

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

In the Matter of
BARRY P. LUNDERVILLE,
CONNOISSEUR MEDIA, LLC,
COLLEGE CREEK BROADCASTING, INC.,
CUMULUS LICENSING LLC, and
KEMP COMMUNICATIONS, INC.
Request to Reduce Bid Withdrawal Payments
CONNOISSEUR MEDIA, LLC
Petition for Reconsideration and Request for
Refund of Bid Withdrawal Payment
NASSAU BROADCASTING HOLDINGS, INC.
Petition for Reconsideration or, in the Alternative,
Request for Waiver of Bid Withdrawal Payment
Rule

ORDER

Adopted: July 2, 2008

Released: July 2, 2008

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address several pleadings seeking relief from bid withdrawal payment obligations that the petitioners incurred under Section 1.2104(g) of the Commission's rules as a result of withdrawing provisionally winning bids in Auction No. 37, an auction of FM broadcast construction permits. Specifically, we address (1) a request filed on behalf of Barry P. Lunderville ("Lunderville"), Connoisseur Media, LLC ("Connoisseur"), College Creek Broadcasting, Inc. ("College Creek"), Cumulus Licensing LLC ("Cumulus"), and Kemp Communications, Inc. ("Kemp") (collectively, the "Joint Parties") seeking a reduction of the bid withdrawal payments they have been assessed; (2) a petition filed

1 47 C.F.R. § 1.2104(g).

2 Letter from Barry P. Lunderville; David Oxenford and Brendan Holland, Counsel for Connoisseur Media, LLC; Aaron Shainis, Counsel for College Creek Broadcasting, Inc.; Mark N. Lipp, Edgar Class, and Scott Woodworth, Counsel for Cumulus Licensing LLC; and James Koerner, Counsel for Kemp Communications, Inc., to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, filed November 20, 2006 ("Joint Parties' Petition"). Connoisseur Media, LLC, participated in Auction No. 37 under its former name, Bigglesworth Broadcasting, LLC ("Bigglesworth"). Public notices and other documents associated with the auction therefore refer to the company as Bigglesworth.

separately by Connoisseur, seeking reconsideration of the assessment of its bid withdrawal payment and a refund of the full amount of its payment;<sup>3</sup> (3) a petition filed by Nassau Broadcasting Holdings, Inc. (“Nassau”) in which Nassau seeks reconsideration of the assessment of its bid withdrawal payment and a reduction or cancellation of the payment or, in the alternative, a waiver of Section 1.2104(g)(1);<sup>4</sup> and (4) an amendment to Nassau’s petition, in which Nassau requests that its bid withdrawal payment be reduced to the amount of the interim bid withdrawal payment it has already paid to the Commission.<sup>5</sup> In addition, we have before us a request filed on behalf of the Joint Parties seeking an extension of time to pay their bid withdrawal payments.<sup>6</sup> For the reasons set forth below, we deny all of the petitions, including Nassau’s amendment, and the Joint Parties’ Request for Extension of Time.

## II. BACKGROUND

### A. The Bid Withdrawal Payment Rule, Auction No. 37, and the Petitioners’ Bid Withdrawal Payments

2. The Commission adopted Section 1.2104(g), which prescribes bid withdrawal payments, as part of its original competitive bidding rules. In doing so, the Commission explained that “[a]llowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding. Insincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency.”<sup>7</sup> The Commission also noted that bid withdrawal payments protect the government from the loss of revenue associated with bid withdrawals.<sup>8</sup>

3. Prior to Auction No. 37, which began on November 3, 2004, and concluded on November 23, 2004, the Wireless Telecommunications Bureau and the Media Bureau (“Bureaus”) jointly released a public notice outlining the terms, conditions, and procedures for the auction.<sup>9</sup> As with most previous auctions, the Bureaus announced that each bidder would be allowed to make limited use of bid withdrawals. The Bureaus specified that in Auction No. 37 each bidder would be permitted to withdraw a

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<sup>3</sup> Connoisseur Media, LLC, Petition for Reconsideration and Request for Refund of Bid Withdrawal Payment, filed November 30, 2006 (“Connoisseur Petition”). See *supra* note 2 regarding Connoisseur’s name change.

<sup>4</sup> Nassau Broadcasting Holdings, Inc., Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Penalty Rule, filed November 30, 2006 (“Nassau Petition”).

<sup>5</sup> Nassau Broadcasting Holdings, Inc., Amendment to Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Penalty Rule, filed February 25, 2008 (“Nassau Amendment to Petition”).

<sup>6</sup> Letter from Denise Moline, Counsel for Advance Acquisition, Inc.; Barry P. Lunderville; David Oxenford and Brendan Holland, Counsel for Connoisseur Media, LLC; Aaron Shainis, Counsel for College Creek Broadcasting, Inc.; Mark N. Lipp, Edgar Class, and Scott Woodworth, Counsel for Cumulus Licensing LLC; and James Koerner, Counsel for Kemp Communications, Inc., to Rita Cookmeyer, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, filed November 20, 2006 (“Joint Parties’ Request for Extension of Time”). As discussed below, the Joint Parties request 90 additional days beyond the 30 days provided to them to submit their bid withdrawal payments. See *infra* para. 32. Advance Acquisition, Inc., a party to the Joint Parties’ Request for Extension of Time, did not join the Joint Parties’ petition seeking a reduction of their bid withdrawal payments and instead filed separate requests for waiver of the bid withdrawal payment it incurred in Auction No. 37. See Advance Acquisition, Inc., *Order*, 22 FCC Rcd 18,846 (WTB 2007) (“*Advance*”).

<sup>7</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2373 ¶ 147 (1994) (“*Competitive Bidding Second Report and Order*”).

<sup>8</sup> *Id.* at 2374 ¶ 152.

<sup>9</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 10,570 (WTB/MB 2004) (“*Auction No. 37 Procedures Public Notice*”).

high bid in no more than two rounds.<sup>10</sup> The *Auction No. 37 Procedures Public Notice* also explained that a “high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 C.F.R. § 1.2104(g).”<sup>11</sup> The *Auction No. 37 Procedures Public Notice* described how interim and final bid withdrawal payments would be calculated under Section 1.2104(g)(1). Under this provision, if a high bid is withdrawn during an auction, the bid withdrawal payment is the difference between the withdrawn bid and the ultimate winning bid for the license or permit. If a license or permit remains unsold at the end of the auction in which the bid is withdrawn, an interim bid withdrawal payment is assessed, and the final bid withdrawal payment is calculated once the license or permit is sold in a subsequent auction.<sup>12</sup> At the time of Auction No. 37, Section 1.2104(g)(1) provided that the interim bid withdrawal payment would be 3 percent of the withdrawn bid.<sup>13</sup>

4. During Auction No. 37, the petitioners withdrew provisionally winning bids that they had submitted in earlier rounds. The withdrawn bids that gave rise to the bid withdrawal payments we consider here are Lunderville’s bid of \$422,000 on the Groveton, New Hampshire, permit, withdrawn in Round 42; Connoisseur’s bid of \$893,750 on the Flasher, North Dakota, permit, withdrawn in Round 36; College Creek’s bid of \$1,339,000 on the Windsor, New York, permit and its bid of \$1,026,000 on the Blue Lake, California, permit, both withdrawn in Round 33; Cumulus’s bid of \$1,461,000 on the Cannon Ball, North Dakota, permit, withdrawn in Round 61; Kemp’s bid of \$1,796,250 on the Nanakuli, Hawaii, permit, withdrawn in Round 42; and Nassau’s bid of \$822,000 on the Whitefield, New Hampshire, permit, withdrawn in Round 39.<sup>14</sup> All of these permits remained unsold at the close of Auction No. 37.<sup>15</sup>

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<sup>10</sup> *Id.* at 10,602-04.

<sup>11</sup> *Id.* at 10,603. Section 1.2104(g) provides that “the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.” 47 C.F.R. § 1.2104(g). Section 1.2104(g)(1) prescribes the method of calculating the payment that is imposed when a bid is withdrawn prior to the close of an auction. 47 C.F.R. § 1.2104(g)(1).

