

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

Requests for Waiver of Section	)	
1.2109(b) of the Commission's Rules	)	
	)	
and	)	FCC Auction Nos. 37 and 62
	)	
Request for Discretionary Implementation of	)	
Section 1.2109(b) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** February 27, 2007

**Released:** February 27, 2007

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

**I. INTRODUCTION**

1. The Auctions and Spectrum Access Division (Division) has before it requests submitted by three unsuccessful bidders seeking the award to them of four FM radio construction permits on which they bid, but did not win, in Auction Nos. 37 and 62. The three petitioners are Glory Communications, Inc. (Glory),<sup>1</sup> Jeremy Itz (Itz),<sup>2</sup> and 2510 Licenses, LLC (2510 Licenses).<sup>3</sup> These parties seek to have the construction permits awarded to them for the amount of their own bids (which were not the highest bids submitted during the auction).<sup>4</sup> With respect to three of the subject permits, the petitioners had placed high bids on them prior to submission of higher bids by other bidders and withdrawal of the higher bids prior to the close of the auction. After the higher bids were withdrawn, these permits received no further bids and, pursuant to the announced procedure for the auctions, were not awarded. The remaining permit at issue here received a winning bid in Auction No. 37; however, after the close of the auction, the winning bidder for the permit defaulted on its bid. For the reasons discussed below, we deny all of the requests.

<sup>1</sup> Letter from Alex Snipe, President, Glory Communications, Inc., to Marlene H. Dortch, Secretary, FCC, dated Nov. 24, 2004 ("Glory Request").

<sup>2</sup> Comments of Jeremy Itz for Auction No. 62, filed April 29, 2005 ("Itz Request"). Itz filed his request in comments responding to a public notice seeking comment on procedures for Auction No. 62. *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 (2005) ("*Auction No. 62 Comment Public Notice*"); 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 (2005) ("*Auction No. 62 Procedures Public Notice*"). We act on Itz's Request despite his having filed it in comments on Auction No. 62. *Cf.* 47 C.F.R. § 1.44 (separate pleadings for different requests).

<sup>3</sup> 2510 Licenses, LLC, Petition for Waiver and Request for Expedited Action, filed February 22, 2006 ("2510 Licenses Petition").

<sup>4</sup> We also received similar waiver requests from Wildcat Communications LLC (Wildcat) and Bigglesworth Broadcasting, LLC (Bigglesworth) in letters dated November 23, 2004, and a Petition for Waiver filed by Talkline Communications, Inc. (Talkline) on January 18, 2005. Wildcat and Bigglesworth (through its successor-in-interest Connoisseur Media, LLC) withdrew their waiver requests on August 31, 2005, and February 9, 2006, respectively. Talkline requested dismissal of its Petition for Waiver on February 15, 2007.

## II. BACKGROUND

2. In Auction No. 37, the Commission made available 288 construction permits in the FM broadcast service for stations in various markets throughout the United States, Guam and American Samoa.<sup>5</sup> On October 18, 2004, the Commission announced that 456 applicants were qualified to bid in Auction No. 37, including Glory and Itz.<sup>6</sup> Auction No. 37 began on November 3, 2004 and closed on November 23, 2004.<sup>7</sup> On December 1, 2004, the Commission announced that 110 bidders won 258 of the 288 construction permits offered in the auction.<sup>8</sup>

3. In Auction No. 62, the Commission made available 171 construction permits for FM broadcast stations in various markets throughout the United States and the U.S. Virgin Islands. On December 21, 2005, the Commission announced that 214 applicants were qualified to participate in Auction No. 62, including 2510 Licenses.<sup>9</sup> Auction No. 62 began on January 12, 2006 and closed on January 31, 2006.<sup>10</sup> On February 8, 2006, the Commission announced that 96 bidders won 163 of the 171 construction permits offered in the auction.<sup>11</sup>

4. Under the procedures in effect for Auction Nos. 37 and 62, bidders were permitted to withdraw provisionally winning bids from previous rounds, but each bidder was limited to making withdrawals in no more than two rounds in Auction No. 37, and in no more than one round in Auction No. 62.<sup>12</sup> After a bid withdrawal, the Commission served as the “place holder” high bidder until there was a provisionally winning high bid for that construction permit at the close of a subsequent round. In both auctions, after a bid withdrawal, the minimum acceptable bid for that construction permit in the next round became the second highest bid received for the permit in the prior rounds.<sup>13</sup>

5. As in other Commission auctions, in Auction Nos. 37 and 62, a bidder’s eligibility to bid on construction permits was determined by the amount of the upfront payment it submitted. Each construction permit was assigned a specific number of bidding units that were equal to the upfront

---

<sup>5</sup> Auction of FM Broadcast Construction Permits, 456 Bidders Qualified to Participate in Auction No. 37, *Public Notice*, 19 FCC Rcd 19773 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021 (2004) (“*Auction No. 37 Closing Public Notice*”).

