



Federal Communications Commission
Washington, D.C. 20554
November 10, 2011

DA 11-1873
Released: November 10, 2011
In Reply Refer to:
1800B3-MIE/TSN

L.T. Simes, II, and Raymond Simes
P.O. Box 2870
West Helena, AR 72390

In re: **FM Broadcast Auction 37**
L.T. Simes, II and Raymond Simes
WNEV(FM), Friars Point, Mississippi
Facility ID No. 164256
File No. BNPH-20050103AAV

Petition for Reconsideration

Dear Applicants:

We have before us an August 21, 2006, Petition for Reconsideration (“Petition”) filed by L.T. Simes, II, and Raymond Simes (collectively, the “Simes”). The Petition requests reconsideration of the February 9, 2006, letter denying the Simes’ eligibility for a new entrant bidding credit with respect to the Friars Point, Mississippi, allotment in FM Broadcast Auction 37 (“Auction 37”).¹ For the reasons stated below, we deny the Petition.

Background. The Simes applied for four FM allotments in Auction 37: (1) Cotton Plant, Arkansas; (2) Elaine, Arkansas; (3) Friars Point, Mississippi; and (4) New Albany, Mississippi. They claimed a 25 percent new entrant bidding credit against their auction bids, having certified in their Form 175 auction filing window application that they had attributable interests in only two other media of mass communication.² While the Simes specifically identified their two existing mass media interests in Exhibit C to Form 175, they only certified their general eligibility for the new entrant bidding credit, thus implying their eligibility for the 25 percent bidding credit for all four allotments selected in their application.³ In a letter dated September 13, 2004,⁴ the staff noted that the Simes were not eligible to claim the new entrant bidding credit against their bids for the construction permit at Elaine, Arkansas, because the proposed station at Elaine was in the same area as one of the stations in which the Simes have an attributable interest.⁵ In the *Simes Acceptance Letter*, however, the staff inadvertently indicated that

¹ *L.T. Simes II and Raymond Simes*, Letter, 21 FCC Rcd 1421 (MB 2006) (“*February 2006 Letter*”).

² *See, e.g.*, Exhibit A – Applicant Identity and Ownership Information – to Form 175 filed by Raymond Simes in FM Broadcast Auction 37. Raymond Simes disclosed a 10 percent interest in station KCLT(FM), West Helena, Arkansas, and a 50 percent interest in KAKJ(FM), Marianna, Arkansas. L.T. Simes, II, disclosed a 45 percent interest in KCLT(FM) and a 50 percent interest in KAKJ(FM).

³ *See* Exhibit C – Status as a New Entrant Bidding Credit Recipient – to Form 175 filed by Raymond Simes in FM Broadcast Auction 37.

⁴ *Mr. Raymond Simes*, Letter, Ref. No. 1800B3-TSN (MB Sept. 13, 2004) (“*Simes Acceptance Letter*”).

⁵ *Auction of FM Broadcast Construction Permits-456 Bidders Qualified to Participate in Auction No. 37*, Public Notice, 19 FCC Rcd 19773, 19872 (MB/WTB 2004). *See also* 47 C.F.R. §§ 73.5007(a), (b) (applicant receives no bidding credit if any of an applicant’s commonly owned mass media facilities serves the same area as the proposed

Simes could claim a bidding credit for the other three FM permits selected on their Form 175 application, including Friars Point.

The Simes were the successful bidders for the Friars Point, Mississippi, allotment, and timely filed their post-auction FCC Form 301 application. The Simes' Form 301 application included the required study demonstrating compliance with the Commission's radio multiple ownership rules.⁶ That study disclosed overlap of the 70 dB μ contours of KCLT(FM), in which the Simes have attributable interests, and the proposed new Friars Point FM broadcast station. The staff reviewed the Form 301 application and, in a March 11, 2005, letter, concluded that the Simes were ineligible for the 25 percent new entrant bidding credit they claimed for the Friars Point Permit. However, the staff allowed the Simes 15 days to provide evidence and/or arguments to support their claimed eligibility for the bidding credit.⁷