<sup>12</sup> As the *Auction No. 37 Procedures Public Notice* explained, the interim payment is applied toward any final bid withdrawal payment that is assessed after the construction permit is sold. *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10,604. Where a bid that is higher than the withdrawn bid is subsequently submitted in the same auction, no bid withdrawal payment is assessed. 47 C.F.R. § 1.2104(g)(1); *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10,603.

<sup>13</sup> In 2006, the Commission amended Section 1.2104(g)(1) to raise the 3 percent limit on interim bid withdrawal payments to 20 percent. In doing so, the Commission noted that there had been a disproportionate number of bid withdrawals late in auctions, indicating that some bidders had been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses, and expressed its continuing concern that bid withdrawals weaken the integrity of the auctions process and impede the deployment of service to the public. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 901-04 ¶¶ 24-32 (2006). The Commission, as part of its determination of competitive bidding procedures in advance of each auction, now establishes the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set interim bid withdrawal payments. *Id.* at 903-04 ¶ 31.

<sup>14</sup> The amounts of these withdrawn bids, the ultimate winning bids for the construction permits in question, and the interim and final bid withdrawal payments incurred as a result of these withdrawn bids are shown in a table in the Appendix in addition to being discussed in the text of this Order. College Creek also withdrew bids on three other permits in Auction No. 37. These permits received winning bids in Auction No. 37 for less than College Creek’s withdrawn bids, and bid withdrawal payments were assessed. College Creek did not seek relief from these payments. Cumulus also withdrew bids on three other permits in Auction No. 37. Two of these permits received winning bids in Auction No. 62 for amounts equal to or greater than Cumulus’s withdrawn bids, and therefore the Commission assessed no bid withdrawal payments. The other permit was sold in Auction No. 62 for less than Cumulus’s withdrawn bid, and a bid withdrawal payment was assessed. Cumulus did not seek relief from this payment. Kemp withdrew bids on four other permits in Auction No. 37. One of these permits received a winning bid in Auction No. 37 and two of these permits received winning bids in Auction No. 62 for amounts equal to or greater than Kemp’s

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The Commission was therefore unable to calculate final bid withdrawal payments on these permits and instead imposed interim bid withdrawal payments of 3 percent of the withdrawn bids. These interim bid withdrawal payments were announced on December 1, 2004, in a public notice announcing the close of the bidding in Auction No. 37.<sup>16</sup> Lunderville's interim bid withdrawal payment was \$12,660; Connoisseur's was \$26,813; College Creek's were \$40,170 and \$30,780; Cumulus's was \$43,830; Kemp's was \$53,888; and Nassau's was \$24,660.<sup>17</sup> Pursuant to Section 1.2104(g)(1), these amounts were deducted from the upfront payments the petitioners had submitted to qualify for participation in Auction No. 37.<sup>18</sup>

5. Each of the permits in question was won in Auction No. 62, an auction of FM broadcast construction permits that began on January 12, 2006, and concluded on January 31, 2006.<sup>19</sup> On February 8, 2006, in a public notice announcing the close of the bidding in Auction No. 62, the Bureaus announced final bid withdrawal payments for bidders that had withdrawn bids in Auction No. 37 on construction permits that had sold in Auction No. 62, including the petitioners. For the bid withdrawals at issue here, Lunderville's final bid withdrawal payment was \$244,000; Connoisseur's final payment was \$609,750; College Creek's two final payments were \$794,000 and \$665,000; Cumulus's final payment was \$1,337,000; Kemp's final payment was \$112,250; and Nassau's final payment was \$626,000. Pursuant to Section 1.2104(g)(1), each of these amounts was the difference between the withdrawn bid and the ultimate winning bid for the permit.<sup>20</sup> On October 31, 2006, the Commission issued a demand for

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withdrawn bids, and therefore the Commission assessed no bid withdrawal payments. The other permit was sold in Auction No. 62 for less than Kemp's withdrawn bid, and a bid withdrawal payment was assessed. Kemp did not seek relief from this payment.

<sup>15</sup> See FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021, Attachment A (WTB/MB 2004) (“*Auction No. 37 Closing Public Notice*”).

<sup>16</sup> *Id.*, Attachment C.

<sup>17</sup> *Id.*

<sup>18</sup> Section 1.2104(g)(1) provides: “The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.” 47 C.F.R. § 1.1204(g)(1).

<sup>19</sup> The Groveton, New Hampshire, permit sold for \$178,000; the Flasher, North Dakota, permit sold for \$284,000; the Windsor, New York, permit sold for \$545,000; the Blue Lake, California, permit sold for \$361,000; the Cannon Ball, North Dakota, permit sold for \$124,000; the Nanakuli, Hawaii, permit sold for \$1,684,000; and the Whitefield, New Hampshire, permit sold for \$196,000. Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction No. 62, *Public Notice*, 21 FCC Rcd 1071, Attachment A (WTB/MB 2006) (“*Auction No. 62 Closing Public Notice*”).

<sup>20</sup> *Id.*, Attachment D. Section 1.2104(g)(1) states: “In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less.” 47 C.F.R. § 1.1204(g)(1). Kemp qualified for a 25 percent bidding credit in Auction No. 37. The winning bidder for the Nanakuli, Hawaii, permit in Auction No. 62, Big D Consulting, Inc., was initially found to be qualified for a 35 percent bidding credit. The Commission therefore initially calculated Kemp's bid withdrawal payment for the Nanakuli permit as \$701,650, which was the difference between Kemp's net withdrawn bid and Big D Consulting, Inc.'s net winning bid, and announced this amount in Attachment D of the *Auction No. 62 Closing Public Notice*. Following the release of the *Auction No. 62 Closing Public Notice*, Big D Consulting, Inc., became ineligible for the bidding credit it had initially qualified for, and it paid the gross winning bid amount for the Nanakuli permit. Accordingly, Kemp's bid withdrawal payment for the permit was reduced to \$112,250. See Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Will Kemp, President, Kemp Communications, Inc., dated October 31, 2006, at 2 n.6.

payment letter to each of the petitioners, informing it of the amount of its final bid withdrawal payment or payments; each petitioner was instructed to pay the amount it owed, after subtracting its interim bid withdrawal payment or payments, within 30 days of the date of the letter.<sup>21</sup>

## B. The Petitioners' Requests

6. *The Joint Parties.* The Joint Parties style their pleading as a request for a reduction of their bid withdrawal payments.<sup>22</sup> Asserting that the Commission has the discretion to decide whether or not to impose bid withdrawal payments, they ask the Commission to “exercise its discretion” and reduce each of their bid withdrawal payments from the amount calculated under Section 1.2104(g)(1) to the difference between the withdrawn bid and the next highest bid submitted for the relevant permit in Auction No. 37.<sup>23</sup> The Joint Parties also request a waiver of Section 1.2104(g)(1) “to the extent necessary.”<sup>24</sup>

7. According to the Joint Parties, the reduction of their bid withdrawal payments is warranted for several reasons. First, they argue that their bid withdrawal payments are individually and collectively “unconscionably excessive.”<sup>25</sup> Noting that each of the challenged payments is greater than \$100,000, they assert that these payments are disproportionately high given the history of bid withdrawal payments because their research shows that (1) there have been only “a small number of withdrawal payments that have totaled more than \$600,000”<sup>26</sup> and (2) “the withdrawal payments assessed in Auction 37 represent a significantly higher percentage of the actual value of the permits than the withdrawal payments assessed in PCS auctions.”<sup>27</sup> Second, the Joint Parties contend that Auction No. 37 was an anomaly among auctions because it was the first broadcast auction in which bids were withdrawn and because six bid withdrawal payments over \$600,000 were assessed as a result of bid withdrawals in the auction.<sup>28</sup>

8. Third, the Joint Parties argue that a reduction of their bid withdrawal payments is appropriate because of the “specialized nature” of the FM broadcast service. According to the Joint Parties, FM broadcast service market conditions change from year to year to a greater degree than market conditions

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<sup>21</sup> Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Barry P. Lunderville, dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Jeffrey D. Warshaw, Bigglesworth Broadcasting, LLC, dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Neal J. Robinson, President, College Creek Broadcasting, Inc., dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Lewis W. Dickey, Cumulus Licensing LLC, dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Will Kemp, President, Kemp Communications, Inc., dated October 31, 2006 (collectively, “Bid Withdrawal Payment Demand Letters”).

<sup>22</sup> Joint Parties’ Petition at 1.

