

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

In the matter of)
)
 Indiana Paging Network)
)
 Petition for Partial Reconsideration)
 Auction No. 40)
 Lower and Upper Paging Bands)
)
)

ORDER

Adopted: January 29, 2007

Released: January 29, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (“Bureau”) has before it a Petition for Partial Reconsideration filed by the Indiana Paging Network (“IPN”).¹ IPN seeks reconsideration of Bureau actions announced in a May 25, 2001 Public Notice regarding the auction of licenses for the lower and upper paging bands (“Auction No. 40”).² IPN challenges Bureau decisions (1) to deem ineffective short-form applications (FCC Form 175) to participate in Auction No. 40 that were filed prior to a May 14, 2001 deadline; and (2) to permit any party to submit a short-form application for the rescheduled Auction No. 40, irrespective of whether such party submitted a short-form application by the May 14, 2001 deadline. For the reasons discussed below, we deny IPN’s Petition.

II. BACKGROUND

2. On April 9, 2001, the Bureau issued a Public Notice announcing that, commencing on June 26, 2001, the Commission would auction licenses for the lower and upper paging bands in Auction No. 40.³ As indicated in the *Auction No. 40 Procedures Public Notice*, applicants had to file short-form applications by no later than 6 p.m. ET on May 14, 2001 in order to be eligible to participate in Auction No. 40.

3. On May 25, 2001, the Bureau postponed Auction No. 40 until October 30, 2001, due to the need for additional testing on newly developed Web-based software. In light of the decision to postpone the start of Auction No. 40 for over four months, the Bureau announced that all previously filed short-form applications would be ineffective and purged from the Commission’s computer system. The

¹ Letter from John D. Wendel to Magalie Roman Salas, June 25, 2001 (“Petition”).

² Auction of Licenses for Lower and Upper Paging Bands Postponed until October 30, 2001, *Public Notice*, 16 FCC Rcd 11,113 (2001) (“*Auction No. 40 Postponement Public Notice*”).

³ Lower and Upper Paging Bands Auction Scheduled for June 26, 2001; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedural Issues, *Public Notice*, 16 FCC Rcd 7675 (2001) (“*Auction No. 40 Procedures Public Notice*”).

Bureau also announced that any party could submit a short-form application to participate in the rescheduled Auction No. 40, regardless of whether such party had filed a short-form application prior to the original deadline.⁴

4. On June 25, 2001, IPN filed its Petition asking that the Bureau reconsider its decision to purge the short-form applications originally filed for Auction No. 40.⁵ IPN asks that its pre-May 14, 2001, short-form application be processed with respect to any licenses for which it was the only applicant. IPN also asserts that participation in Auction No. 40 should be limited to applicants that filed short-form applications prior to the original filing deadline. Furthermore, IPN insists that those applicants should be permitted to participate in Auction No. 40 only with respect to licenses selected in each applicant's originally filed short-form application.⁶

III. DISCUSSION

5. IPN argues that Section 309(j)(6)(E) of the Communications Act of 1934 prohibits the Bureau from purging previously filed short-form applications and accepting short-form applications from new applicants or from original applicants selecting additional licenses.⁷ Section 309(j)(6)(E) states that the Commission has an obligation in the public interest to continue to consider various means to avoid mutual exclusivity.⁸ Speculating that it was the only applicant to select certain licenses prior to the original short-form application deadline,⁹ IPN contends that the Bureau violated Section 309(j)(6)(E) by accepting new short-form applications, because those new short-form applications might be mutually exclusive with its original short-form application.

6. We reject IPN's interpretation of Section 309(j)(6)(E). Section 309(j)(6)(E) requires only that the Commission consider procedures that avoid mutual exclusivity when it determines that such an approach would further the public interest objectives underlying the Commission's auction authority. Courts repeatedly have recognized that Section 309(j)(6)(E) "imposes an obligation only to minimize

⁴ *Auction No. 40 Postponement Public Notice* at 1.

⁵ IPN does not challenge the Bureau's decision to postpone the auction or the length of time for which it was postponed. Petition at 1.

⁶ See Petition at 1.

⁷ Petition at 2.

⁸ 47 U.S.C. §309(j)(6)(E)("[n]othing . . . in the use of competitive bidding[] shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings").

⁹ Petition at 2. IPN filed a Freedom of Information Act ("FOIA") request seeking records to document this claim. See Petition at 3. As indicated by the *Auction No. 40 Postponement Public Notice*, however, the Bureau purged the originally filed short-form applications prior to receipt of IPN's FOIA request. No record exists of licenses selected by each original applicant. Furthermore, if only one applicant among all those filing short-forms that were accepted for filing had selected a given license, that applicant would not automatically be granted the license. Instead, the license would have been removed from the auction and that applicant would have been permitted to file a long-form application. *Auction No. 40 Procedures Public Notice* at 7671. At that stage, other parties could file petitions to deny the long-form application. 47 C.F.R. §1.939; see *Competitive Bidding Second Report and Order* at 2376 ¶165. In any event, none of the short-form applications filed prior to the original deadline were accepted for filing before being purged. Even if they had been accepted, the Bureau still could have dismissed them. See *Elleron Oil Company WVI Partners, Inc. Petition for Reconsideration of Dismissal of Short-Form Applications for Interactive Video and Data Service Auction, Order*, 13 FCC Rcd 17245, 17251-52 ¶9 (WTB 1998) ("*Elleron*") (distinguishing applications to participate in an auction from applications for construction permits or station licenses filed pursuant to Section 308(a)).

mutual exclusivity in the public interest . . . and within the framework of existing policies.”¹⁰ In several cases, the United States Court of Appeals for the District of Columbia Circuit has held that Section 309(j)(6)(E) does not preclude changes to the application process, even when the changes may result in new mutually exclusive applications being filed for particular licenses.¹¹ Thus, IPN is not entitled to have the Commission protect it from competition by limiting participation in a rescheduled auction to applicants to participate in the originally scheduled auction. Short-form application filing deadlines are not “cut-off dates” after which applications are “cut-off” from additional competition.¹² The purpose of establishing auction filing deadlines is to create a known pool of auction participants by a date certain, not to curtail competition in the auction process or to afford protected status to applicants with accepted applications.¹³

7. The Bureau’s actions were consistent with the Commission’s competitive bidding rules, which expressly provide that the Commission may delay, suspend, or cancel an auction in the event of a technical obstacle, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding.¹⁴ *Elleron* makes explicit that, as an outgrowth of the authority to delay or suspend an auction, the Commission and the Bureau have ancillary authority to return manually-filed, or purge electronically-filed, short-form applications.¹⁵

8. In addition to complying with the Commission’s rules, the Bureau’s actions furthered the ultimate purpose of the auction. Given the four month delay to the start of the auction, the Commission’s competitive bidding process was best served by purging the previously filed short-form applications. The Commission’s auction rules are designed to enable the parties that are qualified to be licensees and that most highly value particular licenses to obtain those licenses through competitive bidding. Changed circumstances during the four months between the original and the rescheduled deadlines could change the parties interested in the auction or the particular licenses in which the parties are interested. Including new applicants in a rescheduled auction helps ensure a competitive auction by attracting as many qualified bidders as possible and furthers the ultimate goal of ensuring that licenses are awarded to those who value them most highly. If, as IPN requests, the application process were locked in place as of the original deadline, the very purpose of the auction might be thwarted.

9. The Bureau’s decision to purge the short-form applications also avoided prolonging the time during which the Commission’s anti-collusion rule remained in effect. Under Section 1.2105(c)(1), applicants with pending short-form applications would have been subject to the rule’s prohibition against collusion. This prohibition would have remained in effect until the winning bidders in the rescheduled

¹⁰ *Benkelman Telephone Company v. Federal Communications Commission*, 220 F.3d 601 (D.C. Cir. 2000)(quoting *DIRECTV v. Federal Communications Commission*, 110 F.3d 816, 828 (D.C. Cir. 1997))(internal quotation marks and citations omitted).

¹¹ See *Bachow Communications, Inc. v. Federal Communications Commission*, 237 F.3d 683, 691-92 (D.C. Cir. 2001) (citing and discussing *Benkelman Telephone Co. v. Federal Communications Commission*, 220 F.3d 601, 606 (D.C. Cir. 2000), *Orion Communications Ltd. v. Federal Communications Commission*, 213 F.3d 761 (D.C. Cir. 2000), and *DIRECTV, Inc. v. Federal Communications Commission*, 110 F.3d 816 (D.C. Cir. 1997)).

¹² *Elleron* at 17250 ¶8.

¹³ *Id.*

¹⁴ 47 C.F.R. § 1.2104(i). The Commission has delegated to the Bureau authority and discretion to act pursuant to this rule on the Commission’s behalf. Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697-98 ¶16 (1997); see 47 C.F.R. §§ 0.131(c), 0.331.

¹⁵ *Elleron* at 17249 ¶6.

auction made their down payments.¹⁶ The anti-collusion rule would have prohibited any negotiations or discussions with other applicants related to bids or bidding strategies, unless those other applicants were part of a bidding arrangement disclosed in the applicants' original short-form applications. Moreover, applicants trying to comply with the anti-collusion rule might have been limited in the conduct of other business transactions in which disclosures of financial information could have disclosed bids or bidding strategies.

10. Acknowledging the significant effect the anti-collusion rule would have had during the postponement had the original short-form applications not been purged, IPN suggests that the Commission simply could have waived the rule.¹⁷ IPN misunderstands the purpose of the Bureau's action, which was only to avoid prolonging the time during which the anti-collusion rule would be in effect. The Bureau did not intend to eliminate the application of the rule, which serves an important purpose in the Commission's auctions. Waiver of the anti-collusion rule once the pool of auction participants was fixed would frustrate the very purpose of the rule.

11. The Bureau's handling of short-form applications filed for Auction No. 40 is consistent with its handling of short-form applications in other delayed auctions. In *Elleron*, the Bureau denied a request for relief with respect to Auction No. 13 almost identical to IPN's Petition.¹⁸ As noted in *Elleron*, the Bureau previously had granted similar relief with respect to Auction No. 5.¹⁹ More recently, the Bureau twice has taken the step of purging applications with respect to Auction No. 31.²⁰

IV. CONCLUSION

12. For the reasons discussed above, we deny IPN's Petition for partial reconsideration of the *Auction No. 40 Postponement Public Notice*. The Bureau's actions announced in the *Auction No. 40 Postponement Public Notice* are consistent with its authority under the Commission's rules and IPN's arguments are without merit.

13. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), and Section 1.106(j) of the Commission's Rules, 47 C.F.R. §1.106(j), the Petition for Partial Reconsideration filed by Indiana Paging Network on June 25, 2001, is DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁶ 47 C.F.R. §1.2105(c)(1).

¹⁷ Petition at 2.

¹⁸ See, generally, *Elleron*.

¹⁹ See *id.* at 17251 ¶8 (discussing Auction No. 5).

²⁰ See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, 15 FCC Rcd 13,954 (2000) (announcing, *inter alia*, purging of previously filed short-form applications); Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001, *Public Notice*, 16 FCC Rcd 3947 (2001) (same).

²¹ 47 C.F.R. § 0.331.