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

<sup>9</sup> See Auction of FM Broadcast Construction Permits, 214 Bidders Qualified to Participate in Auction No. 62, *Public Notice*, 20 FCC Rcd 19937 (2005).

<sup>10</sup> See Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction No. 62, *Public Notice*, 21 FCC Rcd 1071 (2006) (“*Auction No. 62 Closing Public Notice*”).

<sup>11</sup> *Id.*

<sup>12</sup> 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, 10602-03 (2004) (“*Auction No. 37 Procedures Public Notice*”); *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10531-34. There was no limit on the number of bids a bidder could withdraw in any one round. Withdrawals during the auction were subject to the bid withdrawal payments specified in 47 C.F.R. § 1.2104(g). 19 FCC Rcd at 10602-03; 20 FCC Rcd at 10531-34.

<sup>13</sup> *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10602-03; *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10534.

payment for that permit, on a bidding unit per dollar basis.<sup>14</sup> The amount of a bidder's upfront payment determined its initial maximum eligibility as measured in bidding units, i.e., the total number of bidding units on which a bidder could place bids at one time.<sup>15</sup> A bidder's upfront payment is not attributed to specific construction permits, but in order to bid on a construction permit for which it had applied, a qualified bidder was required to have an eligibility level that met or exceeded the number of bidding units assigned to that construction permit.

6. As in other auctions, bidders in Auction Nos. 37 and 62 could not increase their maximum eligibility during the auction. However, a bidder's bidding eligibility level could decrease during the course of the auction if it did not actively bid. In order to ensure that the auction closed within a reasonable period of time, an activity rule required bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Thus, bidders were required to be active on a specific percentage of their current bidding eligibility during each round of the auction. Activity was measured by the number of bidding units associated with the construction permits upon which the bidder placed a bid during a bidding round and with the construction permits upon which it was the provisionally winning bidder.<sup>16</sup> A bidder that did not satisfy the activity rule either incurred a permanent reduction in its bidding eligibility in the next round or was required to use one of the limited number of activity rule waivers each bidder was granted.<sup>17</sup>

7. Section 1.2109 of the Commission's rules provides that if a winning bidder fails to timely make a required payment after the close of an auction, is found unqualified to be a licensee, or defaults or is disqualified for any reason after the close of an auction, the Commission, at its discretion, may either re-auction the license or permit to existing or new applicants or offer it to other highest bidders, in descending order, at their final bids.<sup>18</sup> With respect to instances when a provisionally winning bidder withdraws its bid prior to the close of an auction, the Commission's competitive bidding rules do not provide that the Commission may offer the license or permit to the next highest bidders. As described in more detail below, in both these situations, the Commission has re-auctioned the licenses or permits rather than offer them to other highest bidders.

---

<sup>14</sup> The number of bidding units for a given license is fixed and does not change during the auction as prices rise. In Auction Nos. 37 and 62, the upfront payment for a specific construction permit was equal to the minimum opening bid for that permit.

<sup>15</sup> *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10595-97; *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10522.

<sup>16</sup> The minimum required activity is expressed as a percentage of the bidder's current eligibility. In Auction No. 37, a bidder desiring to maintain its current bidding eligibility was required to be active on construction permits representing 100 percent of its current bidding eligibility. *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10595-97. In Auction No. 62, a bidder desiring to maintain its current bidding eligibility was required to be active on at least 75 percent of its current bidding eligibility during the first stage of the auction and at least 95 percent of its current bidding eligibility during the second stage of the auction. *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10522-24.

<sup>17</sup> Bidders in Auction No. 37 were provided five activity rule waivers. *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10595-97. Bidders in Auction No. 62 were provided three activity rule waivers. *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10524-25. In both auctions, the automated auction bidding system automatically applied a waiver at the end of any round where a bidder's activity level was below the minimum required unless: (1) the bidder had no more activity rule waivers available; or (2) the bidder made automatic application of a waiver unnecessary by reducing its eligibility, thereby meeting the minimum requirements. If a bidder had no waivers remaining and did not satisfy the required activity level, its current eligibility was permanently reduced.