<sup>23</sup> *Id.* In support of their assertion that the Commission may decide whether or not to impose bid withdrawal payments, the Joint Parties cite the language in Section 1.2104(g)(1) stating that a bidder that withdraws a bid during an auction is “subject to” a bid withdrawal payment. *Id.* at 1 n.4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 4-5.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 3, 4.

of other auctionable services.<sup>29</sup> More specifically, they contend that the discrepancy in bids between Auction No. 37 and Auction No. 62 can be explained at least in part by the fact that (1) the value of a new FM station in a market is influenced by the characteristics of other FM stations in the market, (2) these characteristics—including station ownership, formats, and technical parameters—can change frequently, and (3) such characteristics are not shared by other auctionable services.<sup>30</sup> At the same time, however, the Joint Parties assert that they could not have expected that the permits on which they withdrew bids would decrease in value as substantially as they did between Auction No. 37 and Auction No. 62.<sup>31</sup> They also argue that the Commission could have avoided selling the permits in question in Auction No. 62 for substantially less than their withdrawn bids if it had awarded the permits to the next highest bidders in Auction No. 37.<sup>32</sup>

9. Fourth, the Joint Parties assert that the reduction of their bid withdrawal payments would not frustrate the purpose of the bid withdrawal payment rule because there are legitimate reasons for withdrawing bids, such as freeing up bidding units to bid on other permits.<sup>33</sup> Although the Joint Parties do not claim that they all withdrew the bids at issue for this reason, they do assert that Kemp withdrew its high bid on the Nanakuli, Hawaii, permit solely in order to free up bidding units to bid on three other allotments.<sup>34</sup> Similarly, they argue that Connoisseur withdrew its high bid for the Flasher, North Dakota, permit in order to free up bidding units to bid on another permit it valued more highly and that had become available at a price it could afford because of a withdrawn bid.<sup>35</sup> The only explanation the Joint Parties provide regarding the rest of their withdrawn bids is that their decisions to withdraw were “based in part on the number of bidders willing to bid what the Joint Parties valued the permits.”<sup>36</sup> They further assert that “[w]hile the FCC may find the Joint Parties at fault for failing to perform adequate due diligence, the Joint Parties did not try to abuse the FCC’s auction processes.”<sup>37</sup>

10. Finally, the Joint Parties contend that their bid withdrawal payments should be reduced because they have not violated any Commission rule and yet have been assessed bid withdrawal payments that are higher than “any forfeiture for a violation of the FCC’s rules.”<sup>38</sup> “Even if the Commission believes that some gamesmanship was present,” the Joint Parties assert, “these penalties far exceed any fine that may be assessed.”<sup>39</sup>

11. *Connoisseur Media, LLC*. Connoisseur, which is one of the Joint Parties, presents its separate request as a petition for reconsideration of the assessment of its bid withdrawal payment, citing the demand for payment letter issued to it on October 31, 2006.<sup>40</sup> In its petition, Connoisseur indicates that it has paid its bid withdrawal payment under protest, requests the rescission of the assessment, and

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<sup>29</sup> *Id.* at 6-7.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> *Id.* at 7-9.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 10.

<sup>40</sup> Connoisseur Petition at 1.

seeks a full refund of its payment.<sup>41</sup> In support of its request, Connoisseur reiterates a number of the arguments made by the Joint Parties, i.e., that its bid withdrawal payment is unconscionably large; that it could not foresee that the price of the Flasher, North Dakota, permit would decrease by as much as it did between Auction No. 37 and Auction No. 62; that it did not game the Commission's auction process; and that, even though it did not violate any Commission rule, it is being forced to pay an amount higher than any typical forfeiture imposed for a rule violation.<sup>42</sup> Elaborating on the Joint Parties' explanation of its withdrawal of its provisionally winning bid on the Flasher permit, Connoisseur also states that it stopped bidding on the Augusta, Kansas, permit because the price for that permit became too high; that it consequently reduced its eligibility; that the standing high bid for the Augusta permit was then withdrawn; that it had insufficient eligibility to return to its previous position as standing high bidder on the Augusta permit without withdrawing its provisionally winning bid from another license; and that it therefore withdrew its bid on the Flasher permit.<sup>43</sup>

12. Connoisseur asserts that its bid withdrawal payment should be rescinded because, but for the Commission's rules prohibiting the recovery of lost eligibility, it would not have incurred a bid withdrawal payment.<sup>44</sup> According to Connoisseur, allowing bidders to recover lost eligibility, or to return to previously held positions as standing high bidders when others withdraw provisionally winning bids, would be preferable to imposing large bid withdrawal payments on small broadcasters who withdraw bids for valid reasons.<sup>45</sup> In addition, Connoisseur contends that it has benefited the U.S. Treasury by ensuring that the Augusta permit was sold in Auction No. 37 rather than in a later auction, and for a higher price than would have been likely in a later auction.<sup>46</sup> Finally, noting that the Commission decided not to allow bid withdrawals in FM broadcast Auctions No. 68 and 70, Connoisseur argues that Auction No. 37 was in effect a "test case" for certain procedures in broadcast auctions and that it would therefore be only fair for the Commission to rescind its bid withdrawal payment.<sup>47</sup>

13. *Nassau Broadcasting Holdings, Inc.* In its initial request—which it styles as a petition for reconsideration of the demand for payment letter issued to it on October 31, 2006, or, in the alternative, a request for waiver of Section 1.2104(g)(1)—Nassau asks that its bid withdrawal payment be reduced or canceled.<sup>48</sup> In support of its request, Nassau states that after bidding on both the Whitefield and Jefferson, New Hampshire, permits, whose allotments are close to each other, it withdrew its bid on the Whitefield permit to avoid the possibility of violating the Commission's multiple ownership rules.<sup>49</sup> Citing *Atlanta Trunking Associates*, a case in which the Commission waived bid withdrawal payments assessed against bidders that had made typographical errors in submitting bids, Nassau argues that it should be granted the same relief because it withdrew its bid on the Whitefield permit in order to correct "a mistake that may have caused a violation of the Commission's multiple ownership rules."<sup>50</sup> Nassau also states that, after

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<sup>41</sup> *Id.* at 1, 5, 8.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* at 2-3.

<sup>44</sup> *Id.* at 6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2, 5.

<sup>47</sup> *Id.* at 6-7.

<sup>48</sup> Nassau Petition at 1-2. In its initial request Nassau does not specify how it believes a reduction of its bid withdrawal payment should be calculated.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 3-4 (citing *Atlanta Trunking Associates, Inc.* and *MAP Wireless L.L.C.*; Georgia Independent PCS Corporation, *Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) ("*Atlanta Trunking Associates*").

considering the difficulties involved in obtaining the approval of local authorities to construct stations, it decided that “it was far more likely to be successful in obtaining zoning approval if it only requested approval of one, rather than two, tower locations.”<sup>51</sup> According to Nassau, it would be inequitable to penalize it for withdrawing a bid based on such considerations, “which are clearly beyond Nassau’s control.”<sup>52</sup>

14. Citing Section 1.925 of the Commission’s rules, Nassau claims that it meets the Commission’s standard for a waiver of Section 1.2104(g)(1).<sup>53</sup> More specifically, Nassau asserts that the imposition of a bid withdrawal payment in its case does not serve the underlying purpose of the rule, which is to deter insincere bidding. Nassau argues that it has demonstrated that it was a sincere bidder by winning two licenses in Auction No. 37.<sup>54</sup> Nassau also maintains that it would be inequitable to apply the bid withdrawal payment rule to it in this case because it took steps to ensure both compliance with the Commission’s rules and service to the public.<sup>55</sup> Finally, Nassau asserts that it had no reasonable alternative to withdrawing its bid for the Whitefield permit once it realized that it faced the possibility of violating the multiple ownership rules and that it would be unlikely to obtain local governmental approval for two stations in New Hampshire.<sup>56</sup>

15. In its amendment to its petition, Nassau argues that it should receive the same relief we granted in *Advance*, a case decided after Nassau filed its petition.<sup>57</sup> In *Advance*, we waived the portion of Section 1.2104(g)(1) that prescribes final bid withdrawal payments, with the result that the petitioner was required to pay only the amount of the interim bid withdrawal payment it had been assessed.<sup>58</sup> Reiterating its argument that it meets the Commission’s waiver standard under Section 1.925, Nassau further contends in its amendment that “[t]he facts surrounding Nassau’s bid withdrawal more strongly support a waiver of the bid withdrawal rule than the facts in the *Advance Order*.”<sup>59</sup> According to Nassau, this is so because it withdrew its high bid due to a mistake (bidding on permits for two allotments in the same New Hampshire county) that might have caused it to violate a Commission rule, whereas *Advance* withdrew its high bid due to a mistake (relying on engineering software that yielded incorrect results) that meant only that it could not make the station economically attractive through an upgrade.<sup>60</sup>

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<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.* at 2, 5.

<sup>53</sup> *Id.* at 5-6. Section 1.925 of the Commission’s rules applies to wireless radio services licenses. 47 C.F.R. § 1.925. This waiver standard and the waiver standard applied to broadcasters, which is discussed *infra* at para. 20, have been found to be substantially the same. See *In re Application of Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16,889, 16,891 ¶ 7 (2003) (“*Delta Radio*”) (citing *Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)). Nassau asserts that, for the same reasons it meets the waiver standard prescribed in Section 1.925, it also meets the general “good cause” standard for obtaining a waiver of the Commission’s rules under 47 C.F.R. § 1.3. Nassau Petition at 5-6 n.13; Nassau Amendment to Petition at 1-2 n.2, 4 n.10.

<sup>54</sup> Nassau Petition at 6. Nassau won construction permits for Jefferson, New Hampshire, and Hardwick, Vermont. *Auction No. 37 Closing Public Notice*, 20 FCC Rcd 1021, Attachment A.

<sup>55</sup> Nassau Petition at 6.

<sup>56</sup> *Id.*

<sup>57</sup> See *supra* note 6.

<sup>58</sup> *Advance*, 22 FCC Rcd at 18,846 ¶ 1, 18,853 ¶¶ 15, 16. The final bid withdrawal payment assessed against *Advance* was \$4,616,000; *Advance*’s interim bid withdrawal payment, which we did not waive and which *Advance* paid, was \$205,500. *Id.* at 18,847-48 ¶¶ 3-4.

<sup>59</sup> Nassau Amendment to Petition at 4.

<sup>60</sup> *Id.* at 4-5.

16. Nassau acknowledges in its amendment that its bid withdrawal payment is not as high as the final bid withdrawal payment that we waived in *Advance*, which was over \$4 million and which we waived because it was the only bid withdrawal payment ever assessed that both exceeded \$4 million and represented more than 200 percent of the ultimate winning bid for the permit or license.<sup>61</sup> Nassau nevertheless argues that its final bid withdrawal payment of \$626,000 should be reduced to \$24,660, the amount of its interim bid withdrawal payment, because \$626,000 represents 319 percent of the ultimate winning bid for the Whitefield permit. According to Nassau, a bid withdrawal payment of more than 300 percent of the winning bid for the permit is inequitable “in the face of clear evidence that Nassau was not ‘gaming’ the auction system.”<sup>62</sup>

### III. DISCUSSION

17. Before considering the substantive arguments the petitioners present, we address the procedural posture of their requests for relief. Notwithstanding the different ways in which they have styled their requests for either reductions or cancellations of their bid withdrawal payments, we consider all of these petitions as requests for waiver of Section 1.2104(g) of the Commission’s rules. We do not consider them as petitions for reconsideration of the October 31, 2006, letters sent to the petitioners.

18. We note first that the letters sent to the petitioners on October 31, 2006, were demand for payment letters issued pursuant to Section 1.1911 of the Commission’s rules.<sup>63</sup> These letters were ministerial in nature, informing the petitioners of the amount of their final bid withdrawal payments already established under Section 1.2104(g)(1) and announced in the *Auction No. 62 Closing Public Notice*, and providing them with certain other information about their debt.<sup>64</sup> Because the petitioners have not alleged that these letters contained any errors, they have not provided any basis for reconsideration of the letters.

19. We also reject the Joint Parties’ assertion that Section 1.2104(g)(1) provides the Commission, or the Bureau under delegated authority, with the discretion to decide whether or not to impose a bid withdrawal payment.<sup>65</sup> Section 1.2104(g) states unequivocally that “the Commission *will impose* payments on bidders who withdraw high bids during the course of an auction.”<sup>66</sup> The Commission has the authority to waive its rules, but neither it nor the Bureau may decide, absent a finding that the rule should be waived under the appropriate standard, that the provisions of Section 1.2104(g) should not be applied. The Joint Parties and Nassau explicitly request a waiver of Section 1.2104(g)(1); Connoisseur does not. However, Connoisseur’s petition is equivalent to such a waiver request because it seeks a rescission and refund of its bid withdrawal payment. We therefore consider all of the requests for reductions or cancellations of bid withdrawal payments before us as requests for either partial or complete waivers of Section 1.2104(g) of the Commission’s rules.

20. To obtain a waiver of the bid withdrawal payment rule, a petitioner in the FM broadcast service must demonstrate that special circumstances warrant a deviation from the rule, or that such a

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<sup>61</sup> *Id.* at 2,5.

<sup>62</sup> *Id.* at 5-6.

<sup>63</sup> 47 C.F.R. § 1.1911.

<sup>64</sup> For example, the letters explained the basis of the petitioners’ debt and provided information regarding interest, penalties, and administrative costs.

<sup>65</sup> *See supra* para. 6.

<sup>66</sup> 47 C.F.R. § 1.2104(g) (emphasis added).

deviation would serve the public interest.<sup>67</sup> We find that none of the petitioners has demonstrated any special circumstances justifying a deviation from Section 1.2104(g)(1) or that a deviation from this rule would be in the public interest. We therefore conclude that none of the bid withdrawal payments at issue here should be waived either in part or in whole. We turn now to an examination of the petitioners' individual arguments.

21. *The Joint Parties.* We disagree with the Joint Parties' assertion that their bid withdrawal payments are individually and collectively excessive.<sup>68</sup> In adopting the bid withdrawal payment rule, the Commission recognized that bid withdrawal payments that were too high would be detrimental to the auction process because they would tend to discourage the efficient aggregation of licenses.<sup>69</sup> In establishing guidelines for assessing bid withdrawal payments where bidders made typographical errors in submitting bids, the Commission also explained that it wished to provide for bid withdrawal payments in such cases that were "substantial enough to discourage strategic placement of erroneous bids without being so severe as to impose an untenable burden on bidders."<sup>70</sup> Although neither the efficient aggregation of licenses nor bid withdrawal payments triggered by typographical errors are at issue here, we find that the Commission's dual goal of deterring insincere bidding while avoiding excessive burdens on bidders remains relevant to auctions generally.<sup>71</sup> We find here that none of the Joint Parties' bid withdrawal payments is so high as to constitute a special circumstance warranting either a partial or complete waiver of the amount assessed.

22. First, we find that the total amount of the six bid withdrawal payments the Joint Parties challenge, which is \$3,773,000, is irrelevant to a consideration of whether these bid withdrawal payments are too high. Consistent with the purpose of Section 1.2104(g), bid withdrawal payments are calculated on a license-by-license basis. In other words, where a bidder withdraws bids on multiple licenses or permits, the calculation of a bid withdrawal payment is made separately for each license or permit.<sup>72</sup> The

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<sup>67</sup> *Delta Radio*, 18 FCC Rcd at 16,891 ¶ 7. See also *Northeast Cellular Telephone 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)); 47 C.F.R. § 1.3 ("Any provision of the rules may be waived . . . on petition if good cause therefor is shown.").

<sup>68</sup> Joint Parties' Petition at 4-5.

<sup>69</sup> The Commission explained, "In either sequential or simultaneous auctions, a bidder may bid high on one property in the expectation that it will also win a complementary property, only to find that it is outbid on the complementary property. If the penalty for bid withdrawal is too high, bidders will tend to be too cautious in attempting to aggregate licenses." *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373 ¶ 148.

<sup>70</sup> *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C., Order*, 11 FCC Rcd 17,189, 17,198 ¶ 19 (1996). In certain early bid withdrawal cases involving typographical errors, bid withdrawal payments calculated under Section 1.2104(g)(1) might have amounted to tens of millions of dollars because bidders added extra zeroes to bids.

