



Federal Communications Commission
Washington, D.C. 20554

DA 21-912

July 26, 2021

VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

Amrit Girdhar
Upbeat Frequency LLC
9805 Timberwolf
McKinney, TX 75071

Mark Denbo
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W.
Suite 301
Washington, DC 20016

Re: AM and FM Broadcast Auction 109 – Report of Prohibited Communication

Dear Messrs. Girdhar and Denbo:

Upbeat Frequency LLC (Upbeat Frequency) filed a short-form application to participate in Auction 109 (FCC Form 175) and was found to be qualified to bid in Auction 109.¹ On July 21, 2021, Mr. Denbo filed on behalf of Upbeat Frequency and applicant Max Frequency, LLC, a joint report, pursuant to section 1.2105(c)(4) of the Commission's rules, indicating that the applicants had engaged in a communication on July 19, 2021.² That report states that at a July 19, 2021, meeting of the principals of Max Frequency and Upbeat Frequency they discussed a merger of their two companies. According to the report, the principals have had plans to merge for several months, though no such agreement was disclosed in either short-form application as required by the Commission's rules.³ The report also states that the two companies intend to complete such merger in the near term and, if the Commission's rules permit, to merge their upfront payments so that they can have greater bidding eligibility in Auction 109. Based on the information disclosed in that report, applicants Max Frequency and Upbeat Frequency appear to have communicated with regard to each other's bids and bidding strategies in apparent violation of section 1.2105(c) of the Commission's rules.

After the deadline for filing a short-form application, all applicants in Auction 109 are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other in any manner the substance of their own, or each other's, or any other applicant's bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after

¹ *Auction of AM and FM Broadcast Construction Permits, 114 Bidders Qualified to Participate in Auction 109, One FM Broadcast Construction Permit Removed from Auction 109*, AU Docket No. 21-39, Public Notice, DA 21-780, Attachment B (OEA/MB July 1, 2021).

² E-mail from Mark Denbo, Counsel, Max Frequency LLC and Upbeat Frequency LLC to Auction109@fcc.gov, Auctions Division, FCC Office of Economics and Analytics (July 21, 2021 10:05 am ET) (Prohibited Communications Report).

³ See 47 CFR § 1.2105(a)(2)(viii)-(ix).

the down payment deadline.⁴ In addition to express statements of bids and bidding strategies, the prohibition against communicating “in any manner” includes communicating how a party will participate in an auction.⁵ Despite the assertion in your Prohibited Communications Report that the applicants’ principals, Messrs. Girdhar and Modi, did not discuss either party’s bids or bidding strategies for Auction 109, communication between applicants concerning the potential for pooling of their upfront payments to modify either applicant’s bidding eligibility—a result that is not provided for within the Commission’s competitive bidding rules or procedures—necessarily implicates the applicants’ bidding strategies.⁶

The prohibition on certain communications is intended to, among other things, facilitate detection of collusive conduct and deter anticompetitive behavior that could violate the antitrust laws.⁷ If an applicant is found to have violated the antitrust laws or the Commission’s rules in connection with its participation in the competitive bidding process, it may be subject to forfeiture of its upfront payment, down payment, or full bid amount, or other forfeiture amounts and may be prohibited from participating in future auctions, among other sanctions.⁸ We are unable to fully investigate the facts underlying your report prior to the start of bidding, and will refer this apparent violation to the Commission’s Enforcement Bureau for further investigation, which may result in sanctions. You are a qualified bidder for Auction 109; we caution, however, that further participation in Auction 109 by you could exacerbate this violation and may increase the likelihood and severity of possible sanctions, including denial of your post-auction long-form application should you be a winning bidder in Auction 109.

⁴ 47 CFR § 1.2105(c)(1); see generally *Auction of AM and FM Broadcast Construction Permits Scheduled for July 27, 2021; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 109*, AU Docket No. 21-39, Public Notice, DA 21-361, 13-18, paras. 37-53 (OEA/MB Apr. 1, 2021) (*Auction 109 Procedures Public Notice*).

⁵ See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, AU Docket No. 14-252, GN Docket No. 12-269, WT Docket No. 12-269, 30 FCC Rcd 10794, 10796-97, paras. 8-9 (WTB 2015); *Cascade Access, LLC*, Forfeiture Order, 28 FCC Rcd 141, 144, para. 7 (EB 2013) (rejecting argument that the communication was not prohibited because it did not reveal the “substance” of Cascade’s bids or bidding strategies).

⁶ While not all auction-related communications are prohibited by the rule, the *Auction 109 Procedures Public Notice* contains guidance designed to ensure that any third party that an applicant employs for advice pertaining to its participation, bids or bidding strategies does not become a conduit for prohibited communications to other specified parties. See *Auction 109 Procedures Public Notice*, at 15-16, para. 44-46. The *Auction 109 Procedures Public Notice* warned that each applicant must remain vigilant not to communicate, directly or indirectly, information that affects, or could affect, bids or bidding strategies. *Id.*, at 15, para. 43. That Public Notice further explained that certain business discussions might touch upon subject matters that could convey information related to bidding strategies, including management, sales, local marketing agreements, and other transactional agreements. *Id.* You and your counsel should be particularly mindful that your use of the same individual as counsel as the other named applicant may facilitate a violation of the prohibited communications rule. We encourage you and your counsel to review the guidance in *Auction 109 Procedures Public Notice*.

⁷ See *id.* at 18, para. 53.

⁸ See 47 CFR § 1.2109(d).

Should you have any questions about this matter, please contact the Auctions Division staff.

Sincerely,

Jonathan M. Campbell
Chief, Auctions Division
Office of Economics and Analytics