<sup>18</sup> 47 C.F.R. §§ 1.2109(b), (c).

8. *Glory*. Glory was an unsuccessful bidder on construction permits for FM stations at New Albany, Mississippi and New Augusta, Mississippi, in Auction No. 37 and asks that it now be permitted to purchase those permits. The highest bid received on the New Albany permit was placed by Cumulus Licensing, LLC (Cumulus) in round 20, as the provisionally winning bidder.<sup>19</sup> Cumulus also placed the highest bid on the New Augusta permit, as the provisionally winning bidder in round 21.<sup>20</sup> Glory placed its highest bids for the New Albany and New Augusta permits in round 19. While Glory was the second highest bidder on the New Albany permit,<sup>21</sup> it was just one of three bidders that placed the third highest bid for the New Augusta permit.<sup>22</sup> Cumulus withdrew its provisionally winning bids on both the New Albany and New Augusta permits in round 45. At the time Cumulus withdrew, Glory's bidding eligibility was insufficient for it to place a bid on either permit. No bidder submitted any bids on the New Albany and New Augusta permits in the following 17 rounds of the auction. Thus, the auction closed after round 62 with the two permits unsold.<sup>23</sup> Glory requests that we grant it the New Albany permit for the amount of its provisionally winning bid in round 17,<sup>24</sup> which is \$48,000 less than its \$276,000 provisionally winning bid on that permit in round 19.<sup>25</sup> Glory also requests that we grant it the New Augusta permit for the amount of its provisionally winning bid in round 15,<sup>26</sup> which is \$209,000 less than the provisionally winning bid submitted by the second highest bidder on that permit in round 20.

9. *2510 Licenses*. 2510 Licenses' request is based on its participation in FM Auction No. 62. 2510 Licenses was an unsuccessful bidder in that auction on a construction permit for an FM station at Meyersdale, Pennsylvania, but asks that we waive section 1.2109(b) of the Commission's rules and offer it the permit.<sup>27</sup> The highest bid on the Meyersdale permit was placed by Radioactive, LLC, as the provisionally winning bidder in round 50.<sup>28</sup> 2510 Licenses was the second highest bidder on the Meyersdale permit, submitting the provisionally winning bid in round 49.<sup>29</sup> Radioactive withdrew its provisionally winning bid on the permit in round 60. At the time Radioactive withdrew its bid, 2510 Licenses did not

---

<sup>19</sup> Cumulus's highest gross bid for the New Albany permit (MM-FM161-A) was \$304,000. Complete information concerning Auction Nos. 37 and 62, including individual round results and auction outcomes, may be found on the Commission's web site at: <http://auctions.fcc.gov>

<sup>20</sup> Cumulus's highest gross bid for the New Augusta permit (MM-FM162-A) was \$606,000.

<sup>21</sup> Glory's \$276,000 gross bid for the New Albany permit in round 19 was the provisionally winning bid.

<sup>22</sup> The second highest bid on the New Augusta permit, placed by Educational Media Foundation in round 20, was \$551,000. Glory's \$501,000 gross bid in round 19 for the New Augusta permit was one of three identical bids, but Glory was not the provisionally winning bidder in that round. In the event of identical high bids on a construction permit in a given round, the procedures for Auction No. 37 called for the use of a random number generator to select one high bid as the provisionally winning bidder on that permit for that round. Glory also submitted one of three tied gross bids of \$414,000 for the New Augusta permit in round 17, but it was not the provisionally winning bidder in that round.

<sup>23</sup> The New Albany and New Augusta permits were subsequently won by Ace Radio Corporation in Auction No. 62. See *Auction No. 62 Closing Public Notice*, 21 FCC Rcd at 1080.

<sup>24</sup> Glory's gross bid for the New Albany permit in round 17 was \$228,000.

<sup>25</sup> Glory Request at 1. In its waiver request, Glory identified the New Albany market as MM-FM159-A, which was actually the market designation for the Friars Point, Mississippi construction permit. Because Glory did not place any bids on the Friars Point permit, and was the second highest bidder on the permit for the New Albany market, MM-FM161-A, in this order we consider the bidding for the permit for market MM-FM161-A, rather than the permit for market MM-FM159-A.

<sup>26</sup> *Id.* Glory's gross bid in round 15 for the New Augusta permit was \$342,000.

<sup>27</sup> 47 C.F.R. § 1.2109(b).

<sup>28</sup> Radioactive's provisionally winning gross bid for the Meyersdale permit (MM-FM445-A) in round 50 was \$606,000.