<sup>71</sup> Bidders do not normally seek to aggregate construction permits in broadcast auctions such as Auction No. 37 in the same way they may seek to aggregate wireless communications licenses, and none of the petitioners argues that it was in fact attempting to aggregate permits. The cases before us also do not involve facts similar to the cases in which auction participants submitted erroneous bids due to typographical errors. Following the submission of mistaken bids that contained typographical errors in the early years of the auctions program, the Commission implemented various system enhancements to reduce the possibility of such types of erroneous bids. See, e.g., *Atlanta Trunking Associates*, 12 FCC Rcd at 6388 ¶ 11. Typographical errors have ceased to be a problem in Commission auctions.

<sup>72</sup> The Commission has never calculated bid withdrawal payments on other than a license-by-license basis. Moreover, the Commission has refused to calculate default payments under Section 1.2104(g)(2) on an aggregate basis because to do so would minimize the impact of the default payment rule. See *BDPCS, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,602-03 ¶¶ 20-23 (2000) (rejecting argument that where bidder had defaulted on multiple licenses, its default payments should be considered in the aggregate and "gains" realized from the subsequent auction of some licenses should be used to offset "losses" incurred on others); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and*

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aggregate amount of certain bid withdrawal payments owed by different selected parties has no significance, and it would be entirely arbitrary for us to consider the Joint Parties' bid withdrawal payments collectively. Thus, while it is not inappropriate for the Joint Parties to file a joint request for relief presenting a single set of arguments, we find that their assertion that their bid withdrawal payments are collectively excessive is misplaced.

23. Second, we find that none of the Joint Parties' individual bid withdrawal payments is excessive. As noted above, in *Advance* we found that a bid withdrawal payment that exceeded \$4 million and represented more than 200 percent of the ultimate winning bid for the construction permit was unnecessarily high to achieve the purpose of Section 1.2104(g)(1).<sup>73</sup> In reaching this finding, we explained that the bid withdrawal payment in question was the only bid withdrawal payment ever assessed that exceeded both \$4 million and 200 percent of the winning bid; we also noted that, if we were to enforce it, it would be the highest bid withdrawal payment, as an absolute number, ever imposed in the history of the auctions program.<sup>74</sup> In reaching our decision, we found that neither a bid withdrawal payment of over \$4 million that is less than 200 percent of the ultimate winning bid for the permit or license, nor a bid withdrawal payment that is over 200 percent of the winning bid for the permit or license but under \$4 million, is *per se* excessive.<sup>75</sup> In reviewing the bid withdrawal payments at issue here, we continue to hold this view.

24. Three of the bid withdrawal payments we consider here represent more than 200 percent of the winning bids for the permits.<sup>76</sup> All of the challenged bid withdrawal payments, however, are well below the \$4 million bid withdrawal payment we waived in *Advance*. Indeed, the highest bid withdrawal payment assessed against any of the petitioners is \$1,337,000, which we do not consider an excessive amount, and the rest of the bid withdrawal payments at issue are considerably lower than that. The Joint Parties argue that their bid withdrawal payments are excessive because they are greater than \$100,000 and because there have previously been only a small number of bid withdrawal payments over \$600,000.<sup>77</sup> We find, however, that such amounts are not necessarily out of line with the purpose of the bid withdrawal payment rule.

25. Bid withdrawal payments must be substantial enough to deter insincere bidding, whether such bidding is strategic in nature or based on inadequate due diligence or planning. The Joint Parties argue that their bid withdrawal payments should be reduced even though "the FCC may find [them] at fault for failing to perform adequate due diligence."<sup>78</sup> We disagree. Bidders that bid too much for a license or permit based on inadequate due diligence may distort price information, to the detriment of auction efficiency, as do bidders that place insincere bids for strategic reasons. In addition to the obvious possible harm of keeping the second highest bidder from winning a license which it should have been able to win,

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*Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 21,293, 15,327-29 ¶¶ 68-73 (2000) (declining to modify Section 1.2104(g) to provide that, where winning bidder defaults on multiple licenses, default payment would be calculated on aggregate basis, because doing so might encourage insincere bidding). The same reasoning is applicable to bid withdrawal payments under Section 1.2104(g)(1).

<sup>73</sup> *Advance*, 22 FCC Rcd at 18,850 ¶ 7.

<sup>74</sup> *Id.* at 18,851 ¶ 9.

<sup>75</sup> *Id.* at 18,851-52 ¶ 10.

<sup>76</sup> Connoisseur's bid withdrawal payment is 215 percent of the winning bid for the Flasher, North Dakota, permit. Nassau's bid withdrawal payment is 319 percent of the winning bid for the Whitefield, New Hampshire, permit. Cumlulus's bid withdrawal payment is 1078 percent of the winning bid for the Cannon Ball, North Dakota, permit.

<sup>77</sup> Joint Parties' Petition at 4.

<sup>78</sup> *Id.* at 9.

inflated bidding may adversely affect auction participants in more subtle ways. For example, other bidders may react to the inflated price signals, believing them to be true signals of value, by switching their bidding strategies away from comparable licenses on which they may have placed the highest value, or by overbidding in turn on other licenses. Moreover, we reject the Joint Parties' suggestion that their bid withdrawal payments should be reduced "[e]ven if the Commission believes that some gamesmanship was present."<sup>79</sup> To the extent bidders purposefully engage in strategic insincere bidding, they should be held fully accountable for their actions. Indeed, the Joint Parties' suggestion that the Commission should reduce bid withdrawal payments even where bidders perform inadequate due diligence or engage in gamesmanship underlines the importance of assessing bid withdrawal payments that are substantial enough to deter such behavior. We make no findings regarding either the Joint Parties' due diligence or possible gamesmanship on their part; however, we do find that, in light of the purpose of Section 1.2104(g)(1), their bid withdrawal payments are not excessive.

26. We also find no merit in the Joint Parties' contention that their bid withdrawal payments are excessive because the bid withdrawal payments incurred in Auction No. 37 represent a higher percentage of the value of the permits than the bid withdrawal payments incurred in PCS auctions.<sup>80</sup> Although we found in *Advance* that a \$4 million bid withdrawal payment was exceptionally high in part because it was 200 percent of the winning bid for the construction permit and the other \$4 million bid withdrawal payments that had been assessed previously were less than 5 percent of the winning bids for the licenses,<sup>81</sup> we find that comparisons of bid withdrawal payments between auctions or services generally are not a valid basis for reducing individual bid withdrawal payments. The ratios of bid withdrawal payments to winning bids will inevitably vary from one auction to another and may also be different among services. Such variations and differences, which are undoubtedly the result of a complex variety of factors, do not necessarily mean that any individual bid withdrawal payments are excessive or inequitable. We therefore find that only in very exceptional circumstances will the comparison of ratios of bid withdrawal payments to winning bids among auctions or services constitute a basis for reconsidering a bid withdrawal payment calculated pursuant to Section 1.2104(g)(1), and we find no exceptional circumstances here.

27. We turn now to the Joint Parties' remaining arguments. We do not agree that the Joint Parties' bid withdrawal payments should be reduced because Auction No. 37 was the first broadcast auction in which bids were withdrawn and bid withdrawal payments were assessed, or because of the "concentration of high withdrawal payments," as they assert.<sup>82</sup> Neither of these facts renders Auction No. 37 so different from all other Commission auctions that a deviation from the normal application of Section 1.2104(g)(1) to the Joint Parties is justified. The fact that Auction No. 37 was the first open FM broadcast auction does not justify a reduction of the Joint Parties' bid withdrawal payments. For every type of auction the Commission decides to conduct, there has to be a first such auction held. Furthermore, the bid withdrawal payment rule for Auction No. 37 was not new; it had been adopted many years before the auction, and all auction participants should have been familiar with it. In addition, we find that the occurrence of several bid withdrawal payments of over \$600,000 in an auction is not by itself a circumstance that is sufficiently exceptional to warrant a deviation from the bid withdrawal payment rule. The behavior of bidders can vary among auctions, as can the results of auctions. The withdrawal payment rule applies to all auctions in which withdrawals are permitted and variations among auctions do not necessarily constitute special circumstances warranting deviations from the Commission's rules.

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<sup>79</sup> *Id.* at 10.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Advance*, 22 FCC Rcd at 18,851-52 ¶¶ 9-10.

