

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

In the Matter of)
)
Paging Systems, Inc. Petition for)
Reconsideration of Public Notice Announcing)
Procedures for Auction of Automated Maritime)
Telecommunications System Licenses)
(Auction 61))

ORDER ON RECONSIDERATION

Adopted: July 1, 2010

Released: July 1, 2010

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order we affirm the procedures used in our 2005 auction of Automated Maritime Telecommunications System (“AMTS”) licenses. We deny a petition addressed to the Chief of the Commission’s Wireline Telecommunications Bureau (“Bureau”) seeking reconsideration of a Bureau-issued public notice filed before the auction by Paging Systems, Inc. (“PSI”), which sought a change in those procedures.¹

2. In advance of each spectrum auction, the Bureau releases a public notice that lists the inventory of licenses proposed to be offered in the auction, describes the Commission rules applicable to the licenses and the auction, and seeks comment from interested parties regarding proposed auction procedures.² Following such a public notice for Auction 61, PSI filed comments suggesting that we change the rules applicable to the auction to prohibit entities that are commonly controlled from participating in the auction.³ Subsequently, the Bureau released a public notice that established the procedures used in the auction and declined to implement PSI’s suggestion.⁴ Today we affirm the determination we made in the public notice to reject PSI’s suggestion. We therefore deny PSI’s petition for reconsideration of the public notice. We also deny two motions filed by PSI that seek permission to

¹ Petition for Reconsideration in the Matter of Auction No. 61 by Paging Systems Inc. (filed May 23, 2005) (“Petition”).

² See 47 U.S.C. § 309(j)(3)(E), requiring the Commission to provide notice and an opportunity to comment before an auction on the proposed auction procedures.

³ “Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures for Auction No. 61,” *Public Notice*, 20 FCC Rcd 2057 (WTB 2005) (“*Auction 61 Comment Public Notice*”).

⁴ “Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures for Auction No. 61,” *Public Notice*, 20 FCC Rcd 7811, 7824-25 (WTB 2005) (“*Auction 61 Procedures Public Notice*”).

file two supplements to its Petition for Reconsideration after the deadline established in the Commission's rules for the filing of petitions for reconsideration and any supplements, and accordingly dismiss the late-filed supplements.

3. PSI acknowledges that its Petition is based on the same arguments that PSI made in its Application for Review in which it sought to reverse a Bureau order that rejected PSI's claim that the participation of commonly controlled entities in Auction 57, also an auction of AMTS licenses, harmed competition in that auction.⁵ The Commission recently denied PSI's Application for Review in a *Memorandum Opinion and Order* that addressed at length all of PSI's arguments.⁶ We are therefore guided by the Commission's decision with respect to PSI's claims in Auction 57, and we deny PSI's Petition for all of the reasons the Commission explained in its *Memorandum Opinion and Order*. To the extent that PSI has pending filings in other proceedings in which it presents the same arguments that were newly presented in its late-filed supplements at issue here, any such arguments properly raised will be addressed in those other proceedings.⁷

II. BACKGROUND

4. On February 2, 2005, the Bureau released the *Auction 61 Comment Public Notice* announcing that Auction 61 would commence on August 3, 2005, and seeking comment on procedures for the auction of ten AMTS licenses that had remained unsold in the Commission's previous AMTS auction, Auction 57.⁸ PSI filed comments in which it asked the Bureau to delay Auction 61 until the release of a decision on PSI's then-pending petition seeking reconsideration of an earlier decision of the Bureau's Auctions and Spectrum Access Division ("Division"). The Division's decision had denied PSI's request to dismiss the applications of two commonly controlled entities to participate in Auction 57.⁹ PSI's Auction 61 comments largely tracked the arguments it made in seeking to have the results of

⁵ See Petition at 3-4 & n.7 ("this Petition incorporates and premises its arguments upon those made in the Petition for Reconsideration with respect to Auction No. 57 and its pending Application for Review")

⁶ In the Matter of Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 4036 (2010), *appeal docketed sub nom. Paging Systems, Inc. v. FCC*, No. 10-1097 (D.C. Cir., filed May 14, 2010). ("Memorandum Opinion and Order").

⁷ See Paging Systems, Inc., Petition for Reconsideration in the Matter of Intelligent Transportation & Monitoring Wireless, LLC, AMTS Consortium LLC, filed Sept. 5, 2006. The Intelligent Transportation & Monitoring Wireless, LLC application is File No. 0002304206. The AMTS Consortium LLC application is File No. 0002302769.

⁸ See *Auction 61 Comment Public Notice*, 20 FCC Rcd at 2057-58; *Auction 61 Procedures Public Notice*, 20 FCC Rcd at 7816. Auction 57 closed on September 15, 2004. "Automated Maritime Telecommunications System Spectrum Auction Closes, Winning Bidders Announced," *Public Notice*, 19 FCC Rcd 18252 (WTB 2004). AMTS is a maritime service that was established in 1981 as an alternative to VHF public coast service ("VPCS"). See Amendment of Parts 2, 81 and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) Along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875, 876 ¶ 2, on reconsideration, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678 (1981), *aff'd sub nom.*, WJG Tel. Co. v. FCC, 675 F.2d 386 (D.C. Cir. 1982). In the *Public Coast Second Report and Order and Second Further Notice*, the Commission described AMTS as a specialized system of public coast stations providing integrated and interconnected marine voice and data communications, somewhat like a cellular phone system, for tugs, barges, and other commercial vessels on waterways. Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,949, 17,004 ¶ 111 (1997).

⁹ Comments by Paging Systems, Inc. at 3, 7 (filed Feb. 26, 2005). See Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification, *Order*, 19 FCC Rcd 20482 (WTB/ASAD 2004) ("*Division Order*"). The two applicants at issue were Telesaurus-VPC, LLC ("Telesaurus") and AMTS Consortium, LLC ("AMTS Consortium"), both of which are controlled by Warren C. Havens. PSI also filed a Petition for Reconsideration of the *Division Order* in which it asked the Bureau to overrule that portion of the order in which the Division denied a

(continued...)

Auction 57 nullified—namely that commonly owned entities should not be permitted to participate as separate bidders in a spectrum auction.

5. In the *Auction 61 Procedures Public Notice*, released on April 21, 2005, the Bureau denied PSI's request. The Bureau determined that the public interest would be served by conducting Auction 61 as scheduled and noted that on that same day, it had issued a ruling on PSI's Auction 57 Petition in which it had resolved all of the issues PSI had raised in its comments.¹⁰ In the *Auction 57 Bureau Order*, the Bureau denied PSI's petition for reconsideration, finding that PSI had presented no evidence of anticompetitive bidding activity in Auction 57.¹¹ The Bureau noted, among other things, that there is no requirement that bidders compete against all other bidders in an auction.¹² Further, the Bureau noted that the Part 1 competitive bidding rules do not by themselves prohibit agreements between applicants that may lead them to behave as though they are commonly controlled, provided such agreements are properly disclosed and not otherwise unlawful.¹³

6. PSI filed a petition asking the Bureau to reconsider its *Auction 61 Procedures Public Notice* on May 23, 2005. On that same day, PSI also filed an Application for Review, asking the Commission to reverse the *Auction 57 Bureau Order*.¹⁴ Telesaurus, AMTS Consortium, and Warren Havens jointly filed an Opposition to PSI's Petition on June 7, 2005, incorporating by reference all of the arguments they made in their Opposition to PSI's Application for Review of the *Auction 57 Bureau Order*.¹⁵

7. In a *Memorandum Opinion and Order* released April 16, 2010, the Commission denied PSI's Application for Review, rejecting all of its claims.¹⁶ The Commission concluded that PSI had not shown that the participation of commonly controlled entities in Commission spectrum auctions is harmful to competition or contrary to Commission policy.¹⁷ The Commission further decided that PSI had not demonstrated that it was harmed by the participation of such entities in Auction 57, and it disagreed with PSI's assertion that section 1.937(d) of the Commission's rules prohibits the acceptance for filing of auction applications filed by commonly controlled entities.¹⁸ The Commission therefore refused PSI's requests to set aside the results of Auction 57 and to deny other parties in the future an opportunity to participate in the same auction solely because they are commonly controlled.

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request to dismiss the Auction 57 applications of the two commonly controlled entities, Telesaurus and AMTS Consortium. Paging Systems, Inc., Petition for Reconsideration, filed Oct. 14, 2004 ("Auction 57 Petition").

¹⁰ *Auction 61 Procedures Public Notice*, 20 FCC Rcd at 7825-26. See Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Order*, 20 FCC Rcd 8087 (WTB 2005) (rejecting PSI's request to set aside the results of Auction 57 because commonly controlled entities had been allowed to participate) ("*Auction 57 Bureau Order*").

¹¹ 20 FCC Rcd at 8092 ¶ 12.

¹² *Id.* at 8093 ¶ 13.