<sup>29</sup> 2510 Licenses' provisionally winning gross bid in round 49 was \$551,000.

have sufficient bidding eligibility remaining to place a bid on the permit.<sup>30</sup> No bidder submitted any bids on the Meyersdale permit in the following round of the auction and Auction 62 closed after round 61 with the permit unsold.<sup>31</sup> 2510 Licenses requests that we grant it the Meyersdale permit for the amount of its provisionally winning bid on that permit in round 23, which is \$406,000 less than its \$551,000 provisionally winning bid on that permit in round 49.<sup>32</sup>

10. *Itz.* We also consider a request by Jeremy Itz (Itz) submitted after the Commission announced, on April 14, 2005, that FM station construction permits unsold in Auction No. 37 would be available in Auction No. 62.<sup>33</sup> Itz was an unsuccessful bidder on a construction permit for an FM station at Mason, Texas. The winning bid on the Mason permit was placed by Spearman Properties, LLC in round 24.<sup>34</sup> Itz was the second highest bidder on the Mason permit, submitting the provisionally winning bid in round 22.<sup>35</sup> After Spearman Properties placed its final bid, no other bids for this permit were submitted in the following 38 rounds of the auction, and at the close of Auction No. 37, Spearman Properties was the winning bidder.<sup>36</sup> Spearman Properties subsequently defaulted on its bid after the close of the auction.<sup>37</sup> Itz does not request a waiver, but contends that based on the post-auction default, he should be able to acquire the Mason permit for the amount of his highest bid.<sup>38</sup>

### III. DISCUSSION

#### A. Glory and 2510 Licenses Requests

11. 2510 Licenses requests a waiver of Section 1.2109(b) of the Commission's rules to permit the grant to it of the Meyersdale construction permit.<sup>39</sup> Section 1.2109(b) of the Commission's rules provides that, if a winning bidder withdraws or defaults *after* the close of an auction, the Commission may,

---

<sup>30</sup> 2510 Licenses Petition at 2 n.1.

<sup>31</sup> The Meyersdale permit was subsequently won by Educational Media Foundation in FM Broadcast Auction No. 68. *See* Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction No. 68, *Public Notice*, DA 07-93 (rel. Jan. 25, 2007) ("*Auction No. 68 Closing Public Notice*").

<sup>32</sup> 2510 Licenses Petition at 4 n.3. 2510 Licenses' gross bid for the Meyersdale permit in round 23 was \$145,000. 2510 Licenses argues that it should only have to pay the amount it bid in round 23 because we should not consider any of the bids placed by Radioactive or any bids 2510 Licenses placed after the only other bidder for the permit stopped bidding on it.

<sup>33</sup> *See Auction No. 62 Comment Public Notice*, 20 FCC Rcd 7999.

<sup>34</sup> Spearman Properties' winning gross bid for the Mason permit (MM-FM296-A) was \$230,000. *Auction No. 37 Closing Public Notice*, DA 04-3694, Attachment A.

<sup>35</sup> Itz's provisionally winning gross bid in round 22 was \$209,000.

<sup>36</sup> *Auction No. 37 Closing Public Notice*, DA 04-3694, Attachment A.

<sup>37</sup> *See* Letter to Monte L. Spearman, Spearman Properties, LLC from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, 20 FCC Rcd 8139 (Auc. Div. 2005) ("*Spearman Letter*") (assessing initial payment for default on winning bids in Auction No. 37, including the Mason, Texas construction permit).

<sup>38</sup> The Mason permit was subsequently won by Munbilla Broadcasting Properties, Ltd. in FM Broadcast Auction No. 62. *See Auction No. 62 Closing Public Notice*, Attachment A, 21 FCC Rcd 1071, 1081 (2006).

<sup>39</sup> 2510 Licenses Petition at 1. 2510 Licenses acknowledges that the Commission's rules do not directly address the situation, where a provisionally winning bidder withdraws its bid prior to the close of the auction, but it contends that "in light of the circumstances, [Section 1.2109(b)] is applicable and should be waived." *Id.* at 3 and n.2. Although Glory did not expressly state that it sought a waiver of Section 1.2109(b), we treat its request as a request for waiver of Section 1.2109(b), because Glory asks us to take an action described in the rule in circumstances that vary from those in which the rule states that the Commission may take such action.

at its discretion, offer licenses to other high bidders in descending order at their final bids.<sup>40</sup> Pursuant to Section 1.3 of the Commission's rules, we may waive rule provisions "for good cause shown" by the petitioner.<sup>41</sup> As interpreted by the courts, this standard requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>42</sup>

12. 2510 Licenses asserts that Section 1.2109(b) should be applied here where bids were withdrawn *before* the auction closed, arguing that this is similar to a default by a winning bidder after the auction closes.<sup>43</sup> We disagree. Section 1.2109(b) was intended to address only the narrow circumstance when a bidder defaults *after* the close of the auction.<sup>44</sup> In addition, neither Glory nor 2510 Licenses has identified any case in which the Wireless Telecommunications Bureau (Bureau) or Commission, in the context of a withdrawal occurring before the close of an auction, granted waivers in order to offer unsold authorizations to the next highest bidder. In fact, in previous auctions when bid withdrawals occurring before the close of the auction resulted in similar waiver requests by the second highest bidders, the Division refused to grant such a waiver in *Banks Broadcasting*, and the Bureau refused to do so in *Harbor Wireless*.<sup>45</sup>

13. We are not persuaded that the public interest would be served by granting either Glory or 2510 Licenses a waiver and offering the subject construction permits to these unsuccessful bidders outside the auction process. An argument that a waiver would serve the public interest is not sufficient grounds for granting a waiver unless the applicant also shows that application of the rule would not serve its underlying purpose or that unique or unusual circumstances are involved.<sup>46</sup> After analyzing each of their requests, we find that Glory and 2510 Licenses have not made a sufficient showing to meet this standard, for the reasons discussed below.

14. When the Commission adopted its rules governing defaults by a winning bidder *after* the close of an auction, it even then stated, as a general matter, that the best course of action would be to re-auction the spectrum.<sup>47</sup> In the *Competitive Bidding Second Report and Order*, the Commission noted that one of its primary concerns is that licenses be awarded to the parties that value them most highly, and in the situation of a winning bidder's withdrawal after the close of an auction, this can best be assured

---

<sup>40</sup> 47 C.F.R. § 1.2109(b).

<sup>41</sup> 47 C.F.R. § 1.3 provides in pertinent part: "The provisions of this chapter may be . . . waived for good cause shown . . . subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission . . . on petition if good cause therefore is shown."

<sup>42</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972)); *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983).

<sup>43</sup> 2510 Licenses also asserts that the Commission should amend its rules prior to the next auction to require it to offer a construction permit to the second highest bidder when a high bidder withdraws its bid prior to the close of an auction. 2510 Waiver Petition at 3 n.2. We do not address this suggestion here because it is outside the scope of the instant matter.

<sup>44</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2382-84 ¶¶ 195-205 (1994) ("*Competitive Bidding Second Report and Order*").

<sup>45</sup> See Letter to John E. Mason, Member, Harbor Wireless, LLC from Kathleen O'Brien Ham, Deputy Bureau Chief, 16 FCC Rcd 3615 (WTB 2001) ("*Harbor Wireless*"); Letter to Gregory M. Schmidt, Vice President, Banks Broadcasting, Inc. from Margaret W. Wiener, Division Chief, 18 FCC Rcd 10431 (Auc. Div. 2003) ("*Banks Broadcasting*").

<sup>46</sup> See *Northeast Cellular Tel.*, 897 F.2d at 1166; *Thomas Radio*, 716 F.2d at 921; *WAIT Radio*, 418 F.2d at 1157-59.

<sup>47</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383 ¶ 204.

through a re-auction.<sup>48</sup> In a later rulemaking proceeding, the Commission considered revisions to Section 1.2109(b) and decided to reserve discretion to either re-auction the spectrum associated with a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.<sup>49</sup> The Commission noted in that order, however, that offering spectrum associated with a defaulted license to the next highest bidder at its final bid amount may not ensure that the license will be awarded to the bidder who values it most highly.<sup>50</sup> In particular, the Commission observed that "other parties can argue that they would pay more for the license if given the opportunity."<sup>51</sup> Moreover, when more than one license is being auctioned, applicants' backup strategies may shift during the course of the auction, affecting the value placed on any individual license by a particular bidder.<sup>52</sup> We have not identified any case in which an applicant has made a convincing showing that the Commission should, in the context of a default occurring after the auction closed, exercise its discretion under Section 1.2109(b) to offer unsold licenses to the next highest bidder.

15. Based on the policies adopted in these Commission rulemaking orders, the Bureau previously has rejected arguments made by unsuccessful bidders that are similar to the arguments 2510 Licenses presents.<sup>53</sup> In *Harbor Wireless* and *Banks Broadcasting*, the petitioners were the second highest bidders on several licenses which remained unsold at the end of the auction after the provisionally winning bidders had withdrawn their bids and the petitioners had insufficient bidding eligibility to bid on the licenses. 2510 Licenses argues that its waiver request is distinguishable from *Harbor Wireless* based on its assertion that no other bidders would be prejudiced by granting their requests, because such other bidders submitted lower bids than it. 2510 Licenses also attempts to distinguish itself from *Harbor Wireless* by claiming that the communities Harbor Wireless wished to serve had existing services, while Meyersdale lacks a second FM station.<sup>54</sup> 2510 Licenses further attempts to distinguish *Harbor Wireless* as a decision involving wireless services for which blocks of licenses are auctioned within shorter time intervals than FM construction permits.<sup>55</sup> We find no merit in any of these arguments. In *Harbor Wireless*, as in 2510 Licenses' case, a provisionally winning bidder withdrew its bid after Harbor Wireless, the next highest bidder, had exhausted its eligibility, and the licenses went unsold.<sup>56</sup> Harbor Wireless also sought a waiver of Section 1.2109(b) and asked the Commission to offer it the license at Harbor Wireless's next-highest bid, making many of the same arguments as 2510 Licenses. In *Harbor Wireless*, the Bureau decided that a bidder's "lack of sufficient unused eligibility to bid on the Licenses does not rise to the level of a unique or unusual circumstance, warranting special consideration by the Commission."<sup>57</sup> In denying the request, *inter alia*, the Bureau specifically rejected the unsuccessful bidder's assertion that a waiver of Section 1.2109(b) was appropriate to award it the licenses as the party that valued them the most highly.<sup>58</sup> Instead, the Bureau determined that the best alternative was to re-

---

<sup>48</sup> *Id.*

<sup>49</sup> Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 461-62 ¶ 152 (1997).

<sup>50</sup> *Id.*, 13 FCC Rcd at 462 ¶ 153.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See e.g., *Harbor Wireless*, 16 FCC Rcd at 3618; *Banks Broadcasting*, 18 FCC Rcd at 10431.

<sup>54</sup> 2510 Licenses Petition at 5-6.

<sup>55</sup> *Id.* 2510 Licenses also argues specifically that the *Banks* decision is inapposite and distinguishes it from its own circumstances on the same basis 2510 used to distinguish the *Harbor Wireless* decision. *Id.*

<sup>56</sup> *Harbor Wireless*, 16 FCC Rcd at 3615.

<sup>57</sup> See *Harbor Wireless*, 16 FCC Rcd at 3618.

<sup>58</sup> *Id.*

offer those licenses in a subsequent auction.<sup>59</sup> This is the course we have followed here for the construction permits that were unsold in Auction Nos. 37 and 62.<sup>60</sup>

16. The bidding activity and eligibility requirements in Auction Nos. 37 and 62 were integral components of the auction process. The activity and eligibility procedures were announced after potential bidders were provided with notice and opportunity for comment and they were applied uniformly to all bidders in the auction.<sup>61</sup> The bidding activity and eligibility procedures serve several important functions that are necessary to promote efficient auction processes and outcomes. These procedures encourage bidders to make early bids in the auction, rather than waiting until later rounds to participate.<sup>62</sup> Prompt and early participation by a bidder in the auction reveals useful information to other bidders about its demand and valuations for licenses.<sup>63</sup> This transparent process allows bidders to modify their strategies based on current prices.<sup>64</sup> The activity and eligibility procedures also help maintain the pace of the auction, which reduces costs to bidders and the Commission.<sup>65</sup> By promoting an efficient auction process, these procedures increase the likelihood that the winning bidder will be the party that most highly values the license.<sup>66</sup>

17. The fact that operation of the activity and eligibility procedures resulted in Glory and 2510 Licenses not having sufficient bidding eligibility to place bids on the New Albany, New Augusta and Meyersdale permits after the high bidders withdrew their bids was not a unique or unusual circumstance. We cannot conclude that Glory and 2510 Licenses were the only bidders so situated at that stage of the auction. Indeed, other bidders also may have been without sufficient eligibility to place bids on these construction permits after the highest bids were withdrawn. Neither Glory nor 2510 Licenses has addressed the possibility that after the subject bid withdrawals occurred, other bidders might have based their bidding strategies on the fact that the Commission's rules do not provide for an offer of the permits to the next highest bidders, and thus the permits, if they remained unsold, would be re-

---

<sup>59</sup> In that subsequent auction, all three of the licenses on which Harbor had been the next highest bidder were sold to other bidders for values in excess of Harbor's bids in Auction No. 33. See 700 MHz Guard Bands Auction Closes, Winning Bidders Announced, *Public Notice*, Attachment A, 16 FCC Rcd 4590, 4597 (2001).

<sup>60</sup> The 171 FM construction permits available for bidding in Auction No. 62 included 30 unsold from Auction No. 37. See *Auction No. 62 Comment Public Notice*, 20 FCC Rcd at 7999 (2005); see also *Auction No. 62 Closing Public Notice*, 21 FCC Rcd at 1071 (2006). All 9 of the FM construction permits available for bidding in Auction No. 68 were permits remaining unsold after either Auction No. 37 or Auction No. 62. See Auction of FM Broadcast Construction Permits Scheduled for January 10, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 68, *Public Notice*, 21 FCC Rcd 11144, 11146 ¶ 2 (2006).

<sup>61</sup> See Revised Inventory and Auction Start Date for FM Broadcast Construction Permits, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 6907 (2004) ("*Auction No. 37 Comment Public Notice*"); *Auction No. 62 Comment Public Notice*, 20 FCC Rcd at 8001-03. See also Auction of Additional FM Broadcast Construction Permits to be Included in Auction No. 37 Scheduled for February 21, 2001, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, 15 FCC Rcd 25486 (2000); FM Broadcast Auction Scheduled for February 21, 2001, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, 15 FCC Rcd 18081 (2000).

<sup>62</sup> See Auction of Licenses in the Lower 700 MHz Band Scheduled for May 28, 2003, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 18 FCC Rcd 3138, 3168 (2003).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; *Banks Broadcasting*, 18 FCC Rcd at 10435-36.



auctioned.<sup>67</sup> We therefore decline to grant the Glory and 2510 Licenses requests, which would effectively grant them a waiver of the Auction Nos. 37 and 62 bidding activity and eligibility procedures that applied to all bidders in those auctions.<sup>68</sup>

18. We also do not find that application of the rule in the instant cases would not serve its underlying purpose as explained above. 2510 Licenses provides no support for its argument that it is the only bidder interested in the Meyersdale construction permit.<sup>69</sup> 2510 Licenses' argument is undermined by the fact that two bidders in addition to 2510 Licenses bid on this construction permit during Auction No. 62.<sup>70</sup> The party that values an authorization most highly is determined by the highest bid within the established competitive bidding rules and procedures, and not by a bidder's interpretation of bidding activity after the auction is closed.<sup>71</sup> Waiver of Section 1.2109(b) after the auction to offer permits on which Glory and 2510 Licenses lacked sufficient unused eligibility to bid after the high bidders' withdrawals would be unfair to other bidders in Auction Nos. 37 and 62 that might otherwise have bid for those construction permits.<sup>72</sup> Such action could undermine the integrity of the auction process.<sup>73</sup>

19. In addition, we are not persuaded by the argument of 2510 Licenses that denial of its waiver request would harm the public interest because it would waste scarce Commission resources, due to delays before re-auction, or that re-auction would be unfair due to potential different bidding results.<sup>74</sup> We reject 2510 Licenses' unsubstantiated claim that it will provide FM service to Meyersdale more quickly than a winning bidder in a subsequent auction.<sup>75</sup> As explained above, we believe that the best approach was to make the FM construction permits unsold in Auction Nos. 37 and 62 available promptly in another auction.<sup>76</sup>

20. While we reach the same conclusions with respect to Glory's request to be granted the FM station construction permits at New Albany and New Augusta, Mississippi, our reasoning applies with even greater force because Glory did not place even the second highest bid for the New Augusta permit.<sup>77</sup> Thus, there was at least one bidder in Auction No. 37 that valued the New Augusta construction permit more highly than Glory.<sup>78</sup> Glory presents no argument for why it should be granted a waiver and offered the New Augusta permit as the third highest bidder for the permit.

---

<sup>67</sup> See *Harbor Wireless*, 16 FCC Rcd at 3619; *Banks Broadcasting*, 18 FCC Rcd at 10435.

<sup>68</sup> We note that neither Glory nor 2510 Licenses requested a waiver of the bidding activity or eligibility requirements in Auction Nos. 37 or 62.

<sup>69</sup> 2510 Licenses Petition at 3-5.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> See *Banks Broadcasting*, 18 FCC Rcd at 10431.