<sup>82</sup> Joint Parties' Petition at 3, 4.

28. We also reject the Joint Parties' argument that a reduction of their bid withdrawal payments is appropriate because of the "specialized nature" of the FM broadcast service.<sup>83</sup> The value of licenses in other services can and does fluctuate from one auction to another because of factors similar to those involved in the FM broadcast service. Thus, although wireless communications operators do not offer "formats" of the kind radio stations do, they nonetheless offer services that can be packaged differently and that can change from one year to the next, which may affect competing service providers. In addition, just as the ownership of radio stations changes, the ownership of wireless licenses can change from year to year, which may affect market conditions. We therefore find the Joint Parties' assertion that broadcast service market conditions change from year to year to a greater degree than the market conditions of other auctionable services to be unsupported. We also find their contention that they could not have expected the permits on which they withdrew bids to decrease in value as much as they did between Auction No. 37 and Auction No. 62 to be misplaced; the possibility that license values will fluctuate over time is a risk that bidders in all auctions face, regardless of the service involved.

29. In addition, we do not accept the Joint Parties' claim that the Commission could have avoided selling the permits in question for substantially less than their withdrawn bids if it had awarded the permits to the next highest bidders in Auction No. 37.<sup>84</sup> According to the Joint Parties, the Commission could have done this under Section 1.2109(b) of its rules.<sup>85</sup> The Joint Parties acknowledge that Section 1.2109(b) applies to winning bidders that withdraw bids *after* the close of an auction or fail to remit their required down payments on time, but they assert that this "does not seem to preclude the FCC from awarding a permit to the next highest bidder when a high bid is withdrawn during an auction and no subsequent bids are placed."<sup>86</sup> We disagree. Section 1.2109(b) by its terms provides the Commission with the discretion to award a permit or license to the next highest bidder in an auction when the winning bidder withdraws its winning bid after the auction closes; Section 1.2104(g), which governs cases in which a provisionally winning bid is withdrawn during an auction, does not provide the Commission with such discretion. We may not read such discretion into Section 1.2104(g), nor may we apply Section 1.2109(b) to situations governed by Section 1.2104(g).

30. We agree with the Joint Parties that there are legitimate reasons for withdrawing bids, such as freeing up bidding units to pursue alternative bidding strategies. We also accept at face value their assertions that Kemp and Connoisseur withdrew the provisionally winning bids at issue for this reason.<sup>87</sup> We find, however, that the withdrawal of a bid for such a reason does not constitute a special circumstance; to the contrary, this kind of bid withdrawal is both expected and commonplace in Commission auctions. Similarly, we find nothing remarkable about the Joint Parties' statement that their decisions to withdraw bids were "based in part on the number of bidders willing to bid what the Joint Parties valued the permits."<sup>88</sup> As noted above, the Joint Parties suggest that they may not have performed adequate due diligence in preparing for Auction No. 37.<sup>89</sup> We lack sufficient information to make any such findings on this point. We find, however, that, even assuming adequate due diligence and an absence of insincere bidding on their part, the Joint Parties' asserted reasons for withdrawing their bids do not constitute special circumstances that would warrant a deviation from the bid withdrawal payment rule.

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<sup>83</sup> *Id.* at 6-7.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> 47 C.F.R. § 1.2109(b).

<sup>86</sup> Joint Parties' Petition at 7 n.19.

<sup>87</sup> *Id.* at 8-9.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 9.

31. We also do not accept the Joint Parties' argument that their bid withdrawal payments should be reduced or waived because they are higher than forfeitures imposed for violations of the Commission's rules.<sup>90</sup> As we explained in *Advance*, the statutory and regulatory provisions that govern such forfeitures have different purposes than the Commission's bid withdrawal payment rule.<sup>91</sup> Moreover, the factors involved in any particular forfeiture case will be different from the factors involved in the assessment of a bid withdrawal payment under Section 1.2104(g)(1). Any comparison of forfeitures and bid withdrawal payments is therefore irrelevant to a consideration of the equitableness of the latter.<sup>92</sup>

32. Finally, we find that the Joint Parties have not justified an extension of time in which to pay their bid withdrawal payments. The demand letters of October 31, 2006, provided them with 30 days from the date of the letters to submit their final payments in full.<sup>93</sup> In their Request for Extension of Time, the Joint Parties request an additional 90 days, i.e., until February 28, 2007. In making this request, they state that, if their request for a reduction of their bid withdrawal payments is granted, the amount each party owes will be significantly reduced.<sup>94</sup> Three of the Joint Parties—Connoisseur, Cumulus, and Kemp—nevertheless paid their final bid withdrawal payments within 30 days of the date of the demand letters. The Joint Parties' Request for Extension of Time is therefore moot with respect to these three parties. Because it presents no facts that warrant providing either of the other Joint Parties with additional time in which to pay their bid withdrawal payments, we deny the Joint Parties' Request for Extension of Time as it applies to Lunderville and College Creek.<sup>95</sup>

33. *Connoisseur Media, LLC*. As noted above, Connoisseur makes arguments in its individual petition that are in addition to those already made by the Joint Parties. We find that these arguments fail to describe any special circumstances that warrant a deviation from Section 1.2104(g)(1). First, we reject Connoisseur's assertion that its bid withdrawal payment should be rescinded because it would not have incurred this payment if it had been allowed to recover the eligibility it had lost before withdrawing its bid on the Flasher, North Dakota, permit.<sup>96</sup> Prior to Auction No. 37, the Bureaus sought comment on proposed activity rules for the auction, including a requirement that auction participants bid on construction permits representing 100 percent of their bidding units in each round of the auction in order to maintain the bidding eligibility established by their upfront payments. The Bureaus explained that, under this proposal, failure to maintain the requisite activity level would result in either the use of one of the bidder's limited number of activity rule waivers, if the bidder had not used them all, or a permanent reduction in the bidder's eligibility.<sup>97</sup> Connoisseur did not comment on or object to these proposed rules,

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<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Advance*, 22 FCC Rcd at 18,852 ¶ 12.

<sup>92</sup> *Id.*

<sup>93</sup> Bid Withdrawal Payment Demand Letters, *supra* note 20, at 2.

<sup>94</sup> Joint Parties' Request for Extension of Time at 1.

<sup>95</sup> As explained in the Bid Withdrawal Payment Demand Letters, under 31 U.S.C. § 3717 unpaid debts owed the United States are subject to interest, penalties, and administrative costs from the date of delinquency. In this instance, the debts were delinquent if not paid in full on or before October 31, 2006. *See* Bid Withdrawal Payment Demand Letters, *supra* note 20, at 2. Because Connoisseur, Cumulus, and Kemp paid the full amount due within 30 days of October 31, 2006, under 31 U.S.C. § 3717(d) these three parties were not charged interest and they incurred no penalties or administrative costs.

<sup>96</sup> Connoisseur Petition at 6.

<sup>97</sup> Consistent with their general practice, in their Public Notice seeking comment on procedures for the auction the Bureaus proposed that the amount of the upfront payment submitted by each bidder would determine the maximum number of bidding units on which that bidder would be permitted to place bids, and that this limit would define the bidder's initial eligibility. Revised Inventory and Auction Start Date for FM Broadcast Construction Permits; Auction Rescheduled for November 3, 2004; Comment Sought on Reserve Prices or Minimum Opening Bids and

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which were adopted for the auction.<sup>98</sup> Its argument that the procedures applied during the auction were flawed is therefore untimely. Moreover, the activity rules and bid withdrawal procedures applied in Auction No. 37 were applied to all participants. We therefore find that Connoisseur's reduced eligibility during Auction No. 37 is not an unusual circumstance and does not justify a rescission of its bid withdrawal payment.

34. Second, we disagree with Connoisseur's contention that its bid withdrawal payment should be waived because it benefited the U.S. Treasury by ensuring that the Augusta permit was won in Auction No. 37 rather than in a subsequent auction, and for a higher price than would have been likely in a later auction.<sup>99</sup> The fact that Connoisseur won a permit other than the one on which it withdrew a provisionally winning bid is not a special circumstance. Bidders may frequently win one permit or license after withdrawing a bid on another. If we were to waive the bid withdrawal payment rule each time this happened, the rule would no longer function as intended to deter insincere bidding. Connoisseur's claim that it won the Augusta permit at a price higher than would have been likely in a later auction is therefore not only speculative but also irrelevant to the application of Section 1.2104(g)(1).