¹³ *Id.* at 8093 ¶ 13.

¹⁴ Paging Systems, Inc., Application for Review, filed May 23, 2005 ("Application for Review").

¹⁵ AMTS Consortium LLC, Telesaurus VPC LLC, and Warren C. Havens, Opposition to Petition for Reconsideration in the Matter of Auction No. 61, filed June 7, 2005, at 2.

¹⁶ *Memorandum Opinion and Order*, 25 FCC Rcd at 4066 ¶ 97.

¹⁷ *Id.* at 4060 ¶ 80, 4061-64 ¶¶ 83-89.

¹⁸ *Id.* at 4064-65 ¶¶ 92-93.

8. Bidding in Auction 61 began on August 3, 2005. On August 17, 2005, after 116 rounds, bidding closed in Auction 61 with winning bids having been placed on all ten available AMTS licenses.¹⁹ PSI was the winning bidder for one license, which was the only license on which PSI had placed a bid during the auction.²⁰

9. On August 26, 2005, PSI filed a Motion for Leave to File Supplement to Petition for Reconsideration and a Supplement to Petition for Reconsideration.²¹ PSI was required to request leave to file the supplement because PSI submitted it more than 30 days after the release of the *Auction 61 Procedures Public Notice*.²² In the supplement, PSI cites to bidding activity in Auction 61 by commonly controlled entities, which it claims is anti-competitive and which it alleges, for the first time, constitutes a violation of the federal antitrust laws, specifically, Section 1 of the Sherman Act.²³

10. On June 16, 2006, more than a year after release of the *Auction 61 Procedures Public Notice*, PSI filed a Motion for Leave to File Second Supplement to Petition for Reconsideration, accompanied by its Second Supplement to Petition for Reconsideration.²⁴ In its second supplement, PSI cites to the bidding activity of two commonly controlled entities participating in Auction 65, an auction of 800 MHz band commercial Air-Ground Radiotelephone Service licenses. PSI did not apply to participate in Auction 65.²⁵ It asserts, however, that the bidding activity of two commonly controlled entities that did participate in that auction was anti-competitive and a violation of federal antitrust laws.²⁶

III. DISCUSSION

A. PSI's Standing

11. In the *Memorandum Opinion and Order* affirming the *Auction 57 Bureau Order*, the Commission found that the Bureau had correctly questioned PSI's standing to challenge the *Division Order* because PSI had not shown that it had been adversely affected by the acceptance of auction applications filed by commonly controlled entities.²⁷ As the Bureau noted, PSI had participated in Auction 57, won the only license on which it bid, and had no eligibility to bid on any other licenses

¹⁹ See "Auction of Automated Maritime Telecommunications System Licenses Closes: Winning Bidders Announced for Auction No. 61," *Public Notice*, 20 FCC Rcd 13747 (WTB 2005) ("*Auction 61 Closing Public Notice*").

²⁰ PSI was the winning bidder on license PC-AMT008-B in Hawaii. *Auction 61 Closing Public Notice*, 20 FCC Rcd at 13755.

²¹ PSI Motion for Leave to File Supplement to Petition for Reconsideration, filed August 26, 2005 ("PSI First Motion"); PSI Supplement to Petition for Reconsideration, filed August 26, 2005 ("PSI First Supplement").

²² See 47 C.F.R. § 1.106(f). Section 1.106(f) of the Commission's rules provides that the "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action . . ." The rule also states that no supplement to a petition for reconsideration filed after expiration of the 30 day period will be considered "except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor." *Id.*

²³ 15 U.S.C § 1. See PSI First Supplement at 6-8.

²⁴ PSI Motion for Leave to File Second Supplement to Petition for Reconsideration, filed June 16, 2006 ("PSI Second Motion"); PSI Second Supplement to Petition for Reconsideration, filed June 16, 2006 ("PSI Second Supplement").

²⁵ See "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses; 9 Bidders Qualified to Participate in Auction No. 65," *Public Notice*, 21 FCC Rcd 4266 (WTB 2006) ("*Auction 65 Qualified Bidders Public Notice*").

²⁶ PSI Second Supplement at 3.

²⁷ *Memorandum Opinion and Order*, 25 FCC Rcd at 4044 ¶ 28. See *Bureau Order*, 20 FCC Rcd at 8090 ¶ 8 n.36.

without withdrawing its high bid on the license it won.²⁸ PSI had asserted that it had been denied the right to a fair auction because the Bureau's acceptance of short-form applications by commonly controlled entities deterred it from submitting a larger upfront payment, and thereby establishing eligibility to bid on more licenses.²⁹ The Commission rejected PSI's claim, finding that only PSI was responsible for its decision to submit a specific upfront payment amount.³⁰ Thus, PSI had not shown that it was denied an opportunity to compete in Auction 57 on valid and equal terms with other applicants.³¹ Despite finding that PSI had not established standing, the Commission exercised its discretion to address the merits of PSI's contention that commonly controlled applicants should be prohibited from competing in the same auction.

12. In Auction 61, PSI once again bid on only one license and PSI was the winning bidder for that license. The Commission's analysis of PSI's standing in its *Memorandum Opinion and Order*, coupled with an absence of any demonstration by PSI that it was adversely affected by the Bureau's acceptance of Auction 61 applications by commonly controlled entities, leads us again to question PSI's standing to challenge this aspect of the *Auction 61 Procedures Public Notice*. We nevertheless decline to dismiss PSI's Petition for lack of standing. Given the Commission's decision to address the merits of PSI's Auction 57 challenge, and given that PSI's Petition raises all of the same arguments that it raised in Auction 57, we see no reason not to apply the precedent the Commission established in its *Memorandum Opinion and Order*.

B. PSI's Supplements

13. In its first supplement to the Petition, PSI seeks to introduce bidding activity in Auction 61 by the two commonly controlled entities whose participation PSI challenges, and argues for the first time that such activity is a *per se* violation of the federal antitrust laws.³² In its second supplement to the Petition, PSI focuses on bidding activity in Auction 65 by the same commonly controlled entities, which were also qualified bidders in that auction.³³ PSI did not apply to participate in Auction 65, but it argues that these entities' activity in Auction 65 was also anti-competitive and a *per se* violation of federal antitrust laws, and that the Bureau should consider the Auction 65 activity in deciding PSI's challenge to the procedures in Auction 61.³⁴

14. We deny PSI's motions for leave to file the two supplements and dismiss both of the supplements as being untimely filed. Absent extraordinary circumstances, section 405(a) of the Communications Act limits the Commission's power to consider petitions for reconsideration to those filed within a 30-day period.³⁵ Section 1.106(f) of the Commission's rules implements section 405(a) by specifying that a "petition for reconsideration *and any supplement thereto* shall be filed within 30 days from the date of public notice of the final Commission action"³⁶ Although section 1.106(f) gives the Commission discretion to consider late-filed supplements to timely filed petitions if a petitioner presents

²⁸ *Memorandum Opinion and Order* at 4044 ¶ 28; *Bureau Order* at 8090 ¶ 8 n.36.

²⁹ Application for Review at 13, 17-18.

³⁰ *Memorandum Opinion and Order* at 4044 ¶ 28.

³¹ *Id.*

³² PSI First Supplement at 6-8.

³³ PSI Second Supplement at 3.

³⁴ *Id.* See *Auction 65 Qualified Bidders Public Notice*, 21 FCC Rcd 4266, 4275 (WTB 2006).

³⁵ 47 U.S.C. § 405. See *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (1986) (narrowly construing court created "extraordinary circumstances" exception to statutory time limit for filing petitions for reconsideration).

³⁶ 47 C.F.R. § 1.106(f) (emphasis added).

sufficient justification for it to do so,³⁷ “[t]he Commission does not generally or readily accept late-filed supplements to petitions for reconsideration.”³⁸ As the Commission has stated, “the importance of [adhering to section 1.106(f)’s] filing periods and procedures cannot be overstated” given that a strict enforcement of section 1.106(f)’s filing deadlines is “both necessary and desirable” to avert the “grave danger of the staff being overwhelmed by a seemingly never-ending flow of pleadings.”³⁹

15. PSI argues that the Bureau should accept its late-filed supplements because the facts PSI presents in the supplements in support of its petition relate to bidding in Auction 61 and Auction 65 and therefore were unavailable at the time that its petition was filed. We find that argument unpersuasive for two reasons. First, PSI’s supplements do not merely set forth previously unavailable facts that, in PSI’s view, support the arguments contained in the petition for reconsideration. Instead, PSI uses the supplements as a vehicle by which to raise new entirely new legal arguments, *i.e.*, PSI’s claim that separate bidding by commonly controlled entities violates the federal antitrust laws. These are legal arguments that PSI could have raised, but did not raise, within the 30-day statutory deadline. The Commission’s long-standing policy is not to accept late-filed supplements that raise new arguments that could have been presented within the 30-day deadline prescribed by section 1.106(f).⁴⁰ Adherence to the Commission’s well-established policy requires us to reject PSI’s supplements.

16. Second, the new facts that PSI seeks to present in its supplements are not germane to a resolution of the issue PSI presents on reconsideration. The sole issue on reconsideration is the lawfulness of our decision in the April 21, 2005 *Auction 61 Comment Public Notice* not to prohibit commonly controlled entities from submitting separate bids in Auction 61. PSI in its supplements seeks to introduce facts that allegedly show that *after* the issuance of the April 21, 2005 *Auction 61 Comment Public Notice* decision, two commonly controlled auction participants had engaged in bidding activity that was anticompetitive and in violation of the antitrust laws. In deciding whether our ruling is lawful, we analyze the relevant facts and law at the time the ruling was made; we do not consider claims of misconduct by individual auction participants that allegedly occurred after the release of the *Auction 61 Comment Public Notice*. We note that many of the allegations PSI raises in its untimely supplements PSI also raises in its petition for reconsideration of the denial of PSI’s petition to deny the license applications of the commonly controlled entities, and if properly raised there, such issues will be addressed in that proceeding.⁴¹

³⁷ See 47 C.F.R. § 1.106(f) (“No supplement or addition to a petition for reconsideration . . . filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.”).

³⁸ *John Joseph McVeigh, Esq.*, Letter, 24 FCC Rcd 3572, 3574 (Audio Div., Media Bur. 2010).

³⁹ *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 3 FCC Rcd 4146 at ¶ 5 (1988).

⁴⁰ See, e.g., *In the Matter of Alpine PCS, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 469, 480 n.90 (2010); *Richard R. Zaragoza, et al.*, Letter, 24 FCC Rcd. 5743, 5476 (MB 2009); *In the Matter of Brantley County Board of Education*, Order on Reconsideration, 24 FCC Rcd 8102, 8105-06 at ¶ 9 (2009); *In re Southwest Central Dispatch*, Order on Reconsideration, 17 FCC Rcd 15633, 15636 n.28 (Pub. Safety & Private Wireless Div., WTB 2002); See also *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003) (affirming the Commission's decision not to exercise its discretion to hear late-filed supplements when the petitioner offered no plausible explanation for why supplemental arguments were not made in its initial petition).

⁴¹ *Paging Systems, Inc.*, Petition to Deny, filed November 10, 2005; *Intelligent Transportation & Monitoring Wireless, LLC, AMTS Consortium LLC*, Petitions to Deny filed by Maritime Communications/Land Mobile, LLC and *Paging Systems, Inc.*, Order, 21 FCC Rcd 8791 (2006); *Paging Systems, Inc.*, Petition for Reconsideration in the Matter of *Intelligent Transportation & Monitoring Wireless, LLC, AMTS Consortium LLC*, filed Sept. 5, 2006. The *Intelligent Transportation & Monitoring Wireless, LLC* application is File No. 0002304206. The *AMTS Consortium LLC* application is File No. 0002302769.

C. PSI's Petition for Reconsideration

17. PSI acknowledges that it filed its petition in order to “protect [PSI’s] procedural position while it pursues its administrative review rights under the Commission’s Rules seeking reversal of the ruling in the [*Auction 57 Bureau Order*]”⁴² PSI fully pursued its right to administrative review, and the Commission denied that Application for Review after giving full and thorough consideration to all of the arguments PSI raised therein. PSI admits that its Petition challenging Auction 61 procedures simply “incorporates and premises its arguments upon those [it] made” in the Auction 57 proceeding.⁴³

18. Because the Petition presents no new facts or arguments beyond those PSI has already presented and which the Commission has fully addressed and rejected in its April 16, 2010, *Memorandum Opinion and Order*, we are compelled to follow Commission precedent. We therefore deny PSI’s Petition for Reconsideration.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 309(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(j), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Paging Systems, Inc. on May 23, 2005, is DENIED.

20. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 309(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(j), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Motion for Leave to File Supplement to Petition for Reconsideration filed by Paging Systems, Inc. on August 26, 2005, and the Motion for Leave to File Second Supplement to Petition for Reconsideration filed by Paging Systems, Inc on June 16, 2006, are DENIED and the Supplement to Petition for Reconsideration and Second Supplement to Petition for Reconsideration are DISMISSED.

21. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman, Chief
Wireless Telecommunications Bureau

⁴² Petition at 3.

⁴³ Petition at 3 n.7.