

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

In re Application of)
)
JOSEPH W. BOLLINGER AND) File No. BPH-950724MD
DONNA M. BOLLINGER)
)
For Construction Permit for Channel 258C3,)
Bismarck, Missouri)

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2001

Released: October 5, 2001

By the Commission:

1. The Commission has before it an Application for Review filed by David L. Shepherd (“Shepherd”) on March 2, 2000, and related responsive pleadings.¹ Shepherd requests review of a February 17, 2000, staff decision by the Chief, Audio Services Division, Mass Media Bureau, which partially granted and partially denied Shepherd’s Petition to Deny an application for a construction permit for Channel 258C3, Bismarck, Missouri, filed by Joseph W. Bollinger and Donna M. Bollinger (“Bollinger Partnership” or “Bollingers”).² We find no error in the *Staff Decision* and, therefore, deny the Application for Review.

I. Background

2. The Bollinger Partnership was the winning bidder in Closed Broadcast Auction 25, MX Group FM 68.³ In its FCC Form 175, Application to Participate in an FCC Auction (“Short Form Application”), the Bollinger Partnership reported that it was eligible for a 25 percent new entrant bidding credit. As set forth in 47 C.F.R. § 73.5007, the new entrant bidding credit provides a tiered bidding credit for broadcast auction winning bidders with no, or very few, other media interests. A 25 percent bidding credit will be given to a winning applicant bidder if neither the bidder nor any party with an attributable interest in such bidder, has an attributable interest in more than three mass media facilities and no such facility serves the same area as the proposed broadcast station.⁴ An existing FM broadcast station will be considered to be in

¹ On March 15, 2000, Joseph W. and Donna M. Bollinger filed an Opposition to Application for Review. Shepherd submitted a Reply to Opposition to Application for Review on March 27, 2000.

² File No. BPH-950724MD. See *Letter to Law Office of Lauren A. Colby, et. al.*, Ref. No. 1800B3-JAM (Chief, Audio Services Division, Mass Media Bureau, February 17, 2000) (“*Staff Decision*”).

³ See *Public Notice, Closed Broadcast Auction No. 25 Closes*, 14 FCC Rcd 17186 (1999).

⁴ 47 C.F.R. § 73.5007; see also *First Report and Order, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed* (continued....)

the same area as a proposed FM broadcast station if the principal community contours of the authorized and proposed FM stations overlap.⁵ The *Staff Decision* determined that the Bollinger Partnership was not eligible for the bidding credit claimed because it was the licensee of KHCR(FM), Potosi, Missouri, a radio station that served the same area as its proposed Bismarck station.⁶ However, the staff also determined that there was no substantial and material question of fact regarding whether the Bollinger Partnership intended to deceive the Commission when it claimed the bidding credit, that there were no other substantial and material questions of fact which required further inquiry, and that the Bollinger Partnership was qualified to be a Commission licensee.

3. Shepherd contends that the Bollinger Partnership falsely and knowingly claimed a new entrant bidding credit to which it was not entitled and that this “tainted” the Closed Broadcast Auction 25 proceeding. Shepherd further asserts that the staff erred in finding the Bollinger Partnership qualified to be a Commission licensee and that the subject construction permit application should be denied or designated for hearing. Finally, Shepherd argues that the staff erred in allowing the Bollinger Partnership to pay the gross amount of its winning bid, contending that, if the Commission does not dismiss or designate the Bollinger Partnership application for hearing, it should permit the Bollinger Partnership to compete for the permit only on the basis of its net bid, which was less than Shepherd’s bid. Alternatively, Shepherd argues, the Commission should conduct a new auction for the construction permit for Channel 258C3, Bismarck, Missouri.

II. Discussion

4. *Misrepresentation Issues.* We find that Shepherd’s arguments were thoroughly considered and properly resolved by the staff and we uphold the *Staff Decision*. Although the Bollinger Partnership is not entitled to the bidding credit claimed, there is no evidence that it intentionally misrepresented facts when it claimed that bidding credit. Intent to deceive is an essential element of a finding of misrepresentation. See *Swan Creek Communications*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986) (subsequent history omitted). The Bollinger Partnership states that it had no such intent to deceive but rather mistakenly believed that it was eligible for the 25 percent new entrant bidding credit based on its erroneous belief that the proposed Bismarck station would not serve the same area as KHCR(FM). There is no evidence which contradicts this explanation. Closed Broadcast Auction 25 was the first occasion for the Commission to employ competitive bidding procedures in the broadcast context and, thus, the first occasion where applicants could claim the broadcast new entrant bidding credit. Moreover, we note that the Commission refined the eligibility standards for the new entrant bidding credit, including expanding significantly the definition of “same area,” shortly before the Bollinger Partnership submitted its Short Form Application.⁷ As a result,

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Service Licenses, 13 FCC Rcd 15920 (1998) (“*Broadcast First Report and Order*”), modified, 14 FCC Rcd 8724, 8765-8766 (1999) (“*Broadcast Auction MO&O*”), further modified, 14 FCC Rcd 12541 (1999).

⁵ 47 C.F.R. § 73.5007; see also Footnote 7, *infra*.

⁶ When it filed its Short Form Application, the Bollinger Partnership was the licensee of station KHCR(FM), Potosi, Missouri. Because the predicted 3.16 mV/m contours of station KHCR(FM) and the Bollinger Partnership’s proposed Bismarck FM station partially overlap, they are in the same area. Therefore, the Bollinger Partnership was not entitled to the 25 percent bidding credit claimed. See 47 C.F.R. § 73.5007.

⁷ 47 C.F.R. § 73.5007, which sets forth the relevant broadcast designated entity provisions, originally provided that existing and proposed FM stations would be considered in the same area only if the predicted 1.0 mV/m contour of the existing FM station wholly encompassed, or is encompassed by, the proposed FM station’s (continued....)

the Bollinger Partnership's explanation that it claimed the bidding credit based on a misunderstanding of the term "same area" is credible. Additionally, prior to the auction, the Bollinger Partnership truthfully reported that it had an interest in station KHCR(FM) in the very application in which it claimed the 25 percent new entrant bidding credit. Mere applicant error does not constitute misrepresentation. *See High Country Communications*, 4 FCC Rcd 6237, 6238 (1989) ("*High Country*") (a mistake in an application alone, without any indication that the licensee meant to deceive the Commission, does not raise a substantial and material question of fact regarding whether there was an intentional misrepresentation). The Commission has generally not found an intent to deceive where a misstatement resulted from a mistaken interpretation of the law. *See Liberty Productions, a Limited Partnership, et. al.*, Memorandum Opinion and Order, FCC 01-129, at ¶¶40-42 (released May 25, 2001), *appeal pending sub nom., Orion Communications Limited, et. al. v. FCC*, No. 01-1279 (D.C. Cir., filed June 21, 2001) ("*Liberty Productions*") (finding bidder qualified for construction permit despite its erroneous claim of entitlement to a new entrant bidding credit where applicant divulged sufficient facts prior to auction to permit a determination as to its eligibility for the bidding credit); *see also Baker Creek Communications, L.P.*, 13 FCC Rcd 18709, 18728 (Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, September 22, 1998) ("*Baker Creek*") (finding bidder qualified for LMDS license despite its erroneous assertion of designated entity status, where applicant had fully disclosed its ownership structure and acted under the erroneous assumption that the structure comported with the requirements of the Commission's designated entity provisions). Therefore, the Bollinger Partnership's erroneous declaration of eligibility to a bidding credit does not raise a substantial and material question that the declaration was deliberately false or lacked candor or otherwise raise a question as to the basic qualifications of the Bollinger Partnership.

5. Shepherd contends that intent to deceive may be inferred from motive and that the Bollinger Partnership had motive to misrepresent its eligibility for the claimed bidding credit in order to discourage others from bidding at auction and/or to decrease the amount of its bid. We disagree. Shepherd's arguments in this regard are speculative and are undermined by the fact that, prior to auction, the Bollinger Partnership truthfully reported that it had an interest in station KHCR(FM) in the very application in which it claimed the 25 percent new entrant bidding credit. *See Garrett, Andrews, & Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981), *mod. on other grounds*, 88 FCC 2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support); *see also Valley Broadcasting*, 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989), *citing Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984) (when accurate information previously supplied by a party is a matter of open Commission record, "an intent to categorically misrepresent ... is difficult to find"). We will not infer improper motive from the mere desire for favorable action on an application or desire to prevail at auction. *See Hispanic Broadcast System, Inc.*, 16 FCC Rcd 8072, ¶6 and n.6 (2001) (declining to infer an intent to deceive merely because inaccurate statements were submitted in applications on which the applicant wanted favorable action and therefore had a "motive"). Shepherd's reliance on *Commercial Realty St. Pete, Inc., et. al.*, 77 RR 2d 490 (1995) (subsequent history omitted) in support of his assertion that we should designate issues for hearing in the case currently before us is misplaced. In that proceeding, the Commission ordered the auction winner to show cause why it should not be barred from participating in

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predicted 1.0 mV/m contour. However, on reconsideration, and effective July 6, 1999, the standard for determining whether an existing and proposed station serve the same area was amended to provide that, if there is *any* overlap between the predicted 3.16 mV/m contours of an applicant's existing and proposed FM stations, the stations are considered to be in the same area and the applicant is not eligible for a new entrant bidding credit. *See Broadcast Auction MO&O*, 14 FCC Rcd at 8765-8766.

future Commission auctions and from holding any Commission licenses after determining that an auction winner engaged in gross misconduct by repeatedly, willfully and deliberately violating Commission rules and abusing the Commission's processes by, *inter alia*, willfully and intentionally claiming entitlement seventeen times to a bidding credit for which it was ineligible. In the case currently before us, there has been no such gross misconduct.⁸

6. *Procedural Issues.* Shepherd argues that Closed Broadcast Auction 25 was tainted by the Bollinger Partnership's erroneous claim of a bidding credit and that the staff erred when it concluded that the Bollinger Partnership's construction permit application could be granted subject to payment of the gross bid amount. We disagree. The staff action fully conforms with *Liberty Productions* and *Baker Creek*, where auction winners were found qualified despite erroneous assertions of designated entity status, and the auction winners' applications were granted subject to payment of the gross bid. In *Liberty Productions*, the Commission found that, absent evidence of intent to deceive, it was not appropriate to dismiss an auction winner's application or to set aside the results of the auction because the auction winner incorrectly claimed a new entrant bidding credit. *Liberty Productions*, FCC 01-129 at ¶¶39-43. Additionally, we note that the Commission has indicated that issues arising from erroneous claims of new entrant bidding credits -- even when such claims are made with "the evident intent[] of manipulating the eligibility standards for ... the ... credit" -- are to be decided on a "case-by-case basis." *Broadcast Auction MO&O*, 14 FCC Rcd at 8768.⁹

7. Shepherd's retrospect that he would have bid higher had he known the Bollinger Partnership was not entitled to the bidding credit claimed, as well as his prediction that he is likely to outbid the Bollinger Partnership upon reauction, are unavailing.¹⁰ Established auction procedures provide that

⁸ Shepherd continues to argue on review that the Bollinger Partnership's statement, in its Short Form Application, that it would divest station KHCR(FM) is evidence that the Bollinger Partnership misrepresented facts with an intent to deceive when it claimed the bidding credit. Specifically, Shepherd argues that the statement demonstrates that the Bollinger Partnership knew that the predicted 3.16 mV/m contours of its existing and proposed stations overlapped and that it therefore could not qualify for the bidding credit under 47 C.F.R. § 73.5007. Irrespective of Shepherd's contention, we find no inherent contradiction in the Bollinger Partnership's explanation that it did not realize that the proposed Bismarck station and station KHCR(FM) would serve the "same area" as defined in 47 C.F.R. §§ 73.5007, and the Bollinger Partnership's disclosure of its plans to sell the station, in an effort to be fully forthcoming with the Commission. This conclusion is buttressed by the fact that, as the staff noted, a divestiture statement could not substantiate a claimed bidding credit, because a bidder's attributable interests were determined as of the Short Form Application filing deadline. Finally, Shepherd asserts that the Bollingers failed to file an application to assign station KHCR(FM) and that this shows that they misrepresented facts in their divestiture statement. This argument is without merit. The staff has granted the Bollingers' May 24, 2000, application to assign station KHCR(FM) to a third party (File No. BALH-20000524ABD) and the parties closed on January 12, 2001. See *Letter to Law Office of Lauren A. Colby, et. al.*, Ref. No. 1800B3-JAM (Chief, Audio Services Division, Mass Media Bureau, November 2, 2000). The Bollingers report that the final negotiations took longer than anticipated and that there were unexpected delays by the assignee.

⁹ The staff properly exercised the discretion it has pursuant to the *Broadcast Auction MO&O* when it relied on *Baker Creek* to decide this case. Additionally, in light of the Commission's decision in *Liberty Productions*, we reject Shepherd's assertions that there is a substantive distinction between the LMDS small business credit at issue in *Baker Creek* and the broadcast new entrant bidding credit at issue here which renders reliance on *Baker Creek* inappropriate.

¹⁰ Shepherd also asserts that the Bollinger Partnership is, in fact, asking to "increase the amount of their bid" from their net bid to their gross bid and that this should not be permitted. See Reply to Application for Review, (continued....)

auction participants have the opportunity to review competing auction participants' Short Form Applications prior to auction,¹¹ that petitions to deny an auction winner's construction permit application may be filed after the auction has ended, and that, if an auction winner in Closed Broadcast Auction No. 25 is disqualified, the authorization will be offered to the other highest bidders in descending order of their final bids.¹² Nevertheless, Shepherd asserts that he premised his bidding strategy on his competitor's claimed bidding credit. We will not reauction the authorization because Shepherd now disavows his bidding strategy. In *Liberty Productions*, the Commission rejected a similar argument regarding the effect of a mistakenly claimed bidding credit on another bidder's strategy during auction. See *Liberty Productions*, FCC 01-129 at ¶39. The Commission was not persuaded that the change in the auction winner's bidding status so altered the circumstances under which the auction was conducted as to require that the results be set aside. *Id.* Additionally, we will not restrict the Bollinger Partnership's bid to the net amount bid, as Shepherd urges. Shepherd cites no authority in support of such limitation and, as noted, the staff's decision here is consistent with Commission decisions in similar circumstances.¹³

8. Finally, Shepherd contends that the *Staff Decision* will not only create dangerous precedent as applicants attempt to manipulate the auction process by falsely claiming bidding credits with little fear of reprisal, but such gamesmanship deprives the taxpayers of the full market value of the auctioned spectrum. These arguments are without merit. Our established auction procedures maintain the integrity of the auction process. See *Liberty Productions*, FCC 01-129 at ¶39 (requiring full payment of an auction winner's winning bid, when that auction winner mistakenly claimed entitlement to a bidding credit, preserves the integrity of the auction). Applicants should bear in mind that a bidder's claimed bidding credit may ultimately be disallowed post-auction. Additionally, we do not, as a general matter, assume that applicants will fail to comply with our rules.¹⁴ As noted in the *Broadcast Auction MO&O*, we are fully committed to addressing improper efforts to manipulate or frustrate the purpose of the competitive bidding credit rules on a case-by-case basis.¹⁵

III. Conclusion

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page 2. This argument lacks merit. The Bollinger Partnership's winning bid during Closed Broadcast Auction No. 25, MX Group FM68, was \$311,000. The fact that the Bollinger Partnership is not entitled to the bidding credit claimed does not change the amount of the winning bid, it merely renders the net bid equal to the gross bid. The Bollinger Partnership must pay the amount of its final bid without any bidding credit.

¹¹ The staff did not state that Shepherd should have discovered that the Bollingers' claim was false as Shepherd asserts. Rather, in disputing Shepherd's claim that the auction was "tainted," the staff pointed out that Shepherd "had the opportunity to review the Bollingers' Short Form Application prior to auction and could have discovered their ineligibility for the bidding credit at that time." *Staff Decision*, page 3.

¹² See *Broadcast First Report and Order*, 13 FCC Rcd 15920, 15952 (1998).

¹³ See *Liberty Productions*, FCC 01-129 at ¶¶38-39; *Baker Creek*, 13 FCC Rcd at 18728.

¹⁴ See *Broadcast Auction MO&O*, 14 FCC Rcd at 8768, citing *News International, PLC*, 97 FCC 2d 349, 356-358 (1984).

¹⁵ See *Broadcast Auction MO&O*, 14 FCC Rcd at 8768. The Commission also stated that "we will, after gaining experience with conducting broadcast auctions and implementing the new entrant bidding credit, consider whether the adoption of specific prohibitions or sanctions against particular types of manipulative or abusive conduct are warranted." *Id.* We find that no such action is warranted at this time.

9. Accordingly, IT IS ORDERED that the Application for Review filed March 2, 2000, by David L. Shepherd IS DENIED. The Chief, Audio Services Division, Mass Media Bureau, will list the Bollinger Partnership's application for a construction permit for a FM broadcast station on Channel 258C3 at Bismarck, Missouri in a Public Notice announcing that the construction permit application is ready to be granted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary