bid, rather than the gross winning bid net of the claimed bidding credit.¹⁸ We remind the Simes that failure to remit full final payment in a timely manner will constitute default, and will subject them to the applicable penalties for bid default, notwithstanding any pending challenges to their bidding credit eligibility.¹⁹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁸ See *Auction 37 Qualified Bidders Public Notice*, 19 FCC Rcd at 19377 ("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.")

¹⁹ See *Delta Radio, Inc.*, 18 FCC Rcd 16889 (2003); 47 C.F.R. § 1.2109(c).