35. Finally, we do not accept Connoisseur's argument that its bid withdrawal payment should be rescinded because Auction No. 37 was in effect a "test case" for bid withdrawals in broadcast auctions.<sup>100</sup> Connoisseur is correct that the Bureaus decided not to allow bid withdrawals in Auctions No. 68 and 70, FM broadcast auctions that were held after Auction No. 37.<sup>101</sup> Connoisseur is incorrect, however, in describing Auction No. 37 as a test case for certain procedures in broadcast auctions. The Commission had, consistent with its well-established approach to non-broadcast auctions, permitted bid withdrawals in previous broadcast auctions.<sup>102</sup> The Bureaus decided to prohibit bid withdrawals in Auction No. 68 and Auction No. 70 primarily because they found that there was evidence suggesting that bid withdrawals may have been used for anticompetitive purposes in previous FM broadcast auctions.<sup>103</sup> The Bureaus'

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Other Auction Procedures, *Public Notice*, 19 FCC Rcd 6907, 6911 (WTB/MB 2004) ("*Auction No. 37 Comment Public Notice*").

<sup>98</sup> *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10,593, 10,595-96. Connoisseur also did not comment on the Bureaus' proposal to allow auction participants to withdraw high bids in two rounds of the auction. See *Auction No. 37 Comment Public Notice*, 19 FCC Rcd at 6916.

<sup>99</sup> Connoisseur Petition at 2, 5.

<sup>100</sup> *Id.* at 6-7.

<sup>101</sup> 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 11,144, 11,179-80 ¶ 144 (WTB/MB 2006); Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 70, *Public Notice*, 21 FCC Rcd 12,957, 12,995 ¶ 163 (WTB/MB 2006) ("*Auction No. 70 Procedures Public Notice*").

<sup>102</sup> Bid withdrawals had been permitted, for example, in Auction No. 25. Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999; Minimum Opening Bids and Other Procedural Issues, *Public Notice*, 14 FCC Rcd 10,632, 10,665-66 (WTB/MMB 1999).

<sup>103</sup> In proposing to prohibit bid withdrawals in Auction No. 68, the Bureaus noted that the permits being offered in the auction were permits for which provisionally winning bids had been withdrawn in previous FM broadcast auctions, in some cases in successive auctions by the same bidders, and that allowing bidders further opportunities to withdraw bids on these permits might encourage insincere bidding or the use of withdrawals for anticompetitive purposes. Auction of FM Broadcast Construction Permits Scheduled for January 10, 2007; Comment Sought on

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decision to prohibit bid withdrawals in light of this evidence does not support Connoisseur's claim that Auction No. 37 was a test case for auction procedures; the Bureaus' decision is simply one instance in which auction procedures have been adjusted in response to behaviors on the part of bidders.<sup>104</sup> Therefore, as we have already indicated, we find nothing unusual about Auction No. 37 that would warrant a waiver of Section 1.2104(g)(1).<sup>105</sup>

36. *Nassau Broadcasting Holdings, Inc.* Nassau has also failed to present any special circumstances that warrant a deviation from Section 1.2104(g)(1). We do not accept Nassau's characterization of its bid on the Whitefield, New Hampshire, permit as a mistake similar to the typographical errors involved in *Atlanta Trunking Associates*.<sup>106</sup> Nassau suggests that it realized only during the course of Auction No. 37 that winning both the Whitefield and Jefferson, New Hampshire, permits might cause it to violate the Commission's multiple ownership rules.<sup>107</sup> However, Nassau knew or should have known the requirements of these rules when it began bidding in Auction No. 37, and it should have planned its bidding strategy accordingly.<sup>108</sup> To the extent Nassau determined that it should change its bidding strategy during the auction, or decided that its initial bidding strategy was a mistake, it could have avoided these circumstances by determining at the outset of the auction that, if it bid on both the Whitefield and Jefferson permits, it might risk violating the Commission's multiple ownership rules.

37. Similarly, Nassau should have taken into consideration all zoning laws relevant to its plans before it began bidding in Auction No. 37. Although government approval of tower locations may be beyond the control of any particular bidder, all bidders are responsible for their bidding strategies. If Nassau thought it was more likely to obtain approval of one tower location, rather than two, it could and should have made this assessment prior to the start of bidding.

38. We also find that the application of the bid withdrawal payment rule to Nassau in this case serves the underlying purpose of the rule, which is to deter insincere bidding. Contrary to Nassau's claim, its having won two construction permits in Auction No. 37 does not demonstrate that it bid sincerely. Moreover, Nassau, by its own arguments, has shown that it did not adequately plan its bidding strategy and placed bids before properly taking into consideration laws and regulations that it knew or should have

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Competitive Bidding Procedures for Auction No. 68, *Public Notice*, 21 FCC Rcd 9482, 9489 (WTB/MB 2006). In prohibiting bid withdrawals in Auction No. 70, the Bureaus noted again that some bidders in previous FM broadcast auctions may have used the bid withdrawal mechanism improperly to keep new facilities out of the hands of competitors, thus delaying new service. *Auction No. 70 Procedures Public Notice*, 21 FCC Rcd at 12,995 ¶ 163. As Connoisseur indicates, the Bureaus also stated their conclusion that bid withdrawals are unnecessary in FM broadcast auctions because bidders do not need to aggregate permits to realize the full value of the stations or to put the spectrum to effective and efficient use. *Id.*

<sup>104</sup> Another example of such an adjustment to auction procedures is the institution of click-box bidding in 1997. In the first few years of the auctions program, the bid submission screen provided an entry field in which bidders typed their bids. This system allowed for typographical errors and permitted bidders to signal bidding information to other bidders in violation of the Commission's anti-collusion rules by embedding such information in the digits of their bids. The Commission eliminated these problems and simplified bidding by instituting the provision of click boxes in which bidders check minimum acceptable bid amounts. *See* FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16), *Public Notice*, 12 FCC Rcd 13,449, 13,450 (WTB 1997). *See also* Auction of Licenses in the 747-792 MHz Bands Scheduled for September 6, 2000, *Public Notice*, 15 FCC Rcd 11,526, 11,547 (WTB 2000).

<sup>105</sup> *See supra* para. 27.

<sup>106</sup> Nassau Petition at 4.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *See* 47 C.F.R. § 73.3555(a).

known about before the commencement of the auction. In light of these circumstances, its bid withdrawal payment is not inequitable.

39. Turning to Nassau's amendment to its original petition, we reject Nassau's argument that it should be granted the same relief that we granted in *Advance*. In *Advance* we waived the petitioner's final bid withdrawal payment because we found that it was exceptionally high; more specifically, it was the only bid withdrawal payment ever assessed in the history of the auctions program that exceeded both \$4 million and 200 percent of the ultimate winning bid for the permit or license.<sup>109</sup> Nassau's bid withdrawal payment of \$626,000 is significantly below \$4 million. Nassau therefore is not similarly situated with the petitioner in *Advance*. Moreover, we explained in *Advance* that neither a bid withdrawal payment of over \$4 million that is less than 200 percent of the ultimate winning bid for the permit or license, nor a bid withdrawal payment that is over 200 percent of the winning bid for the permit or license but under \$4 million, is necessarily excessive or out of line with the Commission's goals in imposing bid withdrawal payments.<sup>110</sup> Therefore, our decision in *Advance* provides no precedent for a finding here that Nassau's final bid withdrawal payment is exceptionally high or constitutes a special circumstance under the Commission's waiver standard.

40. Furthermore, Nassau's amendment presents no reason why we should find either that the amount of its final bid withdrawal payment is inconsistent with the Commission's goals in imposing bid withdrawal payments or that a deviation from the bid withdrawal rule is warranted in its case. Nassau claims that its bid withdrawal payment of more than 300 percent of the winning bid for the permit is inequitable "in the face of clear evidence that Nassau was not 'gaming' the auction system."<sup>111</sup> We do not agree that Nassau has submitted unambiguous evidence that it did not withdraw its provisionally winning bid on the Whitefield permit for strategic reasons. Moreover, as we have already explained, Nassau knew or should have known the requirements of the Commission's rules, and should have taken into consideration all zoning laws relevant to its plans, before it began bidding in Auction No. 37. In any event, we need not and do not make any findings regarding Nassau's motivations for withdrawing its provisionally winning bid on the Whitefield permit. As we have already indicated, bidders that bid too much for a license or permit based on inadequate due diligence or planning may distort price information, to the detriment of auction efficiency, in the same way as bidders that place insincere bids for strategic reasons.<sup>112</sup> Other bidders may react to the faulty price signals, believing them to be true signals of value, by modifying their bidding behavior on other licenses in ways that interfere with the auction's ability to assign licenses to the highest valuing bidders. Therefore, in order for the bid withdrawal payment rule to achieve its underlying purpose, bid withdrawal payments must be substantial enough to deter bidding based on inadequate planning and should not be reduced to reward such behavior.

41. Finally, Nassau's contention that it is more deserving of a waiver of the bid withdrawal rule than the petitioner in *Advance*, because its bid withdrawal was occasioned by a mistake that could have resulted in a violation of the Commission's rules and *Advance*'s was not, is without merit.<sup>113</sup> We made clear in *Advance* that our decision to waive the final bid withdrawal payment in that case was based on no other reason than the fact that the bid withdrawal payment at issue was the only one ever assessed that exceeded both \$4 million and 200 percent of the ultimate winning bid for the permit.<sup>114</sup> We also emphasized that we did not consider *Advance*'s allegations of mistake to be a justification for a waiver of

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<sup>109</sup> *Advance*, 22 FCC Rcd at 18,850 ¶ 7, 18,853 ¶ 16.

<sup>110</sup> *Id.* at 18,851-52 ¶ 10.

<sup>111</sup> Nassau Amendment to Petition at 5-6.

<sup>112</sup> *See supra* para. 25.

<sup>113</sup> Nassau Amendment to Petition at 4-5.

<sup>114</sup> *Advance*, 22 FCC Rcd at 18,852 ¶ 13.

the bid withdrawal payment rule.<sup>115</sup> Nassau's comparison of its mistake with that alleged by Advance is therefore misplaced. Just as we found in *Advance* that all participants in Commission auctions are responsible for performing adequate due diligence in deciding whether and how much to bid for any particular construction permit or license, so we find here.<sup>116</sup>

#### IV. CONCLUSION

42. For the reasons discussed above, we conclude that all of the petitioners have failed to demonstrate facts supporting either a partial or complete waiver of Section 1.2104(g). The petitioners have not shown any special circumstances that would justify a deviation from Section 1.2104(g), nor have they shown that a deviation from this rule would be in the public interest. We therefore deny all of the petitions before us seeking relief from the rule.

43. Finally, we conclude that the Joint Parties' Request for Extension of Time is moot with respect to Connoisseur, Cumulus, and Kemp. We deny the Joint Parties' Request for Extension of Time as it applies to Lunderville and College Creek. These two parties' unpaid bid withdrawal payments, which were delinquent debts as of October 31, 2006, are subject to collection action as required under the Debt Collection Improvement Act of 1996, as amended ("DCIA").<sup>117</sup> Interest, penalties, and administrative charges continue to accrue, and the debtors are subject to other administrative procedures to enforce collection.<sup>118</sup> If Lunderville and College Creek fail to make full payment of their outstanding debt obligations, as detailed in the Bid Withdrawal Payment Demand Letters, the Commission will, within 30 days of the date of this Order, transfer the full amount of the outstanding debt to the United States Department of Treasury for debt collection and other administrative or judicial action.<sup>119</sup>

#### V. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), and Sections 1.3 and 1.1204(g)(1) of the Commission's rules, 47 C.F.R. §§ 1.3 and 1.1204(g)(1), that the request for reduction of bid withdrawal payments filed on behalf of Barry P. Lunderville, Connoisseur Media, LLC, College Creek Broadcasting, Inc., Cumulus Licensing LLC, and Kemp Communications, Inc., on November 20, 2006, IS DENIED.

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<sup>115</sup> We stated, "[W]e do not base our decision on Advance's claim that it relied on faulty third-party software. . . . [A]ll participants in Commission auctions are responsible for performing adequate due diligence in deciding whether and how much to bid for any particular construction permit or license. We therefore emphasize that we do not consider Advance's allegations of third-party mistake to be a justification for a waiver of the bid withdrawal payment rule." *Id.* at 18,852 ¶ 11.

<sup>116</sup> *Id.*

<sup>117</sup> Pub.L. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996).

<sup>118</sup> *See* 31 U.S.C. § 3717; 47 C.F.R. § 1.1910.

<sup>119</sup> In 2004, the Commission adopted rules implementing the requirements of the DCIA. *See* Amendment of Parts 0 and 1 of the Commission's Rules – Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, 19 FCC Rcd 6540 (2004); 47 C.F.R. Part 1, Subpart O. The Commission's rules implementing the DCIA require entities and individuals doing business with the Commission to pay their debts in a timely manner. Furthermore, under these rules delinquent debtors may not obtain Commission benefits. Pursuant to Section 1.1910 of the Commission's rules, action will be withheld on any application pending before the Commission that has been filed by Lunderville or College Creek, and if these parties do not pay their delinquent debt or make other satisfactory arrangements within 30 days of the date of this Order, any pending application they have filed will be dismissed. 47 C.F.R. § 1.1910.

45. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), and Sections 1.3 and 1.1204(g)(1) of the Commission's rules, 47 C.F.R. §§ 1.3 and 1.1204(g)(1), that the Petition for Reconsideration filed on behalf of Connoisseur Media, LLC, on November 20, 2006, IS DENIED.

46. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), and Sections 1.3 and 1.1204(g)(1) of the Commission's rules, 47 C.F.R. §§ 1.3 and 1.1204(g)(1), that the Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Penalty Rule, filed on behalf of Nassau Broadcasting Holdings, Inc., on November 30, 2006, and the Amendment to Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Penalty Rule, filed on behalf of Nassau Broadcasting Holdings, Inc., on February 25, 2008, ARE DENIED.

47. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), and Section 1.1204(g)(1) of the Commission's rules, 47 C.F.R. § 1.1204(g)(1), that the Request for Extension of Time filed on behalf of Barry P. Lunderville, Connoisseur Media, LLC, College Creek Broadcasting, Inc., Cumulus Licensing LLC, and Kemp Communications, Inc., on November 20, 2006, IS MOOT with respect to Connoisseur Media, LLC, Cumulus Licensing LLC, and Kemp Communications, Inc., and IS DENIED with respect to Barry P. Lunderville and College Creek Broadcasting, Inc.

48. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting  
Acting Chief, Wireless Telecommunications Bureau

### Appendix

For each of the bid withdrawal payments at issue in this Order, the table below shows the amount of the bid the petitioner withdrew in Auction No. 37, the interim bid withdrawal payment, the winning bid for the construction permit in Auction No. 62, and the final bid withdrawal payment. As explained above, College Creek, Cumulus, and Kemp withdrew other high bids during Auction No. 37, but those withdrawn bids are not at issue in this Order either because the permits received winning bids for amounts equal to or greater than the withdrawn bids and therefore no bid withdrawal payments were incurred or because the withdrawing bidders have not challenged the bid withdrawal payments incurred.<sup>120</sup>

Petitioner Name	Withdrawn Bid(s) in Auction No. 37	Interim Bid Withdrawal Payment(s)	Winning Bid(s) in Auction No. 62	Final Bid Withdrawal Payment(s)
Barry P. Lunderville	\$422,000 (Groveton, NH)	\$12,660	\$178,000	\$244,000
Connoisseur Media, LLC	\$893,750 (Flasher, ND)	\$26,813	\$284,000	\$609,750
College Creek Broadcasting, Inc.	\$1,339,000 (Windsor, NY) \$1,026,000 (Blue Lake, CA)	\$40,170 \$30,780	\$545,000 \$361,000	\$794,000 \$665,000
Cumulus Licensing, LLC	\$1,461,000 (Cannon Ball, ND)	\$43,830	\$124,000	\$1,337,000
Kemp Communications, Inc.	\$1,796,250 (Nanakuli, HI)	\$53,888	\$1,684,000	\$112,250
Nassau Broadcasting Holding, Inc.	\$822,000 (Whitefield, NH)	\$24,660	\$196,000	\$626,000

<sup>120</sup> See *supra* note 14.