<sup>72</sup> See *Harbor Wireless*, 16 FCC Rcd at 3619; *Banks Broadcasting*, 18 FCC Rcd at 10435-36.

<sup>73</sup> See *Banks Broadcasting*, 18 FCC Rcd at 10436; *Two Way Radio of Carolina, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 12035, 12041 ¶ 11 (1999).

<sup>74</sup> 2510 Licenses argues that denial of its waiver request would "frustrate the public interest by preventing the earliest provision of a new local radio service to Meyersdale, Pennsylvania," and claims that a re-auction of the permit would delay new service for at least two years. 2510 Licenses Petition at 5.

<sup>75</sup> *Id.* at 4-5.

<sup>76</sup> See *supra* note 61.

<sup>77</sup> See *supra* note 22.

<sup>78</sup> The second highest bidder for the FM construction permit at New Augusta, Mississippi did not submit a waiver request.

## B. Itz Request

21. In comments responding to a Public Notice seeking comment on minimum opening bids and other procedures for Auction No. 62, Itz contends that he should be granted a construction permit for an FM station at Mason, Texas at the amount of his bid in round 22 of Auction No. 37 because the winning bidder for the permit defaulted after the auction closed.<sup>79</sup> Although Itz was the second highest bidder for the Mason permit and Section 1.2109(b) gives the Commission discretion to offer a permit to a second highest bidder if a winning bidder defaults after the close of the auction, we decline to do so here.

22. As explained above, when the Commission first adopted rules governing defaults by a winning bidder, it stated, as a general rule, that the best course of action would be to re-auction the spectrum.<sup>80</sup> While the Commission decided to reserve discretion to either re-auction the spectrum associated with a defaulted license or offer it to the next highest bidders (in descending order) at their final bids, it also noted that offering spectrum associated with a defaulted license to the next highest bidder at its final bid amount may not ensure that the license will be awarded to the bidder who values it most highly.<sup>81</sup>

23. Itz provides no clear reason for why we should not re-auction the particular construction permit in question. We are not persuaded by his unsupported claim that Auction No. 37 will be a “clean and fair auction” only if we offer the Mason construction permit to Itz as the second highest bidder at its final bid.<sup>82</sup> Itz asserts that he should be offered the Mason permit at his final bid amount, if we offer licenses to any of the other Auction No. 37 participants who were not the winning bidder on such licenses and made a similar request.<sup>83</sup> For the reasons discussed above, we deny Glory’s and 2510 Licenses’ requests. For the same reasons we also deny Itz’s request.

## IV. CONCLUSION

24. Consistent application to all bidders of the auction rules is essential to a fair and efficient licensing process, and is fair to all auction participants, including those who won construction permits and those who did not.<sup>84</sup> The activity and bidding unit eligibility rules were announced in advance of the auctions and applied uniformly to all bidders in Auction Nos. 37 and 62, creating a predictable and fair procedure for all participants.<sup>85</sup> The requests before us fail to persuade us to exempt Glory, 2510 Licenses and Itz from those requirements after the close of the auctions.

---

<sup>79</sup> The winning bidder for the permit failed to remit the required down payment by the established deadline. See *Spearman Letter*, 20 FCC Rcd at 8139.

<sup>80</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383 ¶ 204.

<sup>81</sup> See *supra* paragraph 14.

<sup>82</sup> Itz Request at 3.

<sup>83</sup> *Id.* at 2-3.

<sup>84</sup> See Application of Winstar Broadcasting Corp., *Order on Reconsideration*, 20 FCC Rcd 2043, 2053-54 ¶ 20 (2005).

<sup>85</sup> See *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10595-97; *Auction No. 62 Procedures Public Notice*, 20 FCC Rcd at 10522-24.

**V. ORDERING CLAUSES**

25. ACCORDINGLY, IT IS ORDERED that the waiver requests submitted by Glory Communications, Inc. and 2510 Licenses, LLC ARE HEREBY DENIED.

26. IT IS FURTHER ORDERED that the request submitted by Jeremy Itz for award of an FM station construction permit outside of the competitive bidding process, pursuant to the discretionary authority in 47 C.F.R. § 1.2109(b) IS HEREBY DENIED.

27. IT IS FURTHER ORDERED that the request of Talkline Communications, Inc. that its January 18, 2005 Petition for Waiver be dismissed IS GRANTED and that the Petition for Waiver IS HEREBY DISMISSED WITH PREJUDICE.

28. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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