

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

In the Matter of
Petition for Reconsideration and Motion for Stay
of Paging Systems, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 2010

Released: April 16, 2010

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we reject a claim by Paging Systems, Inc. ("PSI") that the participation of two entities controlled by the same person in our 2004 auction of Automated Maritime Telecommunications System licenses gave those entities advantages over other bidders and harmed auction competition. We therefore refuse PSI's request that we set aside the results of that auction, Auction 57.

2. We deny an Application for Review filed by PSI. PSI requests that we reverse an Order of the Wireless Telecommunications Bureau ("Bureau") in which the Bureau rejected PSI's claim that Auction 57, an auction of Automated Maritime Telecommunications System ("AMTS") licenses conducted in 2004, had been anticompetitive because commonly controlled entities had been allowed to participate. The Bureau denied PSI's request that the results of Auction 57 be set aside and a new auction conducted.

3. In its Application for Review, PSI again asks that we set aside the results of Auction 57 and schedule a new auction of the licenses offered in Auction 57. PSI requests that we permit one but not both of the commonly controlled entities that participated in Auction 57 to bid in the rescheduled auction and that we allow the other parties that had filed short-form applications for Auction 57 to resubmit their applications, modify the markets selected on their applications, and make "appropriate" upfront payments. Alternatively, PSI requests that we schedule a new auction that would exclude commonly

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

2 Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., Order, 20 FCC Rcd 8087 (WTB 2005) ("Bureau Order"). As explained more fully below, the Bureau Order denied a Petition for Reconsideration in which PSI asked the Bureau to overrule that portion of an order issued by the Auctions and Spectrum Access Division ("Division") in which the Division denied a request to dismiss the applications of two commonly controlled entities to participate in Auction 57. Paging Systems, Inc., Petition for Reconsideration, filed Oct. 14, 2004 ("Petition for Reconsideration"), seeking recon. of Motions for Stay of Auction 57 and Requests for Dismissal or Disqualification, Order, 19 FCC Rcd 20,482 (WTB/ASAD 2004) ("Division Order"). The Bureau Order also denied a Motion for Stay filed by PSI asking that the Bureau stay the processing of long-form applications submitted by winning bidders in Auction 57 until its Petition for Reconsideration was resolved. Paging Systems, Inc., Motion for Stay, filed Oct. 14, 2004 ("Motion for Stay").

controlled entities but otherwise be open to all parties wishing to participate.³

4. As explained below, PSI has not shown, as it alleges, that the participation of commonly controlled entities in the same auction deters the participation of other potential bidders, puts other auction participants at a disadvantage, or reduces the competitiveness of the auction. PSI also has not demonstrated that the participation of commonly controlled entities in an auction contravenes Commission rules or policy, nor has it provided any evidence of anticompetitive behavior in Auction 57 or shown that the results of the auction were unfair. We agree with the Bureau that there is no basis for setting aside Auction 57, and we affirm the *Bureau Order*.⁴

II. BACKGROUND

5. In Auction 57, the Commission offered a total of 20 AMTS licenses (in ten markets) in the 217/219 MHz bands. As explained in the *Auction 57 Procedures Public Notice*, which the Bureau released on May 26, 2004, parties interested in participating in the auction were required to submit short-form applications by July 19, 2004, and upfront payments by August 20, 2004.⁵

6. *Parties Filing Short-form Applications*. On August 4, 2004, the Bureau released the *Auction 57 Status Public Notice*, which announced that five short-form applications to participate in Auction 57 had been submitted.⁶ This public notice listed three applications—those of AMTS Consortium, LLC (“Consortium”), Telesaurus-VPC, LLC (“Telesaurus”), and Mobex Network LLC (“Mobex”)—as accepted for filing.⁷ The Consortium and Telesaurus short-form applications both identified Warren C.

³ Application for Review at 19.

⁴ On September 20, 2006, PSI filed comments in response to our pending notice of proposed rule making that sought comment on whether we should adopt additional measures to increase the effectiveness of our rules governing the eligibility of applicants and licensees for designated entity benefits. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753 (2006) (“*Designated Entity Second Further Notice*”). In these comments, PSI asks that we clarify that Commission auction policies prohibit commonly controlled applicants from competing as separate applicants in the same auction. Comments of Paging Systems, Inc., WT Docket No. 05-211, filed September 20, 2006. In the instant Memorandum Opinion and Order, we do not consider PSI's comments regarding our designated entity rules, which are not at issue here, but we fully address its contention that commonly controlled applicants should be prohibited from competing in the same auction because the participation of commonly controlled applicants in Auction 57 had an anti-competitive impact on that auction.

⁵ “Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Auction Procedures,” *Public Notice*, 19 FCC Rcd 9518, 9533 (WTB 2004) (“*Auction 57 Procedures Public Notice*”).

In Commission auctions, each applicant must submit an upfront payment in order to become a qualified bidder. In addition, the amount of each applicant's upfront payment determines the level of its eligibility to bid on licenses. Each license is assigned a specific number of bidding units, and the applicant's upfront payment establishes the number of bidding units on which it may place bids in any given round. Therefore, in order to bid on a particular license, an otherwise qualified bidder that applied for that license in its short-form application must have an eligibility level that meets or exceeds the number of bidding units assigned to that license. An applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the licenses it applied for in its short-form application or the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all licenses for which the applicant has applied, but it must submit an upfront payment sufficient to cover the maximum number of bidding units that are associated with licenses on which it wishes to place bids and hold high bids in any single round of the auction. See *id.* at 9541-43.

⁶ “Automated Maritime Telecommunications System Spectrum Auction; Status of FCC Form 175 Applications to Participate in the Auction,” *Public Notice*, 19 FCC Rcd 14,874 (WTB 2004) (“*Auction 57 Status Public Notice*”).

⁷ *Id.* at 14,879 Attachment A.

Havens as the controlling interest but indicated that these entities had different ownership structures.⁸ The *Auction 57 Status Public Notice* listed two applications—those of PSI and Thomas K. Kurian—as incomplete.⁹ Pursuant to Section 1.2105(b)(2) of the Commission’s rules, applicants whose applications were incomplete were provided with an opportunity to cure the deficiencies in their applications and resubmit them by August 20, 2004.¹⁰ Both PSI and Thomas K. Kurian submitted amended applications by this deadline.¹¹

7. *Mobex’s Requests*. One week before the upfront payment deadline of August 20, 2004, Mobex submitted several filings seeking a delay of the auction schedule and disqualification of the short-form applications filed by Consortium and Telesaurus.¹² In these filings, Mobex requested that the Bureau issue a declaratory ruling on whether two commonly controlled entities may participate in the same auction.¹³ Mobex asked that the Bureau dismiss the Consortium and Telesaurus short-form applications,¹⁴ and stay the deadline for submission of upfront payments until thirty days after resolution of its Request for Declaratory Ruling.¹⁵ Mobex further requested that the Bureau stay the start date of Auction 57 until thirty days after lifting the requested stay of the deadline for submission of upfront payments.¹⁶

8. *Qualified Bidders Public Notice*. On August 27, 2004, the Bureau released a public notice identifying the applicants that were qualified to bid in Auction 57. These parties were Consortium, Telesaurus, PSI, and Thomas K. Kurian.¹⁷ Mobex had not submitted an upfront payment, as required

⁸ FCC Forms 175 of Telesaurus-VPC, LLC, and AMTS Consortium, LLC, for Auction 57 (filed July 19, 2004). Pursuant to 47 C.F.R. § 1.2105(a)(2)(viii), each of these applicants also disclosed a bidding arrangement with the other in Exhibit B of its short-form application.

⁹ *Auction 57 Status Public Notice*, 19 FCC Rcd at 14,880 Attachment B.

¹⁰ 47 C.F.R. § 1.2105(b)(2).

¹¹ “Automated Maritime Telecommunications System Spectrum Auction; 4 Qualified Bidders,” *Public Notice*, 19 FCC Rcd 20,452, 20,459 Attachment A (WTB 2004) (“*Auction 57 Qualified Bidders Public Notice*”).

¹² Mobex filed: (1) Informal Request for Action – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Mobex Motion to Dismiss”); (2) Request for Declaratory Ruling – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Mobex Request for Declaratory Ruling”); (3) Motion for Stay – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Mobex Motion to Stay Auction”); and (4) Motion for Stay – Urgent Action Requested, Automated Maritime Telecommunications System, Auction #57, dated August 13, 2004 (“Mobex Motion to Stay Upfront Payment Date”).

¹³ Mobex Request for Declaratory Ruling at 1.

¹⁴ Mobex Motion to Dismiss at 1.

¹⁵ Mobex Motion to Stay Upfront Payment Date at 1.

¹⁶ Mobex Motion to Stay Auction at 1. Telesaurus VPC LLC, AMTS Consortium, and Warren Havens (the “Responders”) filed pleadings in opposition, and Mobex replied. The Responders’ pleadings in opposition included: (1) Opposition to the Mobex § 1.41 Request to Dismiss the Applications of Telesaurus VPC LLC and AMTS Consortium LLC to Participate in Auction 57, dated September 8, 2004; (2) Opposition to Request for Declaratory Ruling, AMTS Auction 57, dated September 7, 2004; and (3) Opposition to the Two Motions for Stay, AMTS Auction 57, dated September 7, 2004. In reply, Mobex filed: (1) Reply to Opposition to Informal Request for Action, Automated Maritime Telecommunications System, dated September 14, 2004; (2) Reply to Opposition to Request for Declaratory Ruling, Automated Maritime Telecommunications System, Auction 57, dated September 14, 2004; and (3) Reply to Opposition to Motions for Stay, Automated Maritime Telecommunications System, dated September 14, 2004.

¹⁷ *Auction 57 Qualified Bidders Public Notice*, 19 FCC Rcd at 20,459 Attachment A.

under the Commission's rules, and therefore was not qualified to participate in Auction 57.¹⁸

9. *PSI's Letter*. On September 14, 2004, one day prior to the scheduled start of Auction 57 and over a month after the short-form applications had become available for public review, PSI submitted its own letter requesting that the Bureau clarify whether it is permissible for commonly controlled entities to file auction applications for the same licenses.¹⁹

10. *Division Order*. On September 15, 2004, the Division issued an Order denying Mobex's requests.²⁰ In its ruling, the Division pointed out that the Commission's Part 1 competitive bidding rules do not prohibit participation in a spectrum auction by commonly controlled entities.²¹ The Division also found that Consortium and Telesaurus had complied with all disclosure requirements in the Commission's Part 1 rules, noting that they had disclosed in their short-form applications that Mr. Havens was the controlling interest for both applicants, that Mr. Havens managed both applicants, and that there was a joint bidding agreement between the two applicants.²²

11. The Division also took note of the reasons Telesaurus and Consortium had given for both participating in Auction 57, namely that the two entities have separate business plans and separate funds and accounting, which allows for different sources of capital, and that they would need to seek and obtain Commission approval before a license transfer or assignment could be completed between them after the auction. The Division indicated that there could be a variety of legitimate reasons for commonly controlled entities to participate in an auction, including the implementation of different business plans, financing requirements, marketing needs, and the avoidance of transactional costs in the secondary market.²³ In response to Mobex's claim that the participation of two commonly controlled entities would facilitate gaming of the auction process, by, for example, allowing one entity to bid up prices on licenses that other bidders want and then simply withdraw, the Division explained that the Commission's rules contain safeguards against such anticompetitive behavior, including bid withdrawal and default payments.²⁴ Finally, the Division rejected Mobex's argument that Mr. Havens's interest in two separate applications provided an informational advantage relative to other bidders.²⁵

12. *Auction 57*. Auction 57 began as scheduled on September 15, 2004, and closed on the same day. On September 17, 2004, the Bureau issued a public notice announcing the results of Auction 57 and identifying the winning bidders.²⁶ Consortium won five licenses, Telesaurus won three, Thomas K. Kurian won one, and PSI won one.²⁷ Ten licenses received no bids and remained unsold at the close of

¹⁸ *Id.*, Attachment C.

¹⁹ Letter from Audrey P. Rasmussen on behalf of Paging Systems, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, filed September 14, 2004 ("PSI Letter").

²⁰ *See supra* note 2.

²¹ *Division Order*, 19 FCC Rcd at 20,483 ¶ 1.

²² *Id.* at 20,485 ¶ 8 (citing 47 C.F.R. §§ 1.2105 (a)(2)(viii-ix), 1.2105(c)(1)). *See also* FCC Forms 175 of Telesaurus and Consortium, Exhibits A and B.

²³ *Division Order*, 19 FCC Rcd at 20485 ¶ 9.

²⁴ *Id.* at 20486-87 ¶¶ 10-13.

²⁵ *Id.* at 20487 ¶¶ 14-15.

²⁶ "Automated Maritime Telecommunications System Spectrum Auction Closes; Winning Bidders Announced," *Public Notice*, 19 FCC Rcd 18,252 (WTB 2004).

²⁷ *See id.* at 18,258 Attachment A. The ten licenses that were won in the auction were granted on April 27, 2005. "Wireless Telecommunications Bureau Announces the Grant of 10 Automated Maritime Telecommunications System Licenses," *Public Notice*, 20 FCC Rcd 8244 (WTB 2005).

the auction.

13. *PSI's Petition for Reconsideration and Motion for Stay.* On October 14, 2004, PSI filed a Petition for Reconsideration of the *Division Order*. PSI asked the Bureau to (1) overrule that portion of the *Division Order* that denied Mobex's request for the dismissal of Consortium's and Telesaurus's applications to participate in Auction 57; (2) set aside the results of Auction 57 and reschedule the auction; (3) allow either Consortium or Telesaurus, but not both, to resubmit its application; (4) allow other Auction 57 applicants to amend their applications to select additional markets; and (5) permit Mobex to resubmit its application. On the same date, PSI also filed a Motion for Stay asking that the Bureau stay the processing of long-form applications submitted by winning bidders in Auction 57 until its Petition for Reconsideration was resolved.²⁸

14. In support of these requests, PSI argued that Auction 57 had been anticompetitive because two commonly controlled entities had been allowed to participate.²⁹ PSI submitted an economic analysis provided by Dr. John Morgan, who contended, in the context of a specific theoretical auction model, that the presence of commonly controlled entities in an auction creates a disincentive for other bidders to participate. More specifically, Dr. Morgan argued that, in his model, when a controlling interest creates a second bidding entity, other bidders may be deterred from entering an auction because they regard an increased number of competitors as reducing their expected returns from participating.³⁰ PSI asserted that it had decided to limit its participation in Auction 57, and that Mobex had decided not to participate in the auction at all, because of the presence of commonly controlled applicants. According to PSI, these decisions demonstrated the anticompetitive impact of the participation of commonly controlled applicants in the auction.³¹

15. In addition, PSI pointed out that in Auction 57 the commonly controlled bidders had not competed against each other.³² PSI conceded that there is no *per se* prohibition in the Commission's Part 1 competitive bidding rules that would disallow two commonly controlled entities from participating in a spectrum auction. PSI argued, however, that Section 1.937(d) of the Commission's rules, which bars the acceptance for filing of conflicting license applications, prohibits the filing of commonly controlled auction applications.³³

16. *Bureau Order.* On April 21, 2005, the Bureau affirmed the *Division Order*, rejecting PSI's claim that the Division's decision would result in anticompetitive auction outcomes.³⁴ The Bureau

²⁸ Petition for Reconsideration at 8; Motion for Stay at 2. Mr. Havens, along with Consortium and Telesaurus, opposed PSI's Petition for Reconsideration and Motion for Stay. Warren C. Havens, AMTS Consortium, LLC, and Telesaurus-VPC, LLC, Opposition to Petition for Reconsideration, filed Oct. 27, 2004; Warren C. Havens, AMTS Consortium, LLC, and Telesaurus-VPC, LLC, Opposition to Motion for Stay, filed Oct. 21, 2004. PSI replied to the Opposition to Petition for Reconsideration. Paging Systems, Inc., Reply to Opposition to Petition for Reconsideration, filed Nov. 5, 2004 ("Reply to Opposition to Petition for Reconsideration"). In March 2005, Mr. Havens submitted a letter arguing that PSI's Petition for Reconsideration was defective on procedural grounds. Letter from Warren Havens to Howard Davenport, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated March 7, 2005. PSI moved to strike Mr. Havens's letter as an unauthorized pleading. Paging Systems, Inc., Motion to Strike, dated March 10, 2005. The Bureau dismissed both Mr. Havens's letter and PSI's Motion to Strike as untimely under 47 C.F.R. § 1.106. *Bureau Order*, 20 FCC Rcd at 8090 n.29.

²⁹ Petition for Reconsideration at 4, 5-8; *see also* Motion for Stay at 1-2, 4.

³⁰ Petition for Reconsideration, Exhibit 1.

³¹ *Id.* at 4, 5.

³² *Id.* at 6.

³³ *Id.* (citing 47 C.F.R. § 1.937(d)); Reply to Opposition to Petition for Reconsideration at 3.

³⁴ *Bureau Order*, 20 FCC Rcd at 8093 ¶ 13.

disagreed with Dr. Morgan's conclusion that potential bidders will be deterred from participating in auctions simply because of the number of other bidders. In the Bureau's view, applicants for FCC auctions are likely to base their participation decisions on more complete information about other applicants, including the information regarding the affiliations and bidding agreements of other applicants that is available to the public in auction short-form applications. In addition, the Bureau found that the theoretical model on which Dr. Morgan's analysis relied was flawed because it included assumptions that were inconsistent with the Commission's auctions process.³⁵ Noting that Mobex had previously sought a delay of Auction 57 based on reasons unrelated to the participation of commonly controlled entities, including problems in securing financing, the Bureau declined to draw any conclusions regarding Mobex's decision not to participate.³⁶

17. In addition, the Bureau found that PSI had presented no evidence of anticompetitive bidding activity in Auction 57.³⁷ The Bureau noted that there is no requirement that bidders compete against all other bidders in an auction.³⁸ 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.³⁹

18. The Bureau rejected PSI's argument that Section 1.937(d) provides for the dismissal of applications such as those submitted by Consortium and Telesaurus, concluding that Section 1.937(d) does not apply to short-form auction applications.⁴⁰ Finally, the Bureau denied PSI's motion to stay the processing of long-form applications submitted by Auction 57 winning bidders, finding that PSI had failed to meet the standard for such a stay.⁴¹

19. *PSI's Application for Review.* On May 23, 2005, PSI filed the instant Application for Review, arguing that the Commission should reverse the *Bureau Order* because of factual errors, erroneous legal conclusions, and policy considerations.⁴²

20. *Further Pleadings.* On June 7, 2005, Consortium and Telesaurus filed an Opposition to PSI's Application for Review, as did Northeast Utilities Service Company ("NUSCO"). Consortium and Telesaurus argue that PSI's Application for Review is procedurally defective and substantively without merit to the point of being frivolous, and that it should be dismissed with sanctions.⁴³ NUSCO, which describes itself as New England's largest utility system, states that it has, along with Consortium, submitted an application to the Commission to "partition, disaggregate and assign" AMTS license WQCP810, which Consortium won in Auction 57, from Consortium to NUSCO.⁴⁴ NUSCO argues that

³⁵ *Id.* at 8092 ¶ 11.

³⁶ *Id.* at 8093 ¶ 13.

³⁷ *Id.* at 8092 ¶ 12.

³⁸ *Id.* at 8093 ¶ 13.

³⁹ *Id.* at 8093 ¶ 13.

⁴⁰ *Id.* at 8093-94 ¶ 14.

⁴¹ *Id.* at 8094-95 ¶¶ 15-19.

⁴² Application for Review at 1, 5.

⁴³ AMTS Consortium LLC and Telesaurus VPC LLC, Opposition to Application for Review, filed June 7, 2005, at 1 ("Consortium-Telesaurus Opposition to Application for Review").

⁴⁴ Northeast Utilities Service Company, Opposition to Application for Review, filed June 7, 2005, at 1-2 ("NUSCO Opposition to Application for Review") (citing Application File No. 0002147762, Public Notice Report No. 2148 (May 11, 2005)).

PSI's Application for Review should be dismissed for procedural reasons.⁴⁵ In addition, NUSCO contends that no unfairness was demonstrated in Auction 57 and questions whether PSI and Mobex were in fact deterred from participating in the auction because of the presence of commonly controlled entities.⁴⁶

21. On June 17, 2005, PSI filed a Motion to Strike against NUSCO's Opposition.⁴⁷ On June 22, 2005, PSI filed a Motion to Strike against the Consortium-Telesaurus Opposition and also filed a Reply to Oppositions to Application for Review.⁴⁸ On June 30, 2005, NUSCO filed an Opposition to PSI's Motion to Strike.⁴⁹ On July 7, 2005, Consortium and Telesaurus filed an Opposition to Motion to Strike.⁵⁰ On July 8, 2005, PSI filed a Reply to NUSCO's Opposition to Motion to Strike,⁵¹ and on July 14, 2005, it filed a Reply to the Consortium-Telesaurus Opposition to Motion to Strike.⁵²

III. DISCUSSION

22. We first address the procedural issues raised in this proceeding. In particular, we discuss the question of whether PSI has standing to file its Application for Review, and we consider other arguments Consortium, Telesaurus, and NUSCO make in asserting that PSI's Application for Review is procedurally deficient. We also address PSI's motions to strike the Consortium-Telesaurus and NUSCO Oppositions to its Application for Review. As explained below, we agree with the *Bureau Order* that PSI's standing in this proceeding is questionable. We do not, however, dismiss PSI's Application for Review for lack of standing, because we choose to exercise our discretion to address the substantive merits of PSI's Application for Review.⁵³ Following our discussion of the procedural issues raised in this proceeding, we therefore address each of PSI's substantive arguments regarding its claim that commonly controlled entities should not have been permitted to participate in Auction 57. Finally, we address the Consortium-Telesaurus assertion that PSI should be sanctioned for filing its Application for Review and NUSCO's suggestion that PSI may have lacked candor before the Commission.

A. Procedural Issues

23. PSI on the one hand and Consortium, Telesaurus, and NUSCO on the other have presented a wide variety of arguments asserting that each other's pleadings in this proceeding should be dismissed for procedural reasons. We address these arguments in turn. We also note, however, that the parties advance

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.* at 5-10.

⁴⁷ Paging Systems, Inc., Motion to Strike, filed June 17, 2005 ("Motion to Strike NUSCO Opposition").

⁴⁸ Paging Systems, Inc., Motion to Strike, filed June 22, 2005 ("Motion to Strike Consortium-Telesaurus Opposition"); Paging Systems, Inc., Reply to Oppositions to Application for Review, filed June 22, 2005 ("Reply to Oppositions to Application for Review").

⁴⁹ Northeast Utilities Service Company, Opposition to Motion to Strike, filed June 30, 2005 ("NUSCO Opposition to Motion to Strike").

⁵⁰ AMTS Consortium LLC and Telesaurus VPC LLC, Opposition to Motion to Strike, filed July 7, 2005 ("Consortium-Telesaurus Opposition to Motion to Strike").

⁵¹ Paging Systems, Inc., Reply to Opposition to Motion to Strike, filed July 8, 2005 ("Reply to NUSCO Opposition to Motion to Strike").

⁵² Paging Systems, Inc., Reply to Opposition to Motion to Strike, filed July 14, 2005 ("Reply to Consortium-Telesaurus Opposition to Motion to Strike").

⁵³ In *Re Application of Central Mobile Radio Phone Service*, *Memorandum Opinion and Order*, 65 F.C.C.2d 648, 650 ¶ 7 (1977) ("Irrespective of formal standing . . . the Commission possesses independent discretion to consider the merits of a controversy where the issues raised are in the public interest.").

certain procedural arguments—for example, Consortium and Telesaurus’s contention that the *Division Order* was an interlocutory action not subject to reconsideration—that have little or no merit. As discussed below, PSI and the Havens-controlled entities also accuse each other of harassment, and both have appended materials to their pleadings that are irrelevant to this proceeding, which practices serve only to waste Commission resources.⁵⁴

1. PSI’s Application for Review

a. Questions Regarding PSI’s Standing

24. *Background.* The *Bureau Order* questioned whether PSI had standing to petition for reconsideration of the *Division Order*. Noting that in order to establish standing PSI was required to show that it had been adversely affected by the acceptance of auction applications filed by commonly controlled entities, the Bureau indicated that PSI had not shown that it would meet this requirement.⁵⁵ However, the Bureau did not resolve the issue of PSI’s standing because it affirmed the *Division Order*.⁵⁶

25. PSI argues in its Application for Review that it has standing because it suffered economic injury as a result of the Bureau’s “novel decision” to allow two commonly controlled applicants to participate in Auction 57. PSI contends that it was deterred from participating more fully in the auction by the participation of the commonly controlled entities and that, as an incumbent licensee in markets in which the commonly controlled entities bid, it has “competitor standing” to challenge the Bureau’s action. PSI claims that it was harmed because the commonly controlled applicants unfairly acquired licenses to serve areas around its operations and it cannot now compete beyond its currently authorized sites, that the Bureau’s action caused this harm by permitting an unfair auction, and that the Commission can redress this harm by setting aside the results of Auction 57 and disallowing commonly controlled bidders in future auctions.⁵⁷

26. In opposition, Consortium and Telesaurus contend that PSI lacks standing to challenge the outcome of Auction 57 because it was not able and ready to bid on the licenses they won,⁵⁸ that PSI cannot establish standing to challenge the acceptance of their short-form applications based on competitor status because the parties were not competitors at the time of that acceptance;⁵⁹ and that PSI has not been a party to the proceeding because it made no substantive filings on the issues raised by Mobex until after the issuance of the *Division Order* and has not explained why it did not participate earlier as required under 47 C.F.R. § 1.106(b)(1).⁶⁰

⁵⁴ See *infra* para. 96.

⁵⁵ *Bureau Order*, 20 FCC Rcd at 8090 ¶ 8 n.36.

⁵⁶ *Bureau Order*, 20 FCC Rcd at 8090 ¶ 8 n.36.

⁵⁷ Application for Review at 6-10. See also Reply to Oppositions to Application for Review at 3, 4-5.

⁵⁸ Consortium-Telesaurus Opposition to Application for Review at 3-4. Consortium and Telesaurus note that PSI submitted an upfront payment sufficient to win only one or two licenses; that it did not bid on the licenses they won; and that it bid on only one license, which it won unopposed. *Id.*

⁵⁹ *Id.* at 5-6.

⁶⁰ *Id.* at 6-7. NUSCO similarly argues that PSI’s Application for Review should be dismissed because PSI, having neither challenged the acceptance of the commonly controlled short-form applications nor supported Mobex’s challenge to them, had no standing to petition for reconsideration of the *Division Order*. According to NUSCO, we should, upon a *de novo* review, dismiss PSI’s challenge to the *Bureau Order* for failure to meet the standard applied to non-parties to proceedings under Section 1.106(b)(1). NUSCO Opposition to Application for Review at 4. See also NUSCO Opposition to Motion to Strike at 2-3.

27. In reply, PSI contends that it was directly affected by the *Division Order* disposing of Mobex's requests and that it filed a timely petition for reconsideration of that decision as provided for in Section 1.106 of the Commission's rules.⁶¹ PSI further asserts that, being aggrieved by the *Bureau Order*, it has timely identified erroneous findings and legal conclusions in that decision.⁶²

28. *Discussion.* We find that the Bureau correctly questioned PSI's standing to challenge the *Division Order* because, as the Bureau noted, PSI participated in Auction 57, won the only license on which it bid, and had no eligibility to bid on any other licenses without withdrawing its high bid on the license it won.⁶³ We recognize that PSI alleges that it was deterred from submitting a larger upfront payment, and thereby establishing eligibility to bid on more licenses,⁶⁴ by the acceptance of short-form applications by commonly controlled entities. It is PSI's contention that the Bureau, by accepting such applications, denied it the right to a fair auction and thus deprived it of the opportunity to provide service in areas contiguous with its site-based markets.⁶⁵ As explained below, however, PSI could have submitted a larger upfront payment in Auction 57, thereby establishing more bidding eligibility, without significant risk.⁶⁶ Under the Commission's longstanding rules, PSI would have received a refund of any portion of its upfront payment that exceeded the amount of its payment obligations resulting from the auction (e.g., bids for any licenses it won and withdrawal and/or default payments). The only detriment to PSI under such circumstances would have been the loss of the use of the funds comprising the portion of its upfront payment exceeding its auction payment obligations during the period from the upfront payment deadline to receipt of the refund.⁶⁷ Under such circumstances, PSI would have been in exactly the same situation as any other auction participant that submits an upfront payment larger than its auction payment obligations, which is a common occurrence in Commission auctions. We therefore find that PSI has not shown that it was injured by any denial of an opportunity to compete in Auction 57 on valid and equal terms with other applicants. We also find that neither the FCC's auction rules, nor any of the actions of the FCC staff in conducting Auction 57, caused PSI or any other applicant to submit the specific upfront payment it made in this auction. Only PSI could assess its bidding prospects and make the decision to submit a specific upfront payment amount. We further find that PSI's assertions of competitor standing are unpersuasive because the licenses offered in Auction 57 authorize the provision of service in geographic areas that do not overlap with the service areas of the site-based licenses already held by PSI.⁶⁸

29. We do not, however, dismiss PSI's Application for Review for lack of standing. Instead, we

⁶¹ Reply to Oppositions to Application for Review at 5.

⁶² *Id.*

⁶³ *Bureau Order*, 20 FCC Rcd at 8090 ¶ 8 n.36.

⁶⁴ See *supra* note 5 regarding applicants' establishment of bidding eligibility through their submission of upfront payments.

⁶⁵ Application for Review at 7-9.

⁶⁶ See *infra* para. 75-77.

⁶⁷ See 47 C.F.R. § 1.2106(d).

⁶⁸ With respect to the arguments presented regarding Section 1.106 of the Commission's rules, we note that it is unclear whether PSI participated in this proceeding as early as it could have. PSI cites its letter of September 14, 2004, in which it asked the Bureau to "clarify whether the filing of two auction applications for the same licenses by commonly owned entities is permissible," to establish that it "had participated in the proceeding below." See Application for Review at 6; PSI Letter, *supra* note 17. Although the Bureau recognized this letter as seeking a response to Mobex's requests, *Bureau Order*, 20 FCC Rcd at 8089 ¶ 4, the letter does not specifically mention the Mobex requests and does not unambiguously establish PSI as a party to the proceeding initiated by Mobex. However, we need not resolve the question of whether PSI participated in this proceeding as early as it could have because we find that it has not shown that it was injured by the terms under which Auction 57 was conducted.

choose to exercise our discretion to address the merits of PSI's contention that commonly controlled applicants should be prohibited from competing in the same auction because the participation of commonly controlled applicants in Auction 57 had an anticompetitive impact on that auction.

b. Whether PSI's Application for Review Seeks Review of Only Interlocutory Actions or Is an Untimely Petition to Deny

30. *Background.* NUSCO argues that PSI's Application for Review is defective because it seeks review of the Bureau's acceptance of short-form applications, which NUSCO asserts is not a final action but rather an interlocutory action that is not subject to review under Section 1.106(a)(1) of the Commission's rules. According to NUSCO, the only final action taken by the Bureau was the grant of the licenses won in Auction 57, which PSI did not challenge and to which administrative finality has attached.⁶⁹ Consortium and Telesaurus similarly contend that PSI should not be permitted to use its Application for Review as an untimely petition to deny their long-form applications.⁷⁰ They also argue that the *Division Order* was not a final action subject to reconsideration under 47 C.F.R. § 1.106(a)(1) and therefore PSI's Petition for Reconsideration was procedurally defective.⁷¹ In reply, PSI asserts that its challenge is to the auction itself, not the application forms submitted.⁷² PSI further contends that the *Division Order* was a final action because it had the legal consequence of permitting Auction 57 to go forward with the participation of the commonly controlled entities.⁷³

31. *Discussion.* We do not consider PSI's Petition for Reconsideration to have been merely a request for the dismissal of the Consortium and Telesaurus short-form applications, and we will not treat its Application for Review as simply an untimely petition to deny their long-form applications. PSI's statements regarding the nature of its challenges to the actions taken on delegated authority in this proceeding have been confusing and contradictory.⁷⁴ Nevertheless, it is clear that PSI seeks the

⁶⁹ NUSCO Opposition to Application for Review at 4-5.

⁷⁰ Consortium-Telesaurus Opposition to Application for Review at 2-3. Consortium and Telesaurus assert that their short-form applications could not properly be challenged because the acceptance of an FCC Form 175 is not an action ripe for challenge. *Id.* at 2 (citing *In re Application of Joseph W. Bollinger and Donna M. Bollinger, Memorandum Opinion and Order*, 16 FCC Rcd 18,107, 18,110-11 ¶ 7 (2001); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Edward S. O'Neill, 17 FCC Rcd 3235, 3236 (WTB/ASAD 2002); Letter from Margaret Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Steven R. Sixberry, Nevada Wireless, 15 FCC Rcd 15,958, 15,958 (WTB/ASAD 2000).

⁷¹ *Id.* at 8-10.

⁷² Reply to Oppositions to Application for Review at 4.

⁷³ *Id.*

⁷⁴ In its Petition for Reconsideration of the *Division Order*, PSI asked the Bureau to overrule that portion of the *Division Order* that denied Mobex's request to dismiss the short-form applications of the two commonly controlled entities to participate in Auction 57. Petition for Reconsideration at 1. PSI explicitly stated that it was not seeking reconsideration of the Division's decision regarding Mobex's request for a declaratory ruling regarding the permissibility of commonly controlled entities participating in an auction. *Id.* at 1 n.2. In its Reply to Oppositions to Application for Review, PSI also states that it "did not request reconsideration of the denial of the Request for the Declaratory Ruling." Reply to Oppositions to Application for Review at 4. Nevertheless, in support of its Petition for Reconsideration PSI submitted an economic study, that of Dr. Morgan, that discusses the impact of commonly controlled bidders not only on Auction 57 but also on auctions generally. Petition for Reconsideration, Exhibit 1. Moreover, in its Application for Review PSI argues generally that allowing commonly controlled entities to participate in the same auction is inconsistent with the goals of the Commission's auction program and should be prohibited as a matter of policy. Application for Review at 16-18. Finally, despite saying in its Reply to Oppositions to Application for Review that its objections did not relate to the forms submitted, PSI goes on to say

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nullification of Auction 57 and the rescheduling of a new auction for the same licenses under revised procedures.

32. In addition, we disagree with Consortium and Telesaurus's assertion that the *Division Order* was an interlocutory action not subject to reconsideration. The *Division Order* not only denied Mobex's requests for dismissal of the commonly controlled applications and a stay of the auction, but also concluded that the Commission's rules contain no *per se* prohibition against the participation of commonly controlled entities in an auction.⁷⁵ To credit Consortium and Telesaurus's argument that the *Division Order* was not reviewable because it did not represent the "consummation" of an "agency decision making process" would be to declare that no decision issued pursuant to delegated authority is subject to reconsideration, which would be an absurd result.⁷⁶ Under Sections 1.104 and 1.106 of the Commission's rules, actions taken under delegated authority clearly may be final actions subject to reconsideration, and we find that the *Division Order* was such a final action.⁷⁷

c. Whether PSI's Application for Review Is an Untimely Petition for Reconsideration of the Commission's Competitive Bidding Rules

33. *Background.* The Bureau noted that PSI had conceded in its Petition for Reconsideration that the participation of commonly controlled entities in auctions is not prohibited by the Commission's competitive bidding rules. The Bureau further observed that PSI was in effect arguing that these rules are flawed because they do not prohibit such participation.⁷⁸

34. In its Application for Review, PSI states that "[a]lthough the current rules do not appear to directly address commonly controlled applicants, PSI emphasizes that the underlying policy of the competitive bidding rules requires the prohibition of the commonly controlled bidders because of the anti-

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that "[t]he subject of the debate was whether the Division erred when it refused to dismiss the commonly controlled applications. . . ." Reply to Oppositions to Application for Review at 4.

⁷⁵ *Division Order*, 19 FCC Rcd at 20,482-83 ¶ 1. Consortium and Telesaurus are correct that the Commission does not usually consider challenges to short-form applications that are submitted before or during an auction to be ripe, because it is more prudent to address such challenges after winning bidders have submitted their long-form applications when there is more time to consider the allegations made. The Commission has taken this approach in most cases because the challenges to the short-form applications in question involved allegations of noncompliance with the Commission's rules or wrongdoing (such as misrepresentation of an applicant's qualification for small business bidding credits) that need to be investigated. Here, however, the Division reached a decision not to dismiss the challenged applications based on its conclusion that the applicants had complied with all applicable rules.

⁷⁶ See Consortium-Telesaurus Opposition to Application for Review at 9-10.

⁷⁷ Section 1.104 states in pertinent part: "The provisions of this section apply to all final actions taken pursuant to delegated authority.... Any person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review...." 47 C.F.R. § 1.104(a) & (b). Section 1.106(a)(1) states in pertinent part: "Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission." 47 C.F.R. § 1.106(a)(1). Consortium and Telesaurus's reliance on the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), is misplaced because that opinion addresses the question of whether a particular action was a final agency action subject to judicial review. *Id.* at 177-78. Their citation of *Miller v. FCC*, 66 F.3d 1140 (11th Cir. 1995), is equally inapt because that case involved a Commission declaratory ruling that was not an adjudication of a pending case. *Id.* at 1144. In contrast, the *Division Order* was a decision applying the Commission's rules to a specific controversy that was reviewable by the Bureau, and the *Bureau Order* affirming that decision is reviewable by the Commission.

⁷⁸ *Bureau Order*, 20 FCC Rcd at 8091 ¶ 10.

competitive impact such bidders have on spectrum auctions.”⁷⁹ PSI further states that “to ensure a level playing field, the Commission must make it clear that its competitive bidding rules prohibit participation of commonly controlled entities in spectrum auctions.”⁸⁰ Consortium and Telesaurus argue that PSI seeks a change in the Commission’s rules that can be accomplished only through a rulemaking proceeding.⁸¹

35. *Discussion.* PSI’s concession that the Commission’s competitive bidding rules do not prohibit the participation of commonly controlled entities in auctions arguably provides grounds for dismissal of its Application for Review as an untimely petition for reconsideration of these rules. We do not dismiss PSI’s Application for Review, however, because, as noted above, we find that it would be useful to future auction participants for us to explain our views on PSI’s substantive arguments. PSI may at any time file a petition for rulemaking to request that we amend our competitive bidding rules to prohibit the participation of commonly controlled entities in auctions. As explained below, however, PSI’s Application for Review does not persuade us that our current rules are defective or inadequate to promote competitive auctions, or that our competitive bidding rules are inconsistent with Commission policy.⁸² We therefore would not be inclined to grant a petition for rulemaking based on the arguments PSI has presented.⁸³

d. Whether PSI’s Application for Review Impermissibly Includes New Arguments

36. *Background.* Consortium and Telesaurus assert that PSI’s Application for Review must be dismissed or denied because it relies on arguments on which the Bureau did not have an opportunity to pass and that are therefore impermissible under Section 1.115(c) of the Commission’s rules.⁸⁴ In particular, Consortium and Telesaurus cite Exhibit 2 of the Application for Review, in which PSI presents three “scenarios” that purportedly illustrate how commonly controlled bidders are able to manipulate the auction process and thereby put other bidders at a competitive disadvantage.⁸⁵ In two of these scenarios, PSI claims: (1) that a principal who controls multiple bidders in an auction can use additional withdrawals and proactive activity rule waivers to keep the auction from closing, thus gaining an unfair advantage over other bidders and (2) that by creating a shell bidding entity with no assets, such a principal can make strategic use of defaults with little risk to itself and to the disadvantage of other bidders.⁸⁶ PSI

⁷⁹ Application for Review at 12.

⁸⁰ *Id.* at 14.

⁸¹ Consortium-Telesaurus Opposition to Application for Review at 7-8.

⁸² *See infra* paras. 81-89.

⁸³ As noted above, PSI filed comments in response to our *Designated Entity Second Further Notice* in which PSI requested that we prohibit commonly controlled applicants from competing in the same auction. *See supra* note 4.

⁸⁴ Section 1.115(c) provides that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.” 47 C.F.R. § 1.115(c).

⁸⁵ Consortium-Telesaurus Opposition to Application for Review at 10-11. *See also* Consortium-Telesaurus Opposition to Motion to Strike at 8. Consortium and Telesaurus also assert that PSI’s Application for Review impermissibly relies on new arguments related to the issue of PSI’s standing and that Dr. Morgan’s analysis, which was an exhibit to PSI’s Petition for Reconsideration, should not have been considered because it was “new evidence” that was impermissible under 47 C.F.R. § 1.106(c). Consortium-Telesaurus Opposition to Application for Review at 10-11. Consortium and Telesaurus further state in their Opposition to Motion to Strike that none of the exhibits attached to PSI’s Application for Review were presented to the Bureau. Consortium-Telesaurus Opposition to Motion to Strike at 8-10.

⁸⁶ Application for Review at 7-8, Exhibit 2. Bidders in Commission auctions are usually allotted a certain number of activity rule waivers, which they may use proactively to preserve their bidding eligibility despite their activity in a

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asserts that its Application for Review presents no new questions of fact or law that were not presented to the Bureau.⁸⁷

37. *Discussion.* We find that PSI's inclusion of "scenarios" and assertions regarding activity rule waivers, bid withdrawals, and defaults does not warrant the dismissal of its Application for Review.⁸⁸ Although PSI did not raise the issue of activity rule waivers or that of bid withdrawals and defaults in its Petition for Reconsideration considered by the Bureau,⁸⁹ its assertions regarding these matters are not among its principal contentions in its Application for Review. Presented only in an exhibit, these assertions are illustrations of PSI's larger argument that commonly controlled bidders have unfair advantages over other bidders.⁹⁰

2. The Consortium-Telesaurus Opposition to Application for Review

38. *Background.* PSI asks that we strike the Consortium-Telesaurus Opposition to its Application for Review and return it without consideration because the Opposition exceeds the page limit for such pleadings set forth in the Commission's rules.⁹¹ Under Section 1.115(f), oppositions to applications for review may not exceed 25 pages.⁹² Under Section 1.48(a), affidavits, statements, and other materials that are submitted with and factually support a pleading are not counted in determining the length of the pleading; however, if other materials are submitted with a pleading, they are counted in determining its length, and if the pleading exceeds the permitted length, it will be returned without consideration.⁹³

39. The main body of the Consortium-Telesaurus Opposition is 25 pages long. In addition to this text, the Opposition includes (1) a Declaration by Mr. Havens and (2) an Exhibit 1 including a list of AMTS licenses and maps. PSI argues that the Declaration of Mr. Havens as well as at least four pages of Exhibit 1 should be counted toward the 25-page limit because they do not factually support the Opposition.⁹⁴ Consortium and Telesaurus dispute this assertion.⁹⁵

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particular round being below the required minimum level. The auction will not close following a round in which a waiver was submitted proactively or a bid was withdrawn, even if no new bids were placed.

⁸⁷ Reply to Oppositions to Application for Review at 3.

⁸⁸ We further find that it is not in the public interest to dismiss PSI's Application for Review based on its inclusion of other material cited by Consortium and Telesaurus. *See supra* note 86. We will not, however, consider PSI's allegation that Consortium and Telesaurus have begun a "campaign" to cancel its licenses, Application for Review at 10, or Exhibits 1 and 3 to the Application for Review, which are copies of e-mails sent from Mr. Havens to PSI's counsel in which he accuses PSI of violating FCC rules. These exhibits are not only new to the Application for Review, but are also irrelevant to the issues presented in it.

⁸⁹ Mobex raised the issue of waivers in its Request for Declaratory Ruling, and the Division addressed its argument. *Division Order*, 19 FCC Rcd at 20,487 ¶ 14. PSI, however, did not raise this issue prior to its Application for Review.

⁹⁰ Application for Review at 7-8.

⁹¹ Motion to Strike Consortium-Telesaurus Opposition at 1-5; Reply to Consortium-Telesaurus Opposition to Motion to Strike at 3-5.

⁹² 47 C.F.R. § 1.115(f).

⁹³ 47 C.F.R. § 1.48(a).

⁹⁴ Motion to Strike Consortium-Telesaurus Opposition at 3-5.

⁹⁵ Consortium-Telesaurus Opposition to Motion to Strike at 2-7. PSI also asserts that it was not served with the Consortium-Telesaurus Opposition to its Motion to Strike in a timely manner and recommends that the Opposition

(continued....)

40. *Discussion.* Although we find that Mr. Havens's Declaration causes the Consortium-Telesaurus Opposition to exceed 25 pages, we decline to strike the Opposition in its entirety. Having found that it is in the public interest for us to address PSI's substantive arguments regarding the participation of commonly controlled entities in auctions, we also find that it is in the public interest for us to exercise our discretion to consider the counterarguments presented by Consortium and Telesaurus. We will not, however, consider Mr. Havens's Declaration, which consists largely of (1) a continuation of the argument, presented within the body of the Consortium-Telesaurus Opposition, that PSI's filings in this proceeding have been frivolous and malicious; (2) an exposition of Mr. Havens's holdings and activities in not only the AMTS bands but also several other bands; and (3) accusations of fraud leveled at PSI that are unrelated to this proceeding. This Declaration does not qualify as factual support for the Consortium-Telesaurus Opposition and therefore may not be excluded from the Opposition's page count under 47 C.F.R. § 1.48(a).⁹⁶

41. On the other hand, we do accept Exhibit 1 as factual support for the Consortium-Telesaurus Opposition that is permissible under 47 C.F.R. § 1.48(a). According to the exhibit's notes, the list of AMTS licenses provided consists of A block incumbent stations as of May 19, 2005, and the maps show service and interference contours of incumbent stations.⁹⁷ Exhibit 1 is apparently meant to demonstrate that Mobex holds most incumbent AMTS A block licenses and that therefore there was not much spectrum available in Auction 57, an argument Consortium and Telesaurus advance in the body of their Opposition.⁹⁸

3. NUSCO's Opposition to Application for Review

42. *Background.* PSI also asks that we strike NUSCO's Opposition to its Application for Review. According to PSI, NUSCO's status as a party to an assignment application is insufficient to establish party status in this proceeding.⁹⁹ Characterizing the instant proceeding as "adjudicatory," PSI contends that NUSCO, as a non-party, is required to seek leave to intervene and that the Commission should not permit such intervention.¹⁰⁰

43. In its Opposition to Motion to Strike, NUSCO responds by arguing that its participation in this proceeding is authorized because, although Section 1.115 of the Commission's rules requires a party that files an application for review to have previously participated in the proceeding or show good reason why such participation was not possible, the Commission's rules place no such requirement on a party that files an opposition to an application for review.¹⁰¹ In reply, PSI contends that the language of Section 1.115 does not invite participation by the public,¹⁰² that case law does not establish an absolute right for

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therefore be dismissed. Reply to Consortium-Telesaurus Opposition to Motion to Strike at 2-3. Initially, Consortium and Telesaurus indicated that it served its Opposition to its Motion to Strike on PSI on July 7, 2005, the same day it filed the document with the Commission. Consortium and Telesaurus filed an amended certificate of service on July 8, 2005, indicating that PSI was served on that day. We find that PSI was not harmed by Consortium and Telesaurus's error, and we decline to take any action because of it.

⁹⁶ Consortium and Telesaurus did not request permission to exceed the page limit for oppositions to applications for review. See *supra* note 88 regarding the exhibits to PSI's Application for Review that we do not consider.

⁹⁷ Consortium-Telesaurus Opposition to Application for Review, Exhibit 1.

⁹⁸ *Id.* at 16-17.

⁹⁹ Motion to Strike NUSCO Opposition at 4.

¹⁰⁰ *Id.* at 5-6.

¹⁰¹ NUSCO Opposition to Motion to Strike at 4.

¹⁰² Reply to NUSCO Opposition to Motion to Strike at 2.

any entity to intervene in an ongoing adjudicatory proceeding;¹⁰³ and that, because NUSCO's Opposition is a burden on rather than a benefit to the proceeding, the Commission should exercise its discretion to strike this Opposition.¹⁰⁴

44. *Discussion.* We agree with NUSCO that our rules do not require a party who files an opposition to an application for review to have been an earlier participant in the proceeding.¹⁰⁵ PSI bases its request that we strike NUSCO's Opposition largely on the assertion that this is an adjudicatory proceeding and that NUSCO is therefore required to seek leave to intervene.¹⁰⁶ We find that this assertion adds nothing to the analysis of the issue of NUSCO's right to file its Opposition. Moreover, because we find that it was permissible for NUSCO to have filed its Opposition to Application for Review under 47 C.F.R. § 1.115(d), we need not address PSI's argument that NUSCO's status as a party to an assignment application is insufficient to establish party status in this proceeding.

B. Substantive Issues

45. PSI's central argument is that the participation of commonly controlled bidders in an auction provides advantages to such bidders and causes harm to other applicants, thus deterring the participation of other applicants and rendering the auction less competitive. In support of this argument, PSI submitted, as an exhibit to its Petition for Reconsideration, an economic analysis provided by Dr. John Morgan. According to Dr. Morgan, the participation of multiple entities under common control in a specific theoretical auction model has the direct effect of adding an additional bidder and making the bidding environment more competitive for the remaining participants, thereby eroding their expected returns from the auction.¹⁰⁷ Dr. Morgan argues, in the context of the model, that while the party controlling multiple bidders will see its returns increase because of its control of multiple bidders, the remaining participants' expected returns may be lowered to such a degree that they will opt out of participating in the auction.¹⁰⁸

46. The *Bureau Order* rejected this argument, finding, among other things, that Dr. Morgan's theoretical mathematical model was inconsistent with Commission auctions and disagreeing with his conclusion that parties will be deterred from participating in auctions simply because of the number of other bidders.¹⁰⁹ In its Application for Review, PSI presents a number of arguments in support of its position that the Bureau erred in denying its Petition for Reconsideration and that Auction 57 should be conducted anew without the participation of commonly controlled entities.

47. First, PSI contends that the Bureau's findings and conclusions regarding Dr. Morgan's economic analysis are flawed. PSI argues in particular that the Bureau misunderstood Dr. Morgan's theoretical model and that the Bureau erred in relying on the Commission's disclosure rules to mitigate

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.* at 3-4.

¹⁰⁵ Compare 47 C.F.R. § 1.115(a) (requiring any person filing an application for review who has not previously participated in the proceeding to show good reason why it was not possible for him to participate in earlier stages of the proceeding) with 47 C.F.R. § 1.115(d) (imposing no such requirement on persons filing oppositions to applications for review). Cf. *Regionet Wireless License, LLC, Memorandum Opinion and Order*, 17 FCC Rcd 21,263, 21,266 ¶ 9 (2002) (Commission's rules do not require a party who files an opposition to a petition for reconsideration to have been an earlier participant in the proceeding).

¹⁰⁶ Motion to Strike NUSCO Opposition at 5-6; Reply to NUSCO Opposition to Motion to Strike at 3.

¹⁰⁷ Petition for Reconsideration, Exhibit 1, at 1.

¹⁰⁸ *Id.*, Exhibit 1, at 1-2.

¹⁰⁹ *Bureau Order*, 20 FCC Rcd at 8092 ¶ 11.

the anticompetitive impact of commonly controlled auction participants that PSI claims Dr. Morgan has demonstrated. PSI also disputes the Bureau's findings regarding the potential benefits of additional bidders in auctions and asserts that the Bureau erred in finding that bidders with disclosed agreements regarding bidding and post-auction matters may behave in a manner similar to commonly controlled entities.

48. Second, PSI claims that the Bureau failed to properly credit its assertions that it decided to limit its participation in Auction 57, and that Mobex decided not to participate in the auction at all, because of the filing of applications by commonly controlled entities. Third, PSI insists that the results of Auction 57 demonstrate that it was not competitive. Fourth, PSI asserts that the Bureau acted inconsistently with Commission policy in allowing commonly controlled entities to participate in the same auction. Finally, PSI argues that the Bureau erred in finding that Section 1.937(d) of the Commission's rules does not prohibit the filing of auction applications by commonly controlled entities.

49. We examine each of these arguments below in turn. As our discussion explains, we are not persuaded by any of PSI's arguments.¹¹⁰ Moreover, we do not find any errors in the *Bureau Order*.

1. PSI'S Economic Analysis

a. Dr. Morgan's Theoretical Model

50. *Background.* In rejecting Dr. Morgan's assertion that parties are deterred from participating in auctions simply because of the number of other participants, the Bureau found that parties are likely to make decisions about whether to participate in auctions based on more complete information about other applicants than is assumed in Dr. Morgan's theoretical mathematical model. Thus, the Bureau found that the model on which Dr. Morgan's economic analysis relied was inconsistent with some of the basic characteristics of the Commission's auction process, and that therefore the model's conclusions were not meaningful.¹¹¹ More specifically, the Bureau noted that Dr. Morgan's model assumes that all bidders are symmetric and have independent valuations, even the commonly controlled entities, and indicated that the characteristics defining Dr. Morgan's model were not representative of Commission auctions.¹¹² In addition, the Bureau noted an internal inconsistency in Dr. Morgan's model – he assumes that commonly controlled entities are independent but that, at the same time, one entity benefits fully and directly from the bidding activity of a second entity it creates.¹¹³

¹¹⁰ PSI has also submitted, as Exhibit 2 to its Application for Review, scenarios that purport to illustrate how commonly controlled bidders could extend an auction through the use of activity rule waivers and bid withdrawals. Aside from including the scenarios in an exhibit, PSI does not discuss waivers and withdrawals in its filings. Thus, we do not address them in detail in this Order. We note, however, that these scenarios do not change our conclusions. While commonly controlled entities may derive some advantage from being able to use waivers and withdrawals to prolong an auction, the benefits of such a strategy are likely to be very small. Near the end of an auction, bidding rounds are generally frequent and very short in duration; there are sometimes as many as 10 or 12 rounds in a day. Moreover, the Bureau can further increase the frequency of rounds if it believes that doing so would be in the public interest. Therefore, if commonly controlled entities such as those described in Exhibit 2 were to use waivers and withdrawals on behalf of each other to force additional rounds, they would be unlikely to prolong the auction by more than several hours.

¹¹¹ *Id.* at 11. In contrast to the model, in which a bidder is assumed to face twice the competition when a single controlling interest creates two bidding entities, Commission auction rules require applicants to disclose when a single controlling interest is behind multiple bidding entities, so that bidders are aware that they may essentially be facing a single competitor. Auction applicants are required to disclose their ownership structures, as well as indicate any bidding agreements or affiliations with other auction applicants.

¹¹² *Id.* at 11 n.51.

¹¹³ *Id.* at 11 n.53.

51. In its Application for Review, PSI claims that the Bureau misunderstood Dr. Morgan's model. Stating that it includes both a "common value component" and an "idiosyncratic synergy/evaluation component," and that the latter is assumed to be independent across bidders, PSI asserts that this model "is consistent with the Commission's spectrum auction model used in Auction 57."¹¹⁴ In support of this assertion, PSI presents, as an exhibit to its Application for Review, comments on the *Bureau Order* prepared by Dr. Morgan. In these comments, Dr. Morgan discusses the Bureau's findings that his model is inconsistent with Commission auctions and internally inconsistent. In particular, he defends the valuation structure of the model against what he presumes – incorrectly – to be Bureau criticism that it lacks a common value component. He also elaborates on the model's assumption of independence between bidders, claiming that such an assumption is "standard" in auction models of bidding rings.¹¹⁵

52. *Discussion.* We find no evidence that the Bureau misunderstood Dr. Morgan's model. PSI and Dr. Morgan appear to assume that the Bureau found his model unconvincing because of the absence of a "common value component" in the specification of the valuation structure.¹¹⁶ However, we read the *Bureau Order* to have found the model unpersuasive because (1) it ignores critical characteristics of the Commission's auction process and (2) it rests on an assumption that the commonly controlled bidders are independent of one another, which is inconsistent with PSI's claim that commonly controlled bidders have a single purpose.

53. Furthermore, we agree with the Bureau that Dr. Morgan's model is neither consistent with FCC auctions nor supportive of PSI's arguments. First, as the Bureau noted, the model assumes that bidders make decisions regarding whether to participate in a Commission auction based only on the number of other potential bidders, whereas we find that bidders are likely to make such decisions based on broader criteria.¹¹⁷ These criteria include information made available at the time the public notice announcing the status of applications is released, such as the identities of other applicants, whether they have bidding agreements, and their ownership structures. Applicants in FCC auctions are able to use this information to evaluate the extent to which the other bidders in the auction may have interests that compete with their own. They are unlikely to drop out of the auction process based solely on the number of other bidders.

54. Second, Dr. Morgan's model is inconsistent with PSI's argument that commonly controlled entities pursue a single agenda.¹¹⁸ PSI describes a situation in which the two Havens-controlled bidders are fundamentally the same entity. In contrast, Dr. Morgan's model is driven by an assumption that commonly controlled entities are independent bidders. In terms of the valuation structure in Dr. Morgan's model, the two commonly controlled entities are as different from one another as they are

¹¹⁴ Application for Review at 13.

¹¹⁵ *Id.*, Exhibit 4. We note the fundamental difference between the situation PSI challenges and the bidding ring model to which Dr. Morgan cites. In the case at hand, PSI claims that a single entity – Warren Havens – created multiple bidding entities. In the ring bidding model, multiple independent bidding entities choose to act as a single bidding entity.

¹¹⁶ Dr. Morgan states in his comments: "Presumably, the 'inconsistency' being referred to is the absence of . . . a 'common value component.'" *Id.*, Exhibit 4 at 1. *See also id.* at 13.

¹¹⁷ Petition for Reconsideration, Exhibit 1 at 4. Dr. Morgan states that prior to the introduction of an additional bidder, "[s]ince all bidders are alike, each expects to earn a 1/z share of this expected return." After a bidder is added, expected returns are calculated "[u]sing the same calculation as before but noting the presence of an additional bidder. . . ."

¹¹⁸ *See* Application for Review at 16.

different from the other bidders.¹¹⁹

55. Third, we disagree with Dr. Morgan that a decrease in bidders' expected returns resulting from the participation of an additional bidder with an independent valuation could ever be characterized as the effect of "entry-detering" behavior by the additional bidder. A bidder with independent valuations for spectrum licenses has a legitimate reason for entering an FCC auction—to win licenses—and it cannot win licenses unless it enters the auction. That its entry may create greater auction competition is unavoidable, and its entry should not be regarded as unfair or anticompetitive behavior.

b. The Commission's Disclosure Rules

56. *Background.* As noted above, the Bureau found that parties are likely to base decisions on whether to participate in auctions on more complete information about other bidders than is assumed in Dr. Morgan's model. Noting that the Commission's Part 1 competitive bidding rules require the disclosure of any affiliations or bidding agreements among auction applicants, the Bureau explained that applicants may evaluate for themselves the extent to which another bidder may represent an independent

¹¹⁹ Petition for Reconsideration, Exhibit 1 at 3, n.3. Dr. Morgan acknowledges that his analysis relies on the assumption that the commonly controlled bidders have independent valuations, and while he makes the claim that his results would also hold under "milder assumptions," he is not specific about the assumptions to which he refers. Moreover, it is this characteristic of the model—that all the bidders, including the two commonly controlled bidders, derive value in the same way, with a component that is independent of the idiosyncratic component of all the other bidders—that drives the result that the addition of a bidder leads the initial bidders to see their expected payoffs from the auction decrease.

If, more in keeping with PSI's argument that the two Havens entities represent the same business interests, we assume that two commonly controlled bidders have the same valuation, the initial bidders do not see their *ex ante* expected payoffs from the auction decrease with the addition of a commonly controlled bidder. On an intuitive level, bidders do not see their own chances of having the highest valuation as changing with the addition of another bidder with the same valuation as an existing competitor. If they could outbid the original competitor, they will be able to outbid the additional bidder as well, since in the context of this model the bidder with the highest valuation wins the license.

In the model, Dr. Morgan first characterizes the expected payoffs to the bidders in an auction of three bidders. He then adds a fourth bidder and compares the expected payoffs to the bidders. In Section 3.1 of the model, the expected return to one of the initial bidders falls from 8 1/3 to 5 after the entry of the fourth bidder. *Id.*, Exhibit 1 at 4.

To see how this decrease depends upon the assumption that the additional bidder has a valuation that is independent of the valuations of all the other bidders, consider the model with an alternative assumption. That is, instead of modeling the additional bidder as having a valuation that is independent of the valuations of all the other bidders, assume the additional bidder has the same valuation for a license as does the initial commonly controlled bidder. In mathematical terms, the addition of a commonly controlled bidder does not add an independent valuation draw x_{ij} from the statistical distribution G . As a result, the expected winning bid does not change and the expected return to each of the initial bidders remains the same.

The expected return term ER in Section 3.1 of the model is derived as the difference between the expected highest valuation draw and the expected second highest valuation draw when z independent draws are made from a uniform distribution on the interval $[0,100]$. That is, $ER = [E(V1) - E(V2)]$, where $V1$ and $V2$ are the highest and second highest draws, respectively, from the distribution G . Since G is uniform on the interval $[0,100]$ and applying the expectations operator, this is equivalent to $ER = [(z)/(z+1) - (z-1)/(z+1)] \times 100$ which reduces to $ER = (100/z+1)$. Since z does not change under this alternative assumption that the addition of a commonly controlled bidder does not add an additional independent valuation draw, the expected difference between the highest and second highest valuations does not change and the total expected return for all bidders remains the same. Furthermore, the expected return to each of the initial independent bidders also remains the same. If the number of independent bidders is three, the expected return to each of the initial independent bidders remains equal to 8 1/3.

competitive entity.¹²⁰

57. In its Application for Review, PSI argues that the Bureau erred in relying on the Commission's Part 1 disclosure rules to mitigate the anticompetitive impact of commonly controlled entities. According to PSI, it is the "mere existence" of commonly controlled entities that deters the participation of other applicants in auctions and "[t]he flaw in the Bureau's position is that the decision to participate in auctions is based upon more complete information about additional bidders."¹²¹ More specifically, PSI asserts that the Bureau's findings regarding the Commission's disclosure rules are erroneous because (1) at the time short-form applications are filed, potential participants do not know how many applicants there might be, what their ownership structure is, or what agreements they may have entered into with others; and (2) although applicants learn upon the release of the public notice announcing the status of applications whether other applicants have entered into agreements, the Commission's rules do not enable them to learn the nature of any such agreements until after the conclusion of the auction.¹²² PSI suggests that the disclosure in short-form applications of such details as whether entities with bidding agreements had agreed to bid on the same or different markets would moderate the harmful impact on others but not eliminate it.¹²³

58. *Discussion.* PSI has not shown any error in the Bureau's finding that the disclosure of affiliations and agreements between auction applicants, as required under our rules, may affect others' decisions regarding whether to participate in an auction. The Bureau did not take the position, as suggested by PSI, that the disclosure of bidding agreements mitigates any anticompetitive effect the common control of auction applicants might have.¹²⁴ Regarding the disclosure of bidding agreements, the Bureau said only that parties are likely to take into account the existence of such agreements, among other things, when making decisions about whether to participate in an auction.¹²⁵

59. As explained above, we also agree with the Bureau that prospective bidders in Commission auctions are likely to make decisions about whether to participate in an auction based on factors beyond those captured in the Morgan model, including the ownership structures of other applicants and whether they have bidding agreements. The Commission's rules require the disclosure of such information in applicants' short-form applications, the contents of which are released to the public at the time of the status public notice prior to every auction. Thus, prospective bidders have significant information about potential auction competitors that they may use in deciding whether to participate in an auction, and nothing that PSI has argued persuades us that prospective bidders disregard such information.¹²⁶ The fact that the number of applicants is not made available prior to the release of the status public notice, or that more complete information on bidding agreements is not released until after the auction, does not render erroneous, and indeed is irrelevant to, the Bureau's conclusion that information released under the Commission's Part 1 rules at the time of the status public notice likely affects applicants' decisions

¹²⁰ *Bureau Order*, 20 FCC Rcd at 8092 ¶ 11.

¹²¹ Application for Review at 13-14, 17-18.

¹²² *Id.* at 11-12, 13-14, 18; Reply to Oppositions to Application for Review at 2.

¹²³ Reply to Oppositions to Application for Review at 2.

¹²⁴ See Application for Review at 17-18. PSI attributes to the Division the position "that any anti-competitive impact was mitigated by the disclosure of . . . bidding agreements." Reply to Oppositions to Application for Review at 2. The Division did not, however, make such an assertion, nor did the Bureau.

¹²⁵ *Bureau Order*, 20 FCC Rcd at 8092 ¶ 11.

¹²⁶ The status public notice is released, and the information applicants have disclosed in their short-form applications is made public, prior to the deadline for submitting upfront payments. Therefore, parties that have filed short-form applications have access to the information disclosed by other applicants in their short-form applications before they need to decide whether to submit an upfront payment.

regarding participation in the auction.¹²⁷

60. We need not and do not find that the Commission's disclosure rules eliminate every possibility that the participation in auctions of commonly controlled entities, or entities with bidding agreements, could have an anticompetitive impact. However, as discussed herein, we find that PSI has not demonstrated the anticompetitive impacts it alleges.

c. Additional Bidders in Auctions

61. *Background.* In response to PSI's argument that the participation of commonly controlled entities in an auction creates a disincentive for other parties to participate by introducing an additional bidder, the Bureau observed that, to the extent that additional bidders represent increased competition, additional bidders may enhance an auction's efficiency. In particular, the Bureau noted that an increase in the number of bidders may make it more likely that licenses will be assigned to the parties that value them most highly, provide more price information to participants in an auction, and reduce opportunities for collusion and other anticompetitive conduct.¹²⁸

62. PSI finds fault with the Bureau's observations regarding the potential benefits of additional bidders but, in so doing, misrepresents the Bureau's observations.¹²⁹ Relying on Dr. Morgan's comments on the *Bureau Order* that are appended to its Application for Review, PSI argues that "these very 'pro-competitive' effects create the deterrents to entry . . . that occurred in Auction No. 57."¹³⁰ PSI also contends that, while an increase in the number of independent bidders may provide more price information in an auction, Dr. Morgan's analysis shows that participation by commonly controlled entities distorts price information and increases opportunities for collusion and other anticompetitive conduct.¹³¹ According to PSI, the "ripple effect" of allowing commonly controlled entities to participate in an auction is that fewer parties participate and the chance that winning bids are at fair market price is diminished.¹³²

63. *Discussion.* We agree with the Bureau that additional auction competition is likely to facilitate a more economically efficient assignment of licenses. In general, the more business plans and prospective uses for spectrum licenses that are represented by bidders in an auction -- the more bidders with independent valuations -- the more likely it is that the auction will assign the licenses to the bidders

¹²⁷ We note that PSI's assertion that the "mere existence of the commonly controlled entities" deters participation (Application for Review at 18) demonstrates that applicants consider factors, such as other applicants' ownership structures and relationships, which are beyond those identified in the Morgan model.

¹²⁸ *Bureau Order*, 20 FCC Rcd at 8091-92 ¶ 10.

¹²⁹ According to PSI, "It is the Bureau's position that additional participating bidders represent additional auction competition . . ." Application for Review at 12-13. The Bureau Order instead states "To the extent that additional participating bidders represent increased auction competition, the efficiency of the auction may be enhanced . . ." *Bureau Order*, 20 FCC Rcd at 8091-92 ¶ 10.

¹³⁰ Application for Review at 12-13. Dr Morgan states: "[T]he FCC suggests several pro-competitive aspects of allowing an additional jointly controlled bidder to participate in an auction . . . Specifically, the potential benefits cited include increased competition, improved efficiency, more precise price information, and reduced opportunities for collusion and other anticompetitive conduct. In my earlier analysis I showed . . . that *it was precisely such theoretically pro-competitive effects that created an entry deterring effect.* Specifically, the prospect of increased competition (and hence a higher auction price for the license) reduced the expected returns to participation for a bidder not commonly controlled and thereby led to an incentive for that bidder to decline to participate in the auction in the first place." *Id.*, Exhibit 4 at 1 (emphasis in original).

¹³¹ *Id.* at 13.

¹³² *Id.* at 18.

that will put them to their most efficient and effective use.¹³³ In addition, the more bidders that compete for a license, the less likely it is that bidders will be able to collude successfully, and the more likely it is that fair market prices will result.

64. The Bureau's comments about additional bidders are clearly premised on those bidders competing against each other independently, but in disputing the Bureau's comments, PSI assumes that additional bidders are commonly controlled entities representing a single competing interest.¹³⁴ The Bureau's comments do not apply under this assumption. Therefore, we do not find PSI's arguments addressing the Bureau's observations on the benefits of increased auction competition, including its arguments about price distortion and collusion, to be relevant.

65. We recognize generally that in any particular auction individual bidders may prefer to have fewer competitors, believing that fewer competitors would confer on any one of them a greater chance of winning, and winning at lower prices.¹³⁵ Indeed, Dr. Morgan's model generally reflects the disparity between bidder and FCC objectives with respect to competition. As discussed above, however, we do not agree with Dr. Morgan's characterization of increased competition as "entry deterrence" and we reject the notion that increased auction competition is anticompetitive.

d. The Bureau's Finding That Auction Participants with Bidding Agreements May Behave Similarly to Commonly Controlled Bidders

66. *Background.* In finding that PSI had failed to provide evidence that commonly controlled entities have an adverse effect on the interests of other auction participants, the Bureau pointed out that the Commission's Part 1 competitive bidding rules, which contemplate that auction participants may enter into agreements—i.e., joint bidding agreements, joint marketing agreements, and agreements concerning post-auction market structure—may permit non-commonly controlled auction participants to behave in a manner similar to commonly controlled applicants.¹³⁶ PSI argues in its Application for Review that the Bureau erred in making this assumption.¹³⁷ Again citing Dr. Morgan, PSI argues that while non-commonly controlled parties to bidding agreements have their own separate agendas, a factor that discourages anticompetitive behavior, commonly controlled bidders promote a single agenda and thereby create an anticompetitive environment.¹³⁸

67. In their Opposition to Application for Review, Consortium and Telesaurus argue that PSI's

¹³³ It is easy to show in a simple model such as Dr. Morgan's that this is true. Assume the bidder with the highest valuation (V_1) wins the license and pays a price p . By definition, the winning bidder receives a profit equal to the difference between his valuation for the license and the price he pays, or $[V_1 - p]$. Taxpayers receive benefits equal to the price p , so that total social benefits are equal to the sum of bidder profit and taxpayer benefits, or $[V_1 - p + p] = V_1$. The greater the number of bidders with independently drawn valuations (z), the higher is the expected value of the highest valuation. To illustrate, assume, as Morgan does, that valuations are drawn independently from a uniform distribution on the interval $[0, 100]$. Then the expected value of the highest of z draws is equal to $[z / (z + 1)] * 100$. (Klemperer, Paul. *Auctions: Theory and Practice*. Princeton University Press, 2004. p. 52) This increases with z : $1/2 * 100 < 2/3 * 100 < 3/4 * 100$, and so on. Hence, the more independent bidders in an auction, the higher the expected total benefits.

¹³⁴ ". . . Mr Havens is the real party in interest with respect to both Telesaurus and Consortium." Application for Review at 11.

¹³⁵ This is not to say, as noted above, that we agree with the conclusion Dr. Morgan derives from his model that bidders decide whether to participate based solely on the number of other potential participants in an auction.

¹³⁶ *Bureau Order*, 20 FCC Rcd at 8093 ¶ 13.

¹³⁷ Application for Review at 15-16.

¹³⁸ *Id.* at 16 (citing Petition for Reconsideration, Exhibit 1 at 1-2).

position that the participation of commonly controlled entities in auctions is anticompetitive makes no sense because PSI does not consider bidding agreements between wealthy unaffiliated companies to be a threat to competition but does consider the participation of commonly controlled entities with limited resources such as themselves to pose an unfair threat.¹³⁹ Consortium and Telesaurus also contend that there is nothing two commonly controlled entities can do together in a Commission auction that two non-commonly controlled entities cannot do.¹⁴⁰ Consortium and Telesaurus further assert that the Commission allows bidders the flexibility to enter into bidding agreements, if they disclose such agreements, precisely because they may gain advantages by doing so. According to Consortium and Telesaurus, the advantages enjoyed by entities that enter into disclosed, permissible bidding arrangements—including having more cash to spend and sharing the cost of due diligence—are not anticompetitive but rather are part of the competitive system that Commission auctions are meant to foster.¹⁴¹

68. In its Opposition to Application for Review, NUSCO points out that PSI makes no claim that unfair tactics were used in Auction 57. NUSCO also asserts that PSI has not demonstrated how the ability of commonly controlled entities to participate in an auction differs in substance from the ability of independent entities that have formed consortia or entered into joint bidding arrangements.¹⁴²

69. PSI responds in its Reply to Oppositions to Application for Review by asserting that it has demonstrated a difference between commonly controlled entities and non-affiliated parties. PSI further argues that the disclosure of a bidding agreement between commonly controlled entities is not sufficient to overcome the advantage that accrues to them.¹⁴³

70. *Discussion.* We agree with the Bureau that joint bidding agreements, which must be disclosed under the Commission's rules, may allow non-commonly controlled auction participants to behave in a manner similar to commonly controlled applicants.¹⁴⁴ Indeed, Dr. Morgan acknowledges, in contrast to PSI's assertion, that joint bidding agreements may permit bidders to pursue a bidding strategy similar to that of commonly controlled entities.¹⁴⁵ We also are not persuaded that the Morgan model in any way shows that participation in auctions by commonly controlled entities is anticompetitive while the participation by bidders with a bidding agreement is not. Dr. Morgan asserts that this is true – that commonly controlled bidders pursuing a certain strategy would affect competition while bidders with a bidding agreement pursuing the same strategy would not affect competition -- but we do not agree with his assertion.¹⁴⁶ Moreover, he does not model joint bidding agreements explicitly and therefore the Morgan model cannot be used to support PSI's statements with respect to bidding agreements.¹⁴⁷

¹³⁹ Consortium-Telesaurus Opposition to Application for Review at 14.

¹⁴⁰ *Id.* at 15. Consortium and Telesaurus further argue that they have different plans, obligations, and strategies, and that Mr. Havens has separate fiduciary duties to each entity and their different interest holders. *Id.* at 15-16.

¹⁴¹ *Id.* at 13.

¹⁴² NUSCO Opposition to Application for Review at 5.

¹⁴³ Reply to Oppositions to Application for Review at 2.

¹⁴⁴ *Bureau Order*, 20 FCC Rcd at 8093 ¶ 13.

¹⁴⁵ Petition for Reconsideration, Exhibit 1 at 2 n.2 (“Note that while this bidding strategy could easily be executed by other bidders through a bidding agreement. . .”).

¹⁴⁶ Petition for Reconsideration, Exhibit 1, at 2, n.2 (If single bidders entered into . . . [a bidding] agreement, the overall competitiveness of the auction would be unaffected . . .”).

¹⁴⁷ *See supra* paras. 53-55. As discussed above, the model presented by Dr. Morgan does not support PSI's argument that bidders with a common agenda create an anticompetitive environment, since, in contrast to PSI's

(continued....)

71. Finally, PSI's argument that the disclosure of a bidding agreement between commonly controlled entities is insufficient to overcome the advantage they enjoy is irrelevant to the Bureau's finding that joint bidding agreements may allow non-commonly controlled auction participants to behave in a manner similar to commonly controlled applicants. The disclosure of bidding agreements, as discussed above, is relevant to the information that parties may evaluate in making decisions regarding their participation in an auction; it is not relevant to the issue of non-commonly controlled auction participants having the ability to conduct themselves similarly to commonly controlled auction participants.

2. PSI's Claims Regarding Its Upfront Payment and Mobex's Failure to Participate in Auction 57

72. *Background.* The Bureau declined to draw any conclusions regarding Mobex's decision not to participate in Auction 57. The Bureau noted that Mobex had previously given reasons for seeking a delay of the auction that were unrelated to the participation of commonly controlled entities and had suggested prior to the short-form application deadline that it might have problems in securing financing to participate in Auction 57.¹⁴⁸

73. PSI claims that the Bureau erred in failing to properly credit its assertions in its Petition for Reconsideration that it decided to limit its participation in Auction 57 by limiting its upfront payment (and thus its bidding eligibility), and that Mobex decided not to participate at all, because of the filing of applications by commonly controlled entities.¹⁴⁹ As an exhibit to its Application for Review, PSI submits a Declaration executed by John S. Reardon, President of Mobex, stating that the company chose not to make an upfront payment to qualify for participation in Auction 57 because of "the unfairness of having to participate against multiple bidders controlled by the same person."¹⁵⁰ According to PSI, its and Mobex's decisions are evidence of the deterrent effect on auction participation of commonly controlled entities and they demonstrate the negative impact such entities had on the competitiveness of Auction 57.¹⁵¹

74. In response to PSI's claim that it did not participate more fully in the auction because applications were filed by commonly controlled entities, Consortium and Telesaurus assert that the more rational explanation is that PSI did not have adequate funds for greater participation. Consortium and Telesaurus contend that if PSI and Mobex had had adequate financing, they could have submitted upfront payments to qualify to bid on all of the licenses they may have wanted and received a refund of their

(...continued from previous page)

characterization of the commonly controlled entities as having a single agenda, the commonly controlled entities in Dr. Morgan's model have independent bidding interests.

¹⁴⁸ *Bureau Order*, 20 FCC Rcd at 8093 ¶ 13.

¹⁴⁹ Application for Review at 12, 13, 14-15, 16, 17-18.

¹⁵⁰ *Id.*, Exhibit 5.

¹⁵¹ *Id.* at 17-18. PSI also asserts that the Bureau had "no way of knowing" how the commonly controlled applicants affected their competitors, and that the Bureau's 2005 request for comments on a proposed design for economic experiments on simultaneous multiple round auctions is evidence of this ignorance. Application for Review at 15 (citing "Comment Sought on Experimental Design for Examining Performance Properties of Simultaneous Multiple Round Spectrum License Auctions With and Without Combinatorial Bidding," *Public Notice*, 20 FCC Rcd 8685 (WTB 2005)). The Public Notice in question sought comment on an experimental economics proposal to compare how package and non-package bidding auction formats perform when bidders have complementary valuations for groups of licenses. The Public Notice did not mention commonly controlled entities. Moreover, the economic experiments did not and were not intended to consider the effect of common control on other bidders, and they are therefore unrelated to the issue at hand.

upfront payments if they were outbid for the licenses they sought.¹⁵² Similarly, NUSCO argues that PSI's contention that it decided not to submit a larger upfront payment as a result of conduct by others, whose scope of participation PSI could not gauge at the time it made the decision, "rings hollow and contrived."¹⁵³

75. *Discussion.* We find that the Bureau did not err by not considering PSI's assertions regarding its limited participation in Auction 57 or by declining to draw any conclusions regarding Mobex's decision not to participate. The Commission has no way of knowing why parties make certain decisions, and it cannot act on requests for regulatory relief based on a party's post-hoc assertions regarding its earlier state of mind. Such assertions provide no independent evidence of the validity of a petitioner's claims. Moreover, even assuming that PSI decided to submit an upfront payment for Auction 57 that was lower than the payment it would have submitted absent the participation of commonly controlled entities, we find that such a decision does not demonstrate that the participation of commonly controlled applicants rendered the auction anticompetitive.

76. At the time PSI decided on the amount of its upfront payment for Auction 57, it could not have known how large an upfront payment any of the other applicants would submit, or indeed whether any of them would submit an upfront payment and become a qualified bidder at all. PSI also could not have known how much any other applicant was prepared to bid for any particular license. If PSI decided to limit its upfront payment solely because of the filing of applications by commonly controlled entities, it failed to take into account the range of possibilities regarding how many other applicants might become qualified bidders, how much bidding eligibility they might establish, and how they might bid in the auction. PSI alone was responsible for any failure to consider such factors and the consequent different auction outcomes, some of which may have been favorable to PSI.

77. Moreover, PSI could have decided to participate more fully in Auction 57 without significant risk because, if it had submitted a larger upfront payment, thereby establishing more bidding eligibility, it would have received a refund of that portion of its upfront payment that exceeded the amount of its payment obligations resulting from the auction (e.g., bids for any licenses it won and withdrawal and/or default payments). The only detriment PSI would have sustained under such circumstances is that it would not have had the use of the funds comprising the portion of its upfront payment exceeding its auction payment obligations during the period from the upfront payment deadline to receipt of the refund. Therefore, to the extent PSI suffered harm because the amount of its upfront payment limited its bidding eligibility and foreclosed the possibility of its winning more licenses, we find that this harm is attributable to its own decision rather than to any action of the Bureau.¹⁵⁴

3. The Results of Auction 57

78. *Background.* The Bureau found that it had not been presented with any evidence of anticompetitive bidding activity in Auction 57, or of the participation of two commonly controlled entities

¹⁵² Consortium-Telesaurus Opposition to Application for Review at 18-19. Consortium and Telesaurus also argue that the failure of PSI and Mobex to aggressively participate in the auction to acquire licenses for the "white space" surrounding their site-based licenses, which would have been more valuable to them as incumbents than to any other party, shows that their lack of participation was due "solely to their lack of capability to participate." *Id.* at 17.

¹⁵³ NUSCO Opposition to Application for Review at 6. NUSCO points out that PSI's upfront payment was in the exact amount necessary to bid on the Great Lakes license, which authorizes service in an area where PSI already had site-based licenses and which it won. *Id.*

¹⁵⁴ The same reasoning applies to Mobex's failure to participate in the auction. Mr. Reardon's Declaration does not indicate that the participation of commonly controlled entities in Auction 57 was Mobex's sole reason for not submitting an upfront payment. Assuming it was, however, we find that Mobex alone is responsible for this decision and that any harm that flowed from it is not attributable to the Bureau.

having an adverse effect on other bidders.¹⁵⁵ PSI argues, however, that the results of Auction 57 reveal that “there was something very much amiss.”¹⁵⁶ In particular, PSI asserts that “there was no competition in this auction” and that the auction had one of the “lowest round numbers” and one of the “lowest net bids” of all the Commission’s completed auctions.¹⁵⁷ PSI also suggests that the participation of commonly controlled entities in Auction 57 resulted in “a non-fair market price” for licenses.¹⁵⁸

79. In opposition, Consortium and Telesaurus argue that there are many factors that determine the interest in and revenue generated by an auction. They assert that there were few bidders in Auction 57 because there was not much spectrum available in the larger markets. They also point out that only five parties submitted short-form applications, and that this relatively low level of interest from the beginning of the auction process cannot be attributed to their participation because parties other than themselves would not have known prior to the short-form deadline that commonly controlled entities planned to participate.¹⁵⁹ NUSCO argues that no unfairness was demonstrated in Auction 57.¹⁶⁰

80. *Discussion.* We agree with the Bureau that PSI has presented no evidence that participants’ behavior in Auction 57 was anticompetitive or that the results of the auction were unfair. In arguing that the low number of rounds and low revenues in Auction 57 demonstrate that the commonly controlled bidders had an anticompetitive effect, PSI fails to acknowledge other possible reasons for the auction results, such as limited interest in the licenses. When there is little interest, it takes relatively few bidding rounds to determine final auction prices. Given the small number of licenses offered in Auction 57 and the relatively low level of bidder interest, we do not find the length of the auction or the amount of revenues to indicate anticompetitive behavior, nor do we accept the characterization of the auction prices as “non-fair market prices.”¹⁶¹ Furthermore, we note a contradiction in PSI’s discussion of “non-fair market prices.” PSI points to low revenues, but the Morgan Exhibit to which PSI cites discusses unfairly high prices.¹⁶²

4. Commission Policy and Commonly Controlled Auction Applicants

¹⁵⁵ *Bureau Order*, 20 FCC Rcd at 8092 ¶ 12.

¹⁵⁶ Application for Review at 16.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 13.

¹⁵⁹ Consortium-Telesaurus Opposition to Application for Review at 16-18.

¹⁶⁰ NUSCO Opposition to Application for Review at 5.

¹⁶¹ We also do not accept the notion that bidding activity in Auction 57 lends credibility to Dr. Morgan’s theoretical model. According to Dr. Morgan, bidding was “broadly consistent” with his theory because, for example, the commonly controlled entities did not bid against one another. We find this claim unremarkable because none of the bidders in Auction 57 bid against one another. (Nine of the ten winning bids were submitted in Round 1. The only other bid was submitted in Round 2, by PSI on a license that did not receive a bid in Round 1.) Moreover, Dr. Morgan fails to address obvious alternative hypotheses to explain the auction behavior he cites in support of his model. For example, as evidence of entry deterrence, Dr. Morgan says that PSI competed only for a single license, even though it selected many licenses on its application. However, bidders with limited capital or a narrow business plan frequently select more licenses on their applications than their upfront payments will allow them to bid on in order to have the flexibility to move among different licenses during the course of the auction. Dr. Morgan also claims that Mobex “declined to participate” because of entry-detering behavior, after having selected a number of licenses on its initial application. However, applicants that fail to make an upfront payment, as did Mobex, often do so because they are unable to raise sufficient capital to participate in the auction. See Petition for Reconsideration, Exhibit 1 at 7.

¹⁶² Application for Review at 13.

81. *Background.* The Bureau noted that PSI had conceded in its Petition for Reconsideration that the participation of commonly controlled entities is not prohibited by the Commission's competitive bidding rules.¹⁶³ In its Application for Review, PSI argues that although the Commission's rules do not prohibit commonly controlled applicants from participating in auctions, such participation is inconsistent with Commission policy.¹⁶⁴ According to PSI, the Commission's longstanding commitment to ensuring a level playing field in its auctions compels the prohibition of commonly controlled entities in auctions,¹⁶⁵ and the Bureau "stepped away from its past policy positions" in deciding to accept applications filed by commonly controlled entities for Auction 57.¹⁶⁶

82. PSI argues that in developing its auction rules and policies the Commission has assumed that in most cases the number of bidders and the auction design will deter anticompetitive, collusive conduct, but that the Commission has also recognized that safeguards are needed to ensure that collusion does not jeopardize the competitiveness of the auction process and the post-auction marketplace.¹⁶⁷ PSI states, "The Commission has recognized 'when one entity holds an attributable interest in more than one applicant for licenses in the same geographic area, the potential for collusion is present because of the opportunity from the common owner to influence the bidding of the applicants.' The potential, therefore, for collusion between two commonly controlled applicants is absolute."¹⁶⁸

83. *Discussion.* PSI has not shown that the participation of commonly controlled entities in the same auction is inconsistent with the Commission's longstanding policy of promoting competitive auctions and post-auction markets. PSI argues in essence that our competitive bidding rules are inconsistent with our auction policy, but it has not shown that this is the case. Our competitive bidding policy, and the rules that have been developed to implement that policy, are designed to promote competition in the marketplace through a fair, efficient, and competitive auction process.¹⁶⁹ PSI has not demonstrated that the acceptance of auction applications filed by commonly controlled entities diminishes the achievement of these goals. We therefore reject PSI's assertion that the Bureau deviated from Commission policy when it accepted applications filed by commonly controlled entities for Auction 57.¹⁷⁰

84. We also find unpersuasive PSI's suggestion that the development and purpose of the Commission's anti-collusion rules require the prohibition of commonly controlled entities in auctions. Our anti-collusion rules promote a competitive process by prohibiting cooperation or sharing of information regarding bids and bidding strategies between applicants for licenses in the same geographic area *unless* such applicants disclose on their short-form applications that they are members of a bidding consortium or other joint bidding arrangement.¹⁷¹ In designing the anti-collusion rules, the Commission

¹⁶³ *Bureau Order*, 20 FCC Rcd at 8091-92 ¶¶ 9, 10 (citing PSI Reply to Opposition to Petition for Reconsideration at 3). PSI stated in its Petition for Reconsideration, "PSI agrees with the Division's observation in the September 15 *Order* that the current Auction Rules do not contain any *per se* prohibitions against the participation in spectrum auctions by commonly controlled entities." Petition for Reconsideration at 6.

¹⁶⁴ Application for Review at 12, 16.

¹⁶⁵ *Id.* at 18.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Id.* (citing Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7687-88 ¶¶ 10, 11 (1994) ("1994 Competitive Bidding Memorandum Opinion and Order")).

¹⁶⁹ The statutory purposes of our auctions program, which include the promotion of competition, are set forth at 47 U.S.C. § 309(j)(3).

¹⁷⁰ Application for Review at 15.

¹⁷¹ 47 C.F.R. § 1.2105(c)(1).

has carefully weighed the competitive risks and benefits of allowing auction applicants to cooperate and share resources.¹⁷² The Commission has recognized that one way of promoting competition is to permit entities to enhance their ability to win licenses in auctions by combining their resources and that small businesses in particular may need to pool financial and other resources in order to compete in auctions. Thus, the Commission has, since the establishment of the auctions program, contemplated that auction applicants may enter into consortium arrangements, joint ventures, partnerships, and other bidding agreements as long as they disclose such arrangements and agreements on their short-form applications and as long as they comply with all other applicable laws such as antitrust law.¹⁷³

85. The Commission has also recognized since the early days of the auctions program that permitting parties to hold ownership interests in multiple applicants for licenses in the same markets may help applicants to acquire the capital necessary to participate in auctions, thereby potentially enhancing auction competition. Indeed, in the *1994 Competitive Bidding Memorandum Opinion and Order*, which PSI cites, the Commission liberalized the anti-collusion rules to make it easier for holders of an ownership interest in one applicant to obtain an ownership interest in another. The rules had previously permitted applicants to change their ownership, enter into joint bidding arrangements, and form consortia after the filing of short-form applications only if the parties to such arrangements had not applied for licenses in any of the same geographic areas.¹⁷⁴ The Commission amended the rules to permit a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area after the filing of short-form applications, provided that the attributable interest holder certifies to the Commission that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one applicant for licenses in the same geographic area in which it holds an ownership interest or with which it has a consortium arrangement.¹⁷⁵ In adopting this amendment, the Commission concluded, “We believe that this revision will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants for licenses in the same geographic license areas while ensuring that these investments will not lead to collusion among bidders.”¹⁷⁶

86. Thus, in weighing the competitive risks and benefits of allowing parties to hold ownership

¹⁷² When the Commission first adopted competitive bidding rules in 1994, for example, it found that anti-collusion rules would serve the objectives of the Communications Act by “preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.” Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2386-87 ¶ 221 (1994). At the same time, the Commission concluded that “if anti-collusion rules are too strict or are not sufficiently clear, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities who might not otherwise be able to compete in the auction process.” *Id.*

¹⁷³ Section 1.2105(a)(2)(viii) of the Commission’s rules, which has remained unchanged since 1994, requires auction applicants to identify on their short-form applications “all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.” 47 C.F.R. § 1.2105(a)(2)(viii). As discussed below, compliance with this provision does not insulate an auction applicant from enforcement of the antitrust laws. See *infra* para.89.

¹⁷⁴ 47 C.F.R. § 1.2105(c)(2), (3).

¹⁷⁵ *1994 Competitive Bidding Memorandum Opinion and Order*, 9 FCC Rcd at 7688-89 ¶¶ 10-12; 47 C.F.R. § 1.2105(c)(4).

¹⁷⁶ *1994 Competitive Bidding Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12. The Commission also stated, “Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process. In pursuit of that goal, however, we do not wish to restrict unreasonably the formation of non-collusive bidding consortia.” *Id.* at 7688 ¶ 10.

interests in multiple auction participants, the Commission has not opted to ban such ownership interests. Rather, the Commission has limited the risk of anticompetitive behavior by entities with common ownership interests, as well as entities with bidding agreements, by requiring the disclosure of every applicant's ownership structure and all cooperative agreements between applicants.¹⁷⁷ The Commission has made clear that applicants with common owners must disclose that they are members of a bidding agreement. In the *Competitive Bidding Second Memorandum Opinion and Order* released in August 1994, for example, the Commission stated, "Situations may arise in which an applicant has some common ownership interest with another bidder. We wish to clarify that, unless that other entity is expressly identified as an entity with whom the applicant has an agreement concerning bidding, we will prohibit communication concerning bidding with that bidder . . . even if the other bidder is identified on the applicant's short form application as having some common ownership interest with the applicant."¹⁷⁸

87. We recognize that the Commission has not extended to parties holding controlling interests in auction applicants all of the rule provisions it has adopted for holders of non-controlling interests. Section 1.2105(c)(4), for example, which permits a holder of a non-controlling attributable interest in an applicant to obtain an ownership interest in or enter into a consortium or joint bidding arrangement with another applicant for a license in the same geographic area after the filing of short-form applications, does not apply to holders of controlling interests. We do not find, however, that the Commission's application of this rule amendment only to holders of non-controlling interests reflects any judgment on the Commission's part regarding the circumstances we consider here, i.e., the common control of two applicants that is disclosed in the applicants' original short-form applications prior to the commencement of an auction.

88. The Commission has never determined that the common control of auction applicants is inconsistent with its policy of promoting competitive auctions. We also agree with the Auctions and Spectrum Access Division's finding that the participation of commonly controlled entities in an auction may serve legitimate business purposes because such entities may have different business plans, financing requirements, or marketing needs.¹⁷⁹ We do not say that permitting the common control of auction applicants is without any risk to the competitiveness of the auction process, just as we do not say that joint bidding agreements are without any such risk. However, we do find that the common control of auction applicants is not inconsistent with our auction rules or our longstanding policy of promoting competitive auctions and post-auction markets.

¹⁷⁷ Section 1.2112(a) requires every auction applicant to disclose on its short-form application the real party or parties in interest in the applicant as well as detailed information regarding its ownership and the interests it holds in any FCC-regulated entity and any applicant for an FCC license. 47 C.F.R. § 1.2112(a). As noted above, Section 1.2105(a)(2)(viii) requires every auction applicant to disclose on its short-form application all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure. 47 C.F.R. § 1.2105(a)(2)(viii). In addition, Section 1.2105(a)(2)(ix) requires every auction applicant to certify on its short-form application under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to 47 C.F.R. § 1.2105(a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid. 47 C.F.R. § 1.2105(a)(2)(ix).

¹⁷⁸ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7254 ¶ 53 (1994) (“*Competitive Bidding Second Memorandum Opinion and Order*”). See also Letter to Colby M. May, TCCSA, Inc., d/b/a Trinity Broadcasting Network, from Barbara A. Kreisman, Chief, Video Division, Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 20 FCC Rcd 14648 (WTB/MB 2005) (finding apparent violation of anti-collusion rule where applicants with mutually exclusive applications reported sharing same individual as an officer and director and reported having no bidding agreement).

¹⁷⁹ *Division Order*, 19 FCC Rcd at 20,485-86 ¶ 9.

89. Finally, we note that auction applicants are subject to antitrust law. The Commission has pointed this out to auction applicants since the inception of the auctions program. In the *1994 Competitive Bidding Memorandum Opinion and Order*, for example, the Commission stated, “[W]e wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission’s Rules may be prohibited by the antitrust laws.”¹⁸⁰ As we have discussed, the Commission’s competitive bidding rules have as one of their goals helping small businesses increase their ability to win licenses by pooling their resources.¹⁸¹ However, there may be situations in which behavior that is permitted under our rules is found to violate antitrust law. The possibility of such violations is, however, not at issue here. We consider here only the question of whether PSI has shown that the participation of commonly controlled entities in the same auction is inconsistent with Commission policy, and we conclude that it has not. We also conclude that the Bureau acted consistently with both our rules and policy in accepting applications filed by commonly controlled entities in Auction 57.

5. Section 1.937(d) of the Commission’s Rules

90. *Background.* The Bureau rejected PSI’s contention that the short-form applications submitted by Consortium and Telesaurus for Auction 57 should have been dismissed under Section 1.937(d) of the Commission’s rules.¹⁸² Under this provision, while a license application in the Wireless Radio Services is pending, any subsequent inconsistent or conflicting applications submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing.¹⁸³ The Bureau concluded that Section 1.937(d) does not apply to short-form auction applications.¹⁸⁴

91. In its Application for Review, PSI repeats its earlier argument that the Consortium and Telesaurus applications should not have been accepted for filing because they were repetitive and/or conflicting under Section 1.937(d). According to PSI, the Consortium and Telesaurus applications “are clearly within the ambit” of this rule because Warren Havens is the true party in interest for both. PSI further states that there is “no sound policy reason” for concluding, as the Bureau did, that the rule does not apply to auction short-form applications.¹⁸⁵

92. *Discussion.* We do not agree with PSI that the Consortium and Telesaurus applications were repetitive or in conflict with each other under Section 1.937(d). Although Mr. Havens controls both entities, they have different ownership structures, which, as the Bureau noted, may facilitate the implementation of different business plans, financing requirements or marketing needs; avoid

¹⁸⁰ *1994 Competitive Bidding Memorandum Opinion and Order*, 9 FCC Rcd at 7689 ¶ 12.

¹⁸¹ It is noteworthy that the Commission not only has allowed the pooling of resources under its anti-collusion rules but also has encouraged this practice under its designated entity rules. Under Section 1.2110(b)(3) of the Commission’s rules, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits, the gross revenues of the consortium members are not aggregated. Under such circumstances, the consortium is eligible for bidding credits regardless of whether the gross revenues of all consortium members would, if aggregated, exceed the prescribed revenue limits. The consortium exception, originally adopted on a service-by-service basis where capital costs of auction participation were expected to be high, is intended to enable small businesses or entrepreneurs to pool their resources to help them overcome this challenge to capital formation. 47 C.F.R. § 1.2110(b)(3).

¹⁸² *Bureau Order*, 20 FCC Rcd at 8093-94 ¶ 14.

¹⁸³ 47 C.F.R. § 1.937(d).

¹⁸⁴ *Bureau Order*, 20 FCC Rcd at 8093-94 ¶ 14.

¹⁸⁵ Application for Review at 18-19.

transactional costs in the secondary market; or meet other business needs.¹⁸⁶ In short, Consortium and Telesaurus were different applicants for Auction 57. Section 1.937(d), which prohibits the acceptance for filing of an “inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee,” therefore does not apply to their applications to participate in Auction 57.

93. We also agree with the Bureau that Section 1.937(d) does not apply to auction short-form applications.¹⁸⁷ Prior to 1998, the Commission’s rules barring repetitious license applications were set forth in separate rule parts pertaining to each of the Wireless Radio Services. In 1998, the Commission consolidated its licensing rules for all Wireless Radio Services and adopted Section 1.937 to replace its service-specific rules on the filing of repetitious or conflicting applications.¹⁸⁸ In 2003, the Commission amended Section 1.937 “to prohibit the filing of any repetitious license application in the Wireless Radio Services within twelve months of the denial or dismissal with prejudice of a substantially similar application.”¹⁸⁹ In adopting this amendment, the Commission was particularly concerned with clarifying that it would not consider repetitious license renewal applications.¹⁹⁰ The Commission’s decisions adopting and amending Section 1.937 clearly apply to *license* applications, and there is no mention in either of these decisions or the rule itself of applications to participate in auctions. Moreover, given that the rule’s goal is “the attainment of sound administrative process by preventing the relitigation of decided matters,”¹⁹¹ the application of Section 1.937(d) to auction short-form applications would make no sense.

6. Allegations of Misconduct

94. *Background.* Consortium and Telesaurus assert that they have been injured by the delay in the grant of the licenses they won in Auction 57 caused by PSI’s Petition for Reconsideration, and that PSI’s Application for Review has caused them further harm by “casting a cloud of uncertainty on the licenses.”¹⁹² Alleging that PSI’s Application for Review is frivolous and an abuse of the Commission’s processes, Consortium and Telesaurus urge us to impose sanctions on PSI and its attorneys.¹⁹³ In its Opposition to Application for Review, NUSCO questions the credibility of PSI’s claim that it was deterred from participating more fully in Auction 57, and that Mobex was deterred from participating at

¹⁸⁶ *Bureau Order*, 20 FCC Rcd at 8094 ¶ 14 (citing *Division Order*, 19 FCC Rcd at 20,844 ¶ 9). PSI claims that the applicants here are unlike those in *Interactive Control Two*, a case cited by the Bureau in which it had found that two applications were not in conflict because the real parties in interest were not the same. Application for Review at 18-19 (citing Applications of Interactive Control Two, Inc, Wincom Corp., U.S. Telemetry-New Brunswick, Inc., U.S. Telemetry-Lancaster, Inc. For Consent to the Assignment of Licenses for Stations KIVD0063 and KIVD0247 in the 218-219 MHz Service, *Order on Reconsideration*, 16 FCC Rcd. 18,948, 18,953 (WTB 2001) (“*Interactive Control Two*”). Although the Consortium and Telesaurus applications are controlled by the same party, their common control does not by itself mean that their short-form applications are repetitive or conflicting, nor does *Interactive Control Two* compel such a conclusion.

¹⁸⁷ *Bureau Order*, 20 FCC Rcd at 8093-94 ¶ 14.

¹⁸⁸ Biennial Regulatory Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21,027 (1998).

¹⁸⁹ Amendment of Section 1.937 of the Commission’s Rules Concerning Repetitious or Conflicting Applications, *Report and Order*, 18 FCC Rcd 7190, 7190 ¶ 1 (2003).

¹⁹⁰ *Id.* at 7192-93 ¶¶ 4-6.

¹⁹¹ *Id.* at 7192 ¶ 5.

¹⁹² Consortium-Telesaurus Opposition to Application for Review at 21.

¹⁹³ *Id.* at 22-25.

all, because of the filing of short-form applications by commonly controlled entities.¹⁹⁴ In doing so, NUSCO questions “whether PSI has exhibited candor before the Commission in its Application for Review.”¹⁹⁵ NUSCO also claims in its Opposition to PSI’s Motion to Strike its Opposition to Application for Review that PSI and its counsel have abused the Commission’s processes by filing a pleading that misrepresents decisional authority.¹⁹⁶

95. *Discussion.* We find that Consortium and Telesaurus have failed to show that PSI’s arguments are frivolous, and NUSCO has not demonstrated misrepresentation or lack of candor before the Commission on the part of PSI. We therefore do not impose any sanctions in this case.

96. Nevertheless, as noted above, PSI, Consortium, and Telesaurus have made inappropriate uses of filings in this proceeding. PSI has accused Consortium and Telesaurus of waging a “campaign” against its licenses, and it has appended to its Application for Review copies of e-mails sent from Mr. Havens to its counsel regarding an AMTS license granted to PSI prior to Auction 57.¹⁹⁷ Similarly, Consortium and Telesaurus assert that PSI “wants to harass in this proceeding the legitimate high bidders...,”¹⁹⁸ and they have appended to their Opposition to Application for Review a Declaration of Mr. Havens that, among other things, accuses PSI of violating Commission rules in matters that are outside the scope of this proceeding.¹⁹⁹ We warn these parties that the inclusion of such material wastes Commission resources, and in the future we may exercise our discretion to dismiss as a whole any submission that includes irrelevant materials.

IV. CONCLUSION

97. We conclude that PSI has failed to demonstrate that the Bureau erred in denying its Petition for Reconsideration. PSI has not shown that the participation of commonly controlled entities in Commission auctions is harmful to competition or contrary to Commission policy. Furthermore, PSI has not demonstrated that it was harmed by the participation of such entities in Auction 57, and we disagree with its assertion that Section 1.937(d) of the Commission’s Rules prohibits the acceptance for filing of auction applications filed by commonly controlled entities. In sum, PSI has provided no support for its claim that the results of Auction 57 should be set aside or its assertion that in the future we should deny other parties an opportunity to participate in the same auction solely because they are commonly controlled. We therefore deny PSI’s Application for Review.

¹⁹⁴ NUSCO Opposition to Application for Review at 5-10.

¹⁹⁵ *Id.* at 10. *See also id.* at 7 n.22. Section 1.17 of the Commission’s rules prohibits misrepresentations and lack of candor in Commission filings. 47 C.F.R. § 1.17. Misrepresentations are false statements of fact made with an intent to deceive, while lack of candor involves concealment, evasion, and other failures to be fully informative accompanied by deceptive intent. *Fox River Broadcasting, Inc., Order*, 93 F.C.C. 2d 127, 129 ¶ 6 (1983).

¹⁹⁶ NUSCO Opposition to Motion to Strike at 3-6.

¹⁹⁷ *See* Application for Review at 7 n.18, 8 n.21, 9, Exhibits 1 and 3.

¹⁹⁸ Consortium-Telesaurus Opposition to Application for Review at 16.

¹⁹⁹ *Id.*, Declaration of Warren Havens. *See also id.* at 21. As explained above, we do not consider either Mr. Havens’s Declaration or certain exhibits appended to PSI’s Application for Review. *See supra* note 89, para. 40.

V. ORDERING CLAUSE

98. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 U.S.C. § 1.115(g), the Application for Review filed by Paging Systems, Inc., in the above-captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary