

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

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| In the Matter of |) | |
| |) | |
| STAR WIRELESS, LLC |) | File No. 0001049169 |
| |) | |
| Petition to Deny Long-Form License Application |) | |
| (Auction 44) |) | |

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 2013

Released: January 16, 2013

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. On April 9, 2010, the Commission accepted for filing the “long-form” license application (FCC Form 601) of Star Wireless, LLC (“Star”)¹ regarding certain Lower 700 MHz Band spectrum for which it was the high bidder in Auction 44.² The *Public Notice* stated that petitions to deny the Application must be filed no later than April 19, 2010, ten days after release of the *Public Notice*.³ On April 20, 2010, Warren C. Havens, Environmental LLC, Verde Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation (collectively, “Petitioners”) submitted a petition to deny the Application (“Petition”). The Petition argued that when Star amended its Application and certified that it was eligible for a lower bidding credit than set forth in its initial filing, Star’s action constituted a “major amendment” under the FCC’s rules, and thus, according to the Petitioners, requires the Commission to deny the Application.⁴ As discussed below, we dismiss the Petition. As an alternative and independent basis for rejecting the Petition, we deny the Petition on its merits.

I. BACKGROUND

2. Star was the high bidder for four licenses in Auction 44, involving licenses in the Lower 700 MHz C and D blocks.⁵ Pursuant to the requirements of the *Auction 44 Winning Bidders Public Notice*,

¹ See Star Wireless, LLC Application, File No. 0001049169 (filed Oct. 4, 2002, amended Mar. 18, 2010) (“Application”).

² See Wireless Telecommunications Bureau Announces That an Application for Lower 700 MHz Band Licenses Is Accepted for Filing, *Public Notice*, 25 FCC Rcd 3608 (2010) (“*Public Notice*”).

³ *Id.* See 47 C.F.R. § 1.2108(b).

⁴ Warren C. Havens, Environmental LLC, Verde Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation, Petition to Deny, and in the Alternative, Section 1.41 Request (filed Apr. 20, 2010).

⁵ Lower 700 MHz Band Auction Closes; Winning Bidders Announced, *Public Notice*, 17 FCC Rcd 17272 (2002) (“*Auction 44 Winning Bidders Public Notice*”). The markets for which Star was the high bidder are: CMA 186 – Green Bay, WI; CMA 195 – Cedar Rapids, IA; CMA 711 – Wisconsin 4-Marinette; and CMA 717 – Wisconsin 10-Door, all involving Lower 700 MHz Band C block spectrum.

Star filed the Application—its Form 601 “long-form” application—on October 4, 2002.⁶ That submission included certifications from Star regarding its eligibility for a 35 percent designated entity bidding credit.

3. FCC rules provide that bidding credits are determined based on the entity’s average gross revenues over the preceding three years,⁷ which in this case is 2001, 2000, and 1999. Under relevant Commission rules, designated entities are eligible for a 35 percent bidding credit if their average gross revenues do not exceed \$3 million for the preceding three years, and they are eligible for a 25 percent bidding credit if their average gross revenues do not exceed \$15 million during that same time period.⁸

4. In the 2002 “long-form” Application, Star certified that it was eligible for a 35 percent bidding credit, and it based this certification on its gross revenues for calendar years 2000, 1999, and 1998, which, while not the three preceding years, were the three most recent years for which Star had financial statements.⁹ At the same time, Star disclosed that preliminary financial results for 2001, the most recent year preceding the auction, suggested that Star’s gross revenues for 2001, 2000, and 1999 would likely exceed \$3 million, thus rendering Star ineligible for the 35 percent bidding credit.¹⁰ Star added, however, that it could estimate with reasonable certainty that its average gross revenues would, in any event, be less than \$15 million, which is the maximum revenue that it could have and still qualify for a 25 percent bidding credit.¹¹ Star later amended the Application to disclose that, as a result of its complete financial results for the year 2001, it could certify eligibility only for a 25 percent bidding credit.¹²

5. On April 9, 2010, the Bureau issued the *Public Notice* announcing acceptance of the Application and establishing a deadline of April 19, 2010 for the submission of petitions to deny.¹³ The *Public Notice* provided that petitions to deny could be filed electronically through the FCC’s Universal Licensing System (“ULS”) website or by paper pursuant to the instructions set forth in that document.¹⁴ FCC rules are clear that pleadings filed through ULS must be received before midnight on the filing date and that paper submissions must ordinarily be delivered by 7:00 PM. on that day.¹⁵

⁶ Star submitted its short-form application (Form 175) on May 8, 2002, and amended that application on May 31, 2002. In both the original and amended versions of the short-form application, Star certified as eligible for a 35 percent designated entity bidding credit.

⁷ See 47 C.F.R. § 27.702; 47 C.F.R. § 1.2110(f).

⁸ See 47 C.F.R. § 27.702; 47 C.F.R. § 1.2110(f).

⁹ Application (as filed Oct. 4, 2002), Ex. C at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² Application (as amended Mar. 18, 2010), Amended Ex. C at 1.

¹³ *Public Notice*, 25 FCC Rcd at 3608. Subsequent to the completion of bidding in Auction 44, Star was the subject of a Commission investigation of its conduct during the auction and ultimately was found to have engaged in communications prohibited under section 1.2105(c) of the Commission’s rules. See *Star Wireless, LLC, Notice of Apparent Liability for Forfeiture*, 18 FCC Rcd 17648 (EB 2003), *Forfeiture Order*, 19 FCC Rcd 18626 (EB 2004), *Order on Review*, 22 FCC Rcd 8943 (2007), pet. for review denied, *Star Wireless, LLC v. FCC*, 522 F.3d 469 (D.C. Cir. 2008).

¹⁴ *Id.*

¹⁵ See 47 C.F.R. § 1.4(f); see also *Public Notice*, 25 FCC Rcd at 3608-09.

6. Here, Petitioners concede that they submitted the Petition “after the due date.”¹⁶ In a motion asking the Commission to accept their untimely Petition, they assert that, starting 10 minutes prior to midnight Eastern, they attempted to file their pleading via the FCC’s ULS system.¹⁷ They assert that the FCC’s ULS system “did not respond” and “malfunction[ed],” thus causing them to miss the filing window.¹⁸ They subsequently e-mailed their Petition to FCC staff shortly after midnight Eastern time on April 20, 2010.¹⁹

7. In the Petition itself, Petitioners argue that Star’s Application should be denied and that Star should be disqualified from Auction No. 44.²⁰ They rely on section 1.2105 of the Commission’s rules, which provides that “[m]ajor amendments cannot be made to a *short-form application* after the initial filing deadline.”²¹ According to Petitioners, Star’s amendment to its long-form application, which reduced its bidding credit eligibility from 35 percent to 25 percent based on Star’s analysis of its final financial statement for 2001, amounted to a major amendment. Petitioners rely on the portion of section 1.2105 that provides that “[m]ajor amendments include . . . changes in an applicant’s size which would affect eligibility for designated entity provisions[.]”²²

8. The Petition includes a section that discusses Petitioners’ asserted interest in Star’s Application. Petitioners did not participate in Auction 44, and thus do not claim to have standing to challenge the Application based on any such participation. Rather, they assert that they are submitting the Petition to “preserve their challenge” to a decision Commission staff made in the context of a different auction—Auction 61—that does not involve Star. In Auction 61, Petitioners have filed an application for review of a determination by Commission staff that the amendment of a long-form application, which revised the entity’s designated entity eligibility downward from 35 percent to 25 percent based on additional revenues, does not constitute a major amendment.²³ Petitioners reason that the Commission might establish precedent in this case that could be adverse to them in the Auction 61 proceeding.²⁴ In addition, Petitioners assert that they have an interest in and standing to challenge Star’s Application because (1) an entity controlled by David Behenna, who controls Star, participated in Auction 39, in which one of the Petitioners also participated, without disclosing his wife as an affiliate even though she was disclosed as an affiliate in the Application;²⁵ and (2) two of the Petitioners hold wireless licenses that

¹⁶ See Warren C. Havens, Environmental LLC, Verde Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation, Motion to Accept As Timely Filed Petition to Deny, and in the Alternative, Section 1.41 Request (filed Apr. 20, 2010) at 1 (“Motion”).

¹⁷ *Id.* Petitioners state that they were attempting to make the filing from California, which is in the Pacific time zone.

¹⁸ *Id.* at 1-2.

¹⁹ See *id.*

²⁰ Petition at 1.

