

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 )
Auction 65 Public Notice Regarding Long Form/ ) Report No. AUC-65
FCC Form 601 Applications Accepted for Filing ) DA 06-1520
Application of AC BidCo LLC for Authorization ) FCC File No. 0002653156
To Provide Air-Ground Radiotelephone Service in )
the 800 MHz Band )
Application of LiveTV LLC for Authorization To ) FCC File No. 0002658043
Provide Air-Ground Radiotelephone Service in the )
800 MHz Band )

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2007

Released: March 9, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the "Response to and Informal Request for Reconsideration of Order Regarding Petition for Declaratory Ruling and Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65" filed by Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC (together, the "Havens Parties" or "Petitioners") on May 10, 2006 ("Reconsideration Petition").

1 Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Response to and Informal Request for Reconsideration of Order Regarding Petition for Declaratory Ruling and Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65, filed on May 10, 2006 ("Reconsideration Petition").

2 Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Petition for Declaratory Ruling and Motion for Stay of Auction No. 65, Order, 21 FCC Rcd 5117 (WTB/ASAD 2006) ("Division Order").

eligibility restriction for 800 MHz Air-Ground Radiotelephone licenses set forth in Section 22.853 of the Commission's Rules.<sup>3</sup> In addition, we also address a Petition for Reconsideration filed by the Havens Parties<sup>4</sup> with respect to the applications of AC BidCo LLC ("AC BidCo") and LiveTV LLC ("LiveTV") for authorization to provide Air-Ground Radiotelephone Service in the 800 MHz Band ("Auction No. 65 Applications Reconsideration Petition").<sup>5</sup> For the reasons explained below, we find that the Reconsideration Petition fails to demonstrate that the *Division Order* contained erroneous findings of fact or conclusions of law. Accordingly, we deny both the Reconsideration Petition and the Auction No. 65 Applications Reconsideration Petition.

## 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.<sup>6</sup> 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.<sup>7</sup> In light of specific circumstances 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.<sup>8</sup> 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 Report and Order*, 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.<sup>9</sup> On January 10, 2006, the Wireless Telecommunications Bureau ("Bureau") announced that the auction of new

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<sup>3</sup> 47 C.F.R. § 22.853.

<sup>4</sup> See Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, Petition for Reconsideration, filed on Nov. 30, 2006 ("Auction No. 65 Applications Reconsideration Petition").

<sup>5</sup> See FCC File Nos. 0002653156, 0002658043.

<sup>6</sup> 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*").

<sup>7</sup> *Air-Ground Order*, 20 FCC Rcd at 4405-06 ¶ 1, 4418-22 ¶¶ 24-32.

<sup>8</sup> *Id.* 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.

<sup>9</sup> 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).

licenses in the 800 MHz Air-Ground Radiotelephone service would begin on May 10, 2006, and sought comment on various procedures for the auction.<sup>10</sup>

4. On February 21, 2006, the Bureau released its *Auction No. 65 Procedures Public Notice* announcing various deadlines for applicants wishing to participate, as well as minimum opening bids and other procedures for Auction No. 65.<sup>11</sup> The *Auction No. 65 Procedures Public Notice* described procedures pursuant to which this auction would 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 would be awarded.

5. The *Auction No. 65 Procedures Public Notice* established that applicants were required to file short-form auction applications on FCC Form 175 by March 24, 2006 and upfront payments by April 17, 2006.<sup>12</sup> On April 28, 2006, the Bureau released a public notice identifying the nine bidders that had qualified to participate in Auction No. 65.<sup>13</sup> The Havens Parties were two of the nine qualified bidders.<sup>14</sup>

6. On May 1, 2006, the Havens Parties filed their Petition seeking an explanation of the eligibility provisions of the rules governing the 800 MHz Air-Ground Radiotelephone Service.<sup>15</sup> The Havens Parties posed four questions relating to the 800 MHz Air-Ground Service eligibility restriction, and challenged the rules established by the Commission's *Air-Ground Order*, asserting that further clarification was warranted.<sup>16</sup>

7. On May 4, 2006, the Bureau released a public notice explaining that the computerized competitive bidding system for Auction No. 65 had 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.<sup>17</sup> Specifically, the *Auction No. 65 Supplemental Procedures Public Notice* explained that the system used in Auction No. 65 would not assign both licenses to any single applicant or to multiple applicants that, based on their short-form auction applications (FCC Form 175), shared a common controlling interest. The *Auction No. 65 Supplemental Procedures Public Notice* noted that the Havens Parties reported on their short-forms that

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<sup>10</sup> "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures for Auction No. 65," *Public Notice*, 21 FCC Rcd 4 (WTB 2006).

<sup>11</sup> "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*, 21 FCC Rcd 1278 (WTB 2006) ("*Auction No. 65 Procedures Public Notice*").

<sup>12</sup> *Auction No. 65 Procedures Public Notice*, 21 FCC Rcd at 1300-01 ¶¶ 76, 79.

<sup>13</sup> "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses; 9 Bidders Qualified to Participate in Auction No. 65," *Public Notice*, 21 FCC Rcd 4266 (WTB 2006).

<sup>14</sup> *Id.* at 4265.

<sup>15</sup> Petition at 6-10.

<sup>16</sup> *Id.*

<sup>17</sup> "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*, 21 FCC Rcd 5058 (WTB 2006) ("*Auction No. 65 Supplemental Procedures Public Notice*").

they shared a common controlling interest. It also stated that the Auction No. 65 system would prevent them from both becoming winning bidders in that auction.<sup>18</sup>

8. On May 8, 2006, Havens Parties filed their Supplement, asserting that the *Auction No. 65 Supplemental Procedures Public Notice* did not address the issues that they raised in their Petition.

9. On May 9, 2006, the Division denied the Haven's Parties' Petition and dismissed the Motion for Stay. The Division addressed each of the four questions raised by the Petitioners, noting that, in more than one case, it was premature to make any decision regarding the application of the rules to the particular circumstances of the Havens Parties or any other applicants.<sup>19</sup> The following day, the Havens Parties submitted the instant petition.<sup>20</sup>

### III. DISCUSSION

10. Under Section 1.106 of the Commission's rules, a petition requesting reconsideration of a final Commission action must cite findings of fact and/or conclusions of law it believes to be erroneous and must also state with particularity the respects in which it believes such findings and conclusions should be changed.<sup>21</sup> The Havens Parties argue that the Division failed to address its perceived ambiguity over the "controlling interest" standard as applied to the eligibility restriction for 800 MHz Air-Ground licenses, and, consequently, lacked authority to hold Auction No. 65. For the reasons set forth below, we disagree and deny the Reconsideration Petition.

11. The Havens Parties argue that the language in the *Air-Ground Order* implies that all of the relationships set forth under the definition of "affiliate" in Section 1.2110(c)(5) are "controlling interests" for purposes of the Air-Ground eligibility restriction.<sup>22</sup> We disagree. The Commission clearly stated, in

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<sup>18</sup> *Id.* at 5058 and n.4.

<sup>19</sup> *Division Order*, 21 FCC Rcd at 5120 ¶ 10

<sup>20</sup> On August 7, 2006, the Havens Parties filed a "Petition for Clarification, and Action Deemed Appropriate, Under Sections 1.939, 1.2108, and 1.41." Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, Petition for Clarification, and Action Deemed Appropriate, Under Sections 1.939, 1.2108 and 1.41, filed on Aug. 7, 2006 ("Auction No. 65 Applications Petition"). The applicants, AC BidCo LLC and LiveTV, LLC, filed oppositions. See AC BidCo LLC, Opposition to Petition for Clarification, and Action Deemed Appropriate, filed on Aug. 14, 2006; LiveTV, LLC, Opposition to Petition for Clarification and Action, filed on Aug. 14, 2006. The Havens Parties filed a response. See Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, Reply to Oppositions to Petition for Clarification and Action Deemed Appropriate, Under Section 1.939, 1.2108 and 1.41, filed on Aug. 21, 2006. The Bureau's Mobility Division dismissed the Auction No. 65 Applications Petition as duplicative since it relied upon and incorporated by reference the arguments made in the Reconsideration Petition. See Auction 65 Public Notice Regarding Long Form/FCC Form 601 Applications Accepted for Filing, *et al.*, Order, 21 FCC Rcd 13010 (WTB/MD 2006). The Commission concurrently issued a public notice granting the AC BidCo and LiveTV applications. See Wireless Telecommunications Bureau Grants 800 MHz Air-Ground Licenses, Auction No. 65, *Public Notice*, 21 FCC Rcd 13022 (WTB 2006). The Havens Parties subsequently filed the Auction No. 65 Applications Reconsideration Petition with respect to the Mobility Division order. AC BidCo and LiveTV filed Oppositions. See AC BidCo LLC, Opposition to Petition for Reconsideration, filed on Dec. 7, 2006; LiveTV, LLC, Opposition to Petition for Reconsideration, filed on Dec. 12, 2006.

<sup>21</sup> 47 C.F.R. § 1.106(d)(2).

<sup>22</sup> Reconsideration Petition at 3.

the *Air-Ground Order*, that the eligibility restriction pertains to entities and their controlling interests.<sup>23</sup> The Commission added that the “controlling interests” and “affiliates” definitions set forth in Section 1.2110(c) would apply, but did not assert, as the Petitioners suggest, that every relationship described as affiliation would be deemed to be a controlling interest.<sup>24</sup> Rather, by noting that the definition of “affiliate” would apply in the context of determining Air-Ground eligibility, the Commission was merely indicating that a “controlling interest” in an entity – the operative standard under the *Air-Ground Order* – may arise from certain relationships described under the affiliation definition.<sup>25</sup> We find no evidence that the Commission intended, as the Havens Parties assert, that the *Air-Ground Order* intended to require all affiliates to be considered *per se* controlling interests in an entity for purposes of the Air-Ground eligibility provision found in Section 22.853. As a result, we agree with the *Division Order* with respect to its explanation of the standard.

12. We likewise find to be without merit the Petitioners’ assertion that the Commission – specifically the Division – lacked authority to hold Auction No. 65. The Havens Parties assert that if “all affiliates...are controlling interests, then this auction is fatally flawed...since many if not all short form [applications] of bidders did not disclose all affiliates as controlling interests.”<sup>26</sup> Moreover, the Havens Parties attempt to characterize Section 22.853 as “overly vague” and therefore “unconstitutional and unenforceable,” and as a result, assert that the Division does not have the authority to hold Auction No. 65.<sup>27</sup> We disagree with this assessment. First, as noted above, the Commission’s language in the *Air-Ground Order* is not ambiguous. Second, the Bureau, in the *Auction No. 65 Supplemental Public Notice*, took the added measure of describing how the Air-Ground eligibility restriction will affect provisionally winning bids and minimum acceptable bids in Auction No. 65.

13. We also note that in arguing that the eligibility rule is vague and/or unconstitutional, the Havens Parties are essentially seeking reconsideration of the *Air-Ground Order*. The Petitioners themselves acknowledge this when they state that Section 22.853 “must be fixed by rule making under [Administrative Procedures Act (“APA”)] procedures.”<sup>28</sup> The Commission adopted Section 22.853 through notice-and-comment procedures consistent with the APA, and neither the *Auction No. 65 Supplemental Public Notice* nor the *Division Order* amended that rule, but simply provided guidance in light of the circumstances of Auction No. 65 and the Petition. All interested parties, including the Havens Parties, had an opportunity to seek reconsideration or clarification of Section 22.853 within the time period afforded by Section 1.429 of the Commission’s rules.<sup>29</sup> The Havens Parties concede that they did not participate in the rulemakings that established these service rules, and only recently became interested in this auction and the 800 MHz Air-Ground Service.<sup>30</sup> The Havens Parties, therefore, missed their chance to influence either the rules for this service or the procedures for the auction. They nevertheless

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<sup>23</sup> The Commission specifically 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.” *Air-Ground Order*, 20 FCC Rcd at 4426-27 ¶ 43.

<sup>24</sup> *Id.* at 4427 ¶ 44.

<sup>25</sup> See *Division Order* at 5119 ¶ 8. For example, under 47 C.F.R. § 1.2110(c)(5)(ii)(C), control “can arise through management positions...,” which means that control of an entity may rest in those in management positions under certain conditions.

<sup>26</sup> Reconsideration Petition at 3.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> 47 C.F.R. § 1.429.

<sup>30</sup> Petition at 3.

qualified to bid and participated in Auction No. 65. For all these reasons, the Havens Parties have failed to demonstrate that the Commission lacked authority to hold Auction No. 65.

14. Finally, we address the Petitioners' argument that Division did not consider all of their filings, specifically their Supplement filed May 8, 2006,<sup>31</sup> which, according to the Havens Parties, was filed "well before (given the shortened time frames) release of the Order."<sup>32</sup> We first note that the Havens Parties filed the Supplement on May 8, 2006, and the *Division Order* was released on May 9, 2006. Even taking "shortened time frames" of an auction into account, the characterization that the Supplement was filed "well before" the release of the *Division Order* is, at best, disingenuous.<sup>33</sup> In any case, the arguments made in the Supplement are not substantively different from those raised in the Petition or the Reconsideration Petition and, therefore, have been adequately addressed.

15. In light of our action on the Reconsideration Petition, we also deny the Havens Parties' Auction No. 65 Applications Reconsideration Petition. The Havens Parties allege in that filing that they did challenge the long form applications filed by AC BidCo and LiveTV, stating that "[t]he Applicants participated in an auction under rules that were not fair and effective for reasons Petitioners stated prior to the auction in filings with the FCC concurrently served upon the Applicants: Applicants were put on notice."<sup>34</sup> We have been able to discern no basis for the Havens Parties' challenge to the applications of AC BidCo and LiveTV other than the claims made in the Reconsideration Petition. Thus, for the same reasons that we deny the Reconsideration Petition, we deny the Auction No. 65 Applications Reconsideration Petition.

#### IV. CONCLUSION

16. The Havens Parties assert that the language of Section 22.853 and the *Air-Ground Order* is ambiguous with regard to the "controlling interest" standard contained therein, and that the Division failed to address this ambiguity and therefore lacked the proper authority to hold Auction No. 65. We find that Section 22.853 and the *Air-Ground Order* clearly states that a "controlling interest" standard will be used for the Air-Ground eligibility restriction, and that the definitions of "controlling interests" and "affiliates" in Section 1.2110(c) will be applied. To that end, we find the arguments set forth in Havens Parties' Petition and all subsequent supplements without merit, and dismiss the suggestion that Auction No. 65 should have been rescheduled because of the Petitioner's apparent misunderstanding of the Air-Ground eligibility rule. Therefore, we deny the Reconsideration Petition. Similarly, because the Havens Parties challenge the AC BidCo and LiveTV applications on the same grounds set forth in the Reconsideration Petition, we also deny the Auction No. 65 Applications Reconsideration Petition.

#### V. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), and Sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Response to and Informal Request for Reconsideration

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<sup>31</sup> Reconsideration Petition at 4. The Petitioners also argue that the Division ignored their original petition and motion for stay in the *Auction No. 65 Supplemental Public Notice*. *Id.* The content of the *Auction No. 65 Supplemental Public Notice*, however, is not in question here. Nonetheless, we note that the *Auction No. 65 Supplemental Public Notice* did not arise from the Petition and Motion for Stay, but rather to clarify how bids will be handled in Auction No. 65, given the unique nature of the Air-Ground eligibility provision.

<sup>32</sup> Reconsideration Petition at 5.

<sup>33</sup> Moreover, the Petitioners themselves characterize the Supplement as a "response to the [Supplemental] Public Notice released on [May 5, 2006]." Supplement at 2.

<sup>34</sup> Auction No. 65 Applications Reconsideration Petition at 1.

of Order Regarding Petition for Declaratory Ruling and Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65 filed by Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, on May 10, 2006, and the Petition for Reconsideration filed by Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, on November 30, 2006, are DENIED. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.  
Chief, Wireless Telecommunications Bureau