On April 1, 2005, the Simes filed a response to the *March 2005 Letter* arguing, among other things, that they had accurately represented their attributable interests in the Form 175 application; that the Friar's Point allotment was in a different state and different Arbitron market; and that the Simes detrimentally relied on the Commission's "approval" of the 25 percent bidding credit. In the *February 2006 Letter*, the staff rejected these arguments and concluded that the Simes did not qualify for a new entrant bidding credit with respect to the Friars Point, Mississippi, allotment due to the "same area" overlap, and required the Simes to make a full final payment that equaled the gross amount of the winning auction bid.⁸ While the staff acknowledged that it inadvertently neglected to exclude the Friars Point permit from eligibility for the new entrant bidding credit in the *Simes Acceptance Letter*, the staff also noted that the error was due, in part, to the Simes' initial failure to disclose the Friars Point overlap in their Form 175 application.⁹

In their Petition, the Simes argue that (1) they had no reason to know that the Commission had inadvertently erred when it initially approved the 25 percent bidding credit, and thus they bid to their maximum bidding potential taking into account the bidding credit; (2) the final price is above the fair market value of the station; and (3) the Commission should have presented options other than payment in 60 days or less.¹⁰

Discussion. The Commission will grant reconsideration only when the petitioner shows either a material error in the original order or raises changed circumstances or unknown additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹¹ A Petition for Reconsideration that reiterates

broadcast station; AM and FM broadcast stations are considered to be in the "same area" if the principal community contours of the attributable and auctioned facilities overlap).

⁶ 47 C.F.R. § 73.3555(a).

⁷ *L.T. Simes II and Raymond Simes*, Letter, Ref. No. 1800B3-TSN (MB March 11, 2005) ("*March 2005 Letter*").

⁸ *See February 2006 Letter*.

⁹ *Id.* at 3 (acknowledging that the staff inadvertently neglected to note the Friars Point overlap in the *Simes Acceptance Letter*).

¹⁰ *See* Petition at 3. Specifically, the Simes argue that the Commission should have allowed them either to obtain a refund for the \$189,750 they already paid, to bid again in the next auction proceedings without penalties, or to pay the additional \$63,250 in installment payments over several years as opposed to 60 days. Since filing the Petition, however, the Simes have in fact paid the full bid amount, and have constructed and licensed the station at Friars Point as WNEV(FM). We consider the Petition, then, to be a request for refund of the \$63,250 bidding credit amount.

¹¹ *See* 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 F.C.C. 685, 686 (1964) ("*WWIZ*"), *aff'd sum nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

arguments that were previously considered and rejected will be denied.¹² The Simes have failed to demonstrate a material error or omission in the staff's *February 2006 Letter*, and thus reconsideration is not warranted.

The Simes' first claim essentially reiterates the argument raised in their April 1, 2005, response – that they detrimentally relied on the Commission's approval of the 25 percent bidding credit.¹³ The staff fully considered and rejected this argument in the *February 2006 Letter*. In this case, as in all auctions, the new entrant bidding credit eligibility requirements, including the "same area" restriction, were specifically enunciated in several pre-auction public notices,¹⁴ as well as being set forth in the Rules. Furthermore, applicants are charged with knowledge of the auction rules,¹⁵ and the burden of providing information and demonstrating qualifications by the applicable deadlines falls upon the applicants.¹⁶ The Simes therefore knew, or should have known, that an applicant may not claim a new entrant bidding credit if the station for which it is applying is in the same area as a medium of mass communication in which it has an attributable interest.¹⁷ Moreover, the Rules are clear that FM broadcast stations are considered to be in the "same area" if there is overlap between their principal community (70 dBμ) contours,¹⁸ with no exception for stations that may be in different states and/or markets. The Simes do not present new evidence or claim changed circumstances. Therefore, the Simes' first claim does not warrant reconsideration.

The Simes also argue that the full bid price of \$253,000 is above the fair market value of the proposed station, and therefore the full payment forces them to pay much more than the station is worth. First, this argument is procedurally defective, because it could and should have been raised in the Simes' response, but was not.¹⁹ Second, even if we were to consider the Simes' argument on its merits, it would not prevail because the Simes, as auction participants, are responsible for conducting due diligence prior to participating in the auction.²⁰ In particular, the *Auction 37 Procedures Public Notice* dictates that the potential bidders "are solely responsible for investigating and evaluating all technical and market place factors that may have a bearing on the

¹² *WWIZ*, 37 F.C.C. at 686; see also *Alan Bishop and Saga Communications of New England*, Letter, 25 FCC Rcd 4691 (MB 2010) (denying a petition for reconsideration when the petitioner did not demonstrate a material error or omission in the staff's underlying decision).

¹³ See *February 2006 Letter* at 1.

¹⁴ See, e.g., *Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004 – Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures*, Public Notice, 19 FCC Rcd 10570, 10586, 10615 (MB/WTB 2004) ("*Auction 37 Procedures Public Notice*"); *Auction of FM Broadcast Construction Permits – Status of FCC Form 175 Applications to Participate in Auction No. 37*, Public Notice, 19 FCC Rcd 17938, 17939 n.7 (MB/WTB 2004).

¹⁵ See *Auction 37 Procedures Public Notice* at 10575.

¹⁶ See *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15324 (2000). See also 47 U.S.C. § 307(j)(5) (participation in auction prohibited "unless such bidder submits such information and assurances as the Commission may require").

¹⁷ *Id.*, §§ 73.5007(a), (b).

¹⁸ *Id.* §§ 73.5007(b)(2)(ii), 73.5007 (b)(3)(ii).

¹⁹ See 47 C.F.R. § 1.106(b)(2)(ii) (a petition for reconsideration will be entertained if "[t]he petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity").

²⁰ See *Auction 37 Procedures Public Notice* at 10577.

value of the broadcast facilities in [the] auction.”²¹ Bidders are thus responsible for their own bidding behavior. Had the Simes conducted sufficient due diligence, they would have discovered that the Friars Point allotment was in the “same area” as their existing station, and thus would have known they were ineligible to claim the new entrant bidding credit and adjusted their bidding strategy accordingly. Furthermore, upholding this due diligence standard is in the public interest, as it promotes auction efficiency. Auction participants who bid based on inadequate due diligence may distort price information to the detriment of other bidders.²² Other bidders may react to the faulty price signals and modify their bids in ways that interfere with the auction’s ability to assign construction permits to the bidders placing the highest value on those permits.²³ Lastly, no auction could achieve finality if winning bidders were routinely permitted to indulge in “buyer’s remorse” by second-guessing their winning bids after the fact. Bidders are ultimately responsible for their own bidding behavior, and the Simes are therefore liable for their final gross bid price.

Finally, the Simes argue that the Commission should have provided alternative payment options after notifying them that they were not eligible for the new entrant bidding credit.²⁴ We disagree. For the reasons discussed above, we find that the Simes should have known that they would not be eligible for a bidding credit for the Friars Point allotment, thus the Commission is not obliged to provide special payment options for them. The public has an interest in predictable and consistent application of the Commission’s auction rules and procedures,²⁵ which is essential to a fair and efficient licensing process.²⁶ Requiring the Simes to pay the full price after finding they were ineligible for the new entrant bidding credit is consistent with the payment procedures announced in Auction 37 public notices and in our Rules,²⁷ and is thus in the public interest.²⁸

Conclusion/Action. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by L.T. Simes, II and Raymond Simes IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²¹ *Id.*

²² *Barry P. Lunderville, et. al.*, Order, 23 FCC Rcd 10390, 10406 (WTB 2008) (finding 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).

²³ *Id.*

²⁴ Petition at 3.

²⁵ See *Mr. Lee G. Petro*, Letter, 25 FCC Rcd 9046, 9048 (WTB 2010) (denying a waiver request in light of the public interest in predictable and consistent application of the Commission’s auction rules and procedures).

²⁶ *Winstar Broadcasting Corp.*, Order on Reconsideration, 20 FCC Rcd 2043, 2053-54 (2005).

²⁷ See 47 C.F.R. §§ 1.2109(a), 73.5003. See also *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10605.

²⁸ Moreover, as discussed in note 10, *supra*, this argument is moot, as the Simes have already paid the bidding credit amount in one lump sum.