²¹ 47 C.F.R. § 1.2105(b) (emphasis added). We note that section 1.2105, by its terms, applies only to “short-form” applications, while Petitioners have petitioned to deny Star’s “long-form” application. Major amendments to “long-form” applications are addressed by 47 C.F.R. § 1.929. See Maritime Communications/Land Mobile LLC, *Order on Reconsideration*, 22 FCC Rcd 4780, 4785-86 (¶ 10) (WTB MD 2007) (“*MC/LM Recon. Order*”) (rejecting argument from Mr. Havens that an amendment to a “long-form” application constituted a major amendment and explaining that “a minor amendment is any amendment that is not of a type specifically listed as a major amendment in Section 1.929 of the Commission’s Rules”).

²² 47 C.F.R. § 1.2105(b).

²³ See Petition at 2 (referencing an application for review that Mr. Havens filed in response to the decision of the Mobility Division of the Wireless Telecommunications Bureau in *MC/LM Recon. Order*).

²⁴ *Id.* at 2.

²⁵ *Id.* at 2-3.

overlap the Cedar Rapids, Iowa market that is involved in the subject Application, and that these two Petitioners may compete with Star if it is awarded a license for this market.²⁶

9. Star timely opposed the Petition on April 26, 2010, asserting that the Bureau should dismiss the Petition as untimely.²⁷ Star states that Petitioners have failed to make a showing that would justify a decision to excuse their untimely submission, that Petitioners assumed the risk that they could miss the filing deadline by waiting until the last ten minutes to file, and that Petitioners previously have submitted a number of untimely filings.²⁸ Star additionally argues that Petitioners lack standing as they make no demonstration that they participated or were qualified to bid in Auction 44, and that in fact none of the Petitioners participated in Auction 44.²⁹ Star lastly asserts that the Petition should be dismissed because the Commission already determined that amending an application to reduce the applicant's bidding credit eligibility does not constitute a major amendment.³⁰ Maritime Communications/Land Mobile, LLC ("MC/LM"), the licensee that is the subject of challenge by four of the Petitioners in Auction 61,³¹ also opposes the Petition.³² MC/LM reiterates Star's contention that the Bureau must dismiss the Petition as untimely, stating that "[t]his is at least the fourth time that Havens has filed late and blamed his untimely filing on a technical problem. The Commission has warned Havens not to wait to the last minute and has informed him that he takes the risk of waiting to try to file until the last possible moment."³³ MC/LM additionally argues that the Petition is "nothing more than an impermissible collateral attack" on the Bureau's decision in Auction 61, and not the first one attempted by Mr. Havens.³⁴ Petitioners did not submit a reply.

II. DISCUSSION

10. As discussed below, we dismiss the Petition on two alternative grounds – first, that the Petition was untimely filed with no sufficient justification for acceptance on an untimely basis; and second, that the Petitioners lack standing to challenge the Application. In addition, and as an alternative and independent basis for rejecting the Petition, we deny the Petition on its merits.

11. *The Petition Is Untimely.* We find that the petition to deny is untimely and accordingly dismiss it. Pursuant to section 1.2108(b)'s requirement that petitions to deny be filed no more than ten days after the announcement by public notice of the acceptance of a winning bidder's long-form license

²⁶ *Id.* at 3.

²⁷ Star Wireless, LLC, Opposition to Petition to Deny, and in the Alternative, Section 1.41 Request, and to Motion to Accept As Timely Filed Petition to Deny, and in the Alternative, Section 1.41 Request (filed Apr. 26, 2010) ("Star Opposition").

²⁸ *Id.* at 4 & n.9.

²⁹ *Id.* at 5.

³⁰ *Id.* at 6-7, citing *MC/LM Recon. Order*.

³¹ *See supra* note 23.

³² Maritime Communications/Land Mobile, LLC, Opposition (filed Apr. 26, 2010) ("MC/LM Opposition"). MC/LM also filed a separate opposition to the Motion. Maritime Communications/Land Mobile, LLC, Opposition to Motion to Accept (filed Apr. 26, 2010) ("MC/LM Opposition to Motion").

³³ MC/LM Opposition to Motion at 1, citing, e.g., Mobex Network Services, LLC, *Memorandum Opinion and Order*, 25 FCC Rcd 554, 557 ¶ 7 (2010).

³⁴ MC/LM Opposition at 1-2, citing Paging Systems, Inc., *Memorandum Opinion and Order*, 22 FCC Rcd 1294, 1298-99 ¶ 8 (WTB BD 2007) ("*Paging Systems, Inc.*"), *recon. dismissed, Order on Reconsideration*, 23 FCC Rcd 7458 (2008), *app. for review dismissed w/o prejudice*, Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau, to Warren C. Havens, *Letter*, 24 FCC Rcd 13776 (2009).

application, the *Public Notice* specified that petitions “must be filed no later than April 19, 2010.”³⁵ Petitioners acknowledge that they submitted the Petition on April 20, 2010, after the due date.³⁶

12. We decline Petitioners’ request to waive the filing deadline. When parties ask the Commission to accept an untimely petition to deny, we have applied the section 1.925(b) standard to determine whether to waive the rule governing the filing deadline.³⁷ Under that standard, the Commission may grant a request for waiver if it is shown that (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁸ Similarly, the Commission has, in some circumstances, found good cause to waive a filing deadline where a party makes a good faith effort to make a timely submission but was unsuccessful in doing so because of a technical problem with ULS that was beyond its control.³⁹ We find that under either standard, Petitioners have not made a showing sufficient to justify the Commission’s acceptance of their untimely petition to deny.

13. In reaching this conclusion, we note that this is not the first instance in which Mr. Havens (or companies with which he is associated) have missed Commission deadlines. In a 2008 case in which Mr. Havens missed a filing deadline by one day due to an alleged “temporary and unpredictable technical glitch,”⁴⁰ the Commission determined that the “technical” difficulties encountered by Mr. Havens did not justify a waiver of the filing deadline.⁴¹ Likewise, in 2010, the Commission addressed a request by Mr. Havens for the Commission to consider a pleading that Mr. Havens filed electronically sometime on October 25, 2005 before 9:00 a.m., when the relevant deadline in that case was October 24, 2005.⁴² The Commission denied Mr. Havens’s request, stating that “[f]ilings are due on the day that they are due, not at some (unspecified) time the following day.”⁴³ In a 2011 case, some of the Petitioners here filed a pleading through the ULS system in “the early hours of May 19, 2009,” even though the relevant deadline was May 18, 2009.⁴⁴ In that case, the petitioners argued that their untimely submission should be accepted because their “tardiness was caused solely by their internet service provider, and thus was out of their control.”⁴⁵ The Commission again denied petitioners relief, stating that they “have missed other

³⁵ *Public Notice*, 25 FCC Rcd at 3608 (emphasis omitted).

³⁶ Motion at 1.

³⁷ See, e.g., *In re Applications of Mountain Microwave, Inc.*, 16 FCC Rcd 17633, 17636 ¶ 8 (2001); see also 47 C.F.R. § 1.925.

³⁸ 47 C.F.R. § 1.925(b)(3).

³⁹ See, e.g., *Deltacom, Inc., Order*, 27 FCC Rcd 3982, 3987 ¶ 13 (WTB 2012) (“We have also granted waiver of the deadline for filing renewal applications where the licensee provided documentation showing that it had attempted in good faith, but failed, to file a renewal application in a timely manner, or dismissal of the renewal application stemmed from a technical problem in ULS beyond the licensee’s control.” (footnote omitted)); see also Donald J. Evans, Esq., *Letter*, 27 FCC Rcd 11084, 11085 n.5(2012) (stating that the 47 C.F.R. § 1.925 waiver standard and the 47 C.F.R. § 1.3 “good cause” waiver standard “have been found to be substantially the same”).

⁴⁰ Warren C. Havens, *Memorandum Opinion and Order*, 23 FCC Rcd 3210, 3212 ¶ 7 (2008) (“*Havens*”). Mr. Havens attributed the alleged technical glitch in the *Havens* case to a delay in the electronic transmission of the petition to his legal counsel.

⁴¹ *Id.*

⁴² See *Mobex Network Services, LLC, Memorandum Opinion and Order*, 25 FCC Rcd 554 (2010).

⁴³ *Id.* at 557 ¶ 7.

⁴⁴ *CGG Veritas Land, Inc.*, 26 FCC Rcd 2493, 2493-94 ¶ 2 (2011).

⁴⁵ *Id.* at 2494-95 ¶ 4.

deadlines because they encountered unexpected difficulties in the final minutes before a filing was due. Rather than being extremely unusual, this circumstance appears to be common for Petitioners.”⁴⁶ In yet another case involving a pleading filed electronically by Mr. Havens after midnight, the Commission stated that “electronic filers who wait until the last minute of the last day of the filing period to submit a pleading should not routinely expect a waiver.”⁴⁷ In light of the section 1.925 and good cause standards, and the Commission’s statements in prior cases where Mr. Havens waited until the last minute of the filing period (or later) to submit a pleading, we deny Petitioners’ request that we waive the filing deadline. Given the pattern of late-filed submissions and the various technical problems that Mr. Havens has encountered when attempting to make last-minute filings, we find that the decision to begin the filing process in this case only 10 minutes before the relevant deadline did not demonstrate the type of good faith effort to meet the deadline that would militate in favor of an extension.

14. *Petitioners Lack Standing.* Furthermore, Petitioners lack standing to petition to deny the Application. Section 1.939(d) of the Commission’s Rules requires that a petition to deny contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.⁴⁸ To establish standing as a party in interest, a petitioner must allege facts sufficient to demonstrate that grant of the subject applications would cause it to suffer a direct injury.⁴⁹ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action,⁵⁰ and that any injury would be redressable by the relief requested.⁵¹

15. The Commission and the D.C. Circuit have discussed standing requirements specifically in the context of the Commission’s spectrum auctions.⁵² The Court of Appeals has acknowledged that a bidder has a right to a legally valid auction process, yet it has maintained that “a disappointed bidder, to have standing to challenge the auction outcome, must demonstrate ‘that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis.’”⁵³ Accordingly, an entity that was not qualified to bid in particular markets in an auction has no standing to file a petition to

⁴⁶ *Id.* at 2495-96 ¶ 6 (quotation marks removed).

⁴⁷ Regionet Wireless License, LLC, *Memorandum Opinion and Order*, 17 FCC Rcd 21263, 21265 ¶ 6 (2002) (denying a request that the Commission consider an amended pleading filed electronically after the midnight deadline, but, based on the circumstances in that case, granting a waiver with respect to a pleading that was electronically filed “at 12:00 a.m.”).

⁴⁸ 47 C.F.R. § 1.939(d).

⁴⁹ See Petition for Reconsideration of Various Auction 87 Public Notices, *et al.*, 27 FCC Rcd 4374, 4382 ¶ 21 (WTB MD & ASAD 2012) (“*Auction 87 Order*”); AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (“*AT&T Wireless*”), citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988).

⁵⁰ *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 21; *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 72, 78 (1978).

⁵¹ *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 21; Weblink Wireless, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 24642 ¶ 11 (2002).

⁵² See *High Plains Wireless v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (“*High Plains*”) (ruling that an entity that was not qualified to bid in a particular market in an auction does not have standing to file a petition to deny a winning bidder’s application in that market); *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22; Alaska Native Wireless, L.L.C., *Order*, 18 FCC Rcd 11640, 11644-45 ¶¶ 10-11 (2003).

⁵³ See *High Plains*, 276 F.3d at 605; *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829-30 (D.C. Cir. 1997), citing *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22.

deny the winning bidders' applications in those markets.⁵⁴ Moreover, to establish party in interest standing, a qualified bidder actually must have participated in competitive bidding for licenses in those markets.⁵⁵

16. None of the Petitioners filed a short-form application to participate in Auction 44.⁵⁶ They instead argue that allowing Star to reduce its bidding credit eligibility could establish precedent that might be adverse to their appeal in the Auction 61 matter.⁵⁷ Petitioners additionally contend that standing should be established because Star's inclusion of a certain affiliate could be "false" and also because certain of the Petitioners hold licenses with which they might provide services in competition with Star if it is awarded the licenses included in the Application.⁵⁸

17. Because none of the Petitioners participated in Auction 44, they do not have standing to petition to deny an Auction 44 long-form license application. Petitioners cite no authority for the proposition that standing nonetheless can be established because of an interest in preventing adverse precedent.⁵⁹ In addition, Petitioners provide no evidence beyond speculation to support their second argument that the inclusion of a particular affiliate in the Application or that the exclusion of that particular affiliate in an Auction 39 application might be a falsehood, nor how this possibility establishes standing to petition to deny the Application.⁶⁰ Petitioners' third argument that their holding of licenses with which they might compete with Star provides standing to petition to deny the Application also is not successful. As previously explained in Commission precedent involving most of the Petitioners, broad allegations of potential competition are insufficient for purposes of establishing standing.⁶¹ Petitioners' arguments fail to overcome the prerequisite auction participation for establishing standing in the context of spectrum auctions.

18. *Petitioners' Claims on the Merits Do Not Support Denial of the Application.* As an alternative and independent basis for rejecting the Petition, we deny, on the merits, Petitioners' principal contention—namely, that Star's amendment of its long-form application, which adjusted its bidding credit eligibility downward from 35 to 25 percent, constituted a major amendment because, in Petitioners' view, it changed the applicant's size.⁶² Regardless of whether Petitioners' claim is raised under section 1.929 or

⁵⁴ See *High Plains*, 276 F.3d at 605 (finding that an auction participant that did not bid on some of the licenses it was petitioning did not have standing to challenge the award of licenses on which it did not bid and that were won by another entity). See also *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22.

⁵⁵ See *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 22; *Alaska Native Wireless, L.L.C., Order*, 17 FCC Rcd 4231, 4235 ¶ 9 (WTB 2002) (*Alaska Native Bureau Order*), *app. for review denied, Order*, 18 FCC Rcd 11640 (2003).

⁵⁶ See Auction No. 44 Revised Qualified Bidder Notification, *Public Notice*, DA 02-1933 (rel. Aug. 7, 2002), Att. A, Qualified Bidders (Sorted by Applicant), Att. C, Non-Qualified Bidders (Sorted by Applicant) (rel. Aug. 7, 2002).

⁵⁷ Petition at 2, referencing the Application for Review of the *MC/LM Recon. Order*.

⁵⁸ Petition at 2-3.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 2-3.

⁶¹ See *Auction 87 Order*, 27 FCC Rcd at 4385 ¶ 28; *Paging Systems, Inc.*, 22 FCC Rcd at 1296-1298 ¶ 7.

⁶² Petitioners appear to rely primarily on section 1.2105 to support this argument. See Petition at 6-7. As noted above, section 1.2105, by its terms, addresses major amendments to *short-form* applications (Form 175) to participate in auctions. Star's amendment regarding its bidding credit eligibility was not submitted in connection with its short-form auction application but with its *long-form* application for authorization for the markets it won in Auction 44. Section 1.929 defines what amendments are deemed to be major or minor in the context of applications other than short-form auction applications, see 47 C.F.R. § 1.929; see also the *MC/LM Recon. Order*, 22 FCC Rcd at 4785-86 (¶ 10), and thus applies to the long-form application at issue here. At the same time, Petitioners do cite section 1.929 in their submission, see Petition at 5, 11, and arguably attempted to incorporate a section 1.929

(continued...)

1.2105, we find that Star's amendment is not a "major" one within the meaning of FCC rules or precedents.

19. Applying section 1.929, we previously determined that "[i]n the absence of a change of ownership, an amendment [to a long-form application that] reduc[es] an applicant's bidding credit eligibility is minor" and therefore permissible.⁶³ Continuing, we explained that an amendment to a long-form application "that revises an applicant's designated entity showing by adding revenues . . . [and thus lowering the applicant's designated entity eligibility] . . . is not among the amendments listed as major in Section 1.929, and therefore is properly characterized as a minor amendment."⁶⁴ We reach the same determination here. We find that Star's amendment of its long-form application did not constitute a major amendment under section 1.929 because it only revised its designated entity eligibility downward by adding revenues.

20. Similarly, we find—as we did in the *MC/LM Recon. Order*—that the section 1.2105 standard governing amendments to short-form applications does not alter our conclusion that Star has made only a minor amendment.⁶⁵ In the context of prior cases involving Mr. Havens and amendments to short-form applications, Commission staff has repeatedly found that the reduction of bidding credit eligibility is permissible, explaining that such changes are allowed to "ensure that applicants do not obtain small business bidding credits when they no longer qualified."⁶⁶ Most recently, Commission staff rejected claims that an amendment to a short-form application, which reduced an entity's bidding credit from 35 to 25 percent, constituted a major amendment under the section 1.2105 standard.⁶⁷

21. Here, Petitioners once again question the policy governing bidding credit eligibility. Section 1.2105(b)(2) of the Commission's rules states that "[m]ajor amendments cannot be made to a short form application after the initial filing deadline Major amendments include . . . changes in an applicant's size which would affect eligibility for designated entity status."⁶⁸ When the Commission implemented section 1.2105, it described, as an example of what would be an impermissible major amendment, a scenario in which a company that qualified as a small business merges with another company during the auction and, based on the change in the applicant's size, no longer qualifies for a

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argument into their pleading, *see id.* at 4-5 (incorporating by reference arguments made in their application for review of the *MC/LM Recon. Order* and related filings, which made arguments under section 1.929). Consequently, we will assume, for purposes of this portion of our analysis, that Petitioners have presented an argument under both sections 1.929 and 1.2105.

⁶³ *MC/LM Recon. Order*, 22 FCC Rcd at 4785-86 ¶ 10.

⁶⁴ *Id.*

⁶⁵ *MC/LM Recon. Order*, 22 FCC Rcd at 4785-86 ¶ 10 (after determining that change to long-form application was only a minor amendment, we stated that "[n]othing in Section 1.2105 alters this conclusion").

⁶⁶ *See* Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Analysis Access Division, to Warren C. Havens, AMTS Consortium LLC, *Letter*, 22 FCC Rcd 10201, 10202 (WTB/ASAD 2007) (*Havens ASAD 2007 Letter*).

⁶⁷ *Auction 87 Order*, 27 FCC Rcd at 4386-87 ¶ 28.

⁶⁸ *See* 47 C.F.R. §1.2105(b)(2).

bidding credit.⁶⁹ The rule thus prohibits changes in the applicant's size through merger and acquisition, but an applicant may have its bidding credit reduced for reasons unrelated to such changes in size.⁷⁰

22. Here, Star modified its bidding credit eligibility for reasons unrelated to a change in its size. Star made the change because it received complete financial results subsequent to the respective deadlines for filing its short-form application and its long-form application.⁷¹ The complete financial results indicated that Star was no longer eligible for the 35 percent bidding credit it had originally sought but was eligible for a 25 percent bidding credit. Star therefore filed an amendment disclosing the complete financial results and the resulting change in its bidding credit eligibility.⁷² Star's amendment thus is a permissible "minor" change consistent with the Bureau's practice in similar cases. There is no indication in the record that Star acquired any entity after the initial short-form application deadline or otherwise was involved in any change of ownership after that date that might constitute a "major" change. We thus do not agree with Petitioners that the finalization of Star's financial results for the year 2001 impermissibly changed the applicant's size.⁷³ Star's amendment is properly considered a "minor" change, consistent with long-standing practice in similar cases.

III. CONCLUSION

23. We find the petition to deny was untimely filed and accordingly dismiss it. Petitioners also fail to establish standing as required under our rules, providing an additional basis for dismissing the Petition. Finally, as an alternative and independent basis for rejecting the Petition, we find that Star did not impermissibly change its size when it amended the Application to reduce its bidding credit eligibility to 25 percent based on receipt of complete financial reports, and we thus deny the Petition.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and sections 1.939, 1.2105, and 1.2108 of the Commission's Rules, 47 C.F.R. §§ 1.939, 1.2105, 1.2108, the Petition to Deny, and in the Alternative, Section 1.41 Request, application FCC File No. 0001049169 filed by Warren C. Havens, Environmental LLC, Verde Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation on April 20, 2010 IS DISMISSED. On an alternative and independent basis, as set forth herein, the Petition IS DENIED.

25. IT IS FURTHER ORDERED that the Motion to Accept As Timely Filed Petition to Deny, and in the Alternative, Section 1.41 Request filed by Warren C. Havens, Environmental LLC, Verde

⁶⁹ See, e.g., Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660 – 4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 414 (1997) (*Part 1 Third Report and Order*).

⁷⁰ The D.C. Circuit has upheld the Commission's interpretation of section 1.2105, under which certain changes in size that result in a reduction or loss of eligibility for a bidding credit are considered "minor amendments" that do not disqualify an applicant from participation in an auction. See *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162 (D.C. Cir. 2003) (affirming Liberty Productions, *Memorandum Opinion and Order*, 16 FCC Rcd 12061, 12079 ¶ 39 (2001)). In *Biltmore*, the Court was addressing the "new entrant bidding credit," but also discussed the Commission's interpretation of amendments under section 1.2105 in the context of the small business bidding credit.

⁷¹ Application, Ex. C at 1.

⁷² *Id.*

⁷³ We note that Petitioners' arguments concerning Auction 61 will be considered when the pending application for review is addressed. See *Paging Systems, Inc.*, 22 FCC Rcd at 1298-99 ¶ 8.

Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation on April 20, 2010 IS DENIED.

26. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, that the staff of the Mobility Division of the Wireless Telecommunications Bureau SHALL PROCESS application FCC File No. 0001049169 consistent with this Memorandum Opinion and Order and the Commission's Rules.

27. 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

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau