

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

In the Matter of)
)
BARRY P. LUNDERVILLE)
)
Request for Relief from Bid Withdrawal Payment)
Obligations Incurred in Auction 37)
)

ORDER ON RECONSIDERATION

Adopted: April 16, 2015

Released: April 17, 2015

By the Commission:

I. INTRODUCTION

1. In this order on reconsideration, we reject a petition for reconsideration by Barry P. Lunderville, who seeks a reduction in his payment obligation resulting from his withdrawal of a provisionally winning bid for an FM broadcast construction permit in Auction 37. Lunderville requests reconsideration of a 2013 Commission order affirming the Wireless Telecommunications Bureau's ("Bureau's") denial of his request for relief from the withdrawal payment requirement. He asks that we reduce his obligation from \$244,000, the final amount due under our rules, to \$12,660, the amount of his interim deposit already paid. Because Lunderville fails to satisfy the requirements of our rules with respect to petitions for reconsideration, and in any event fails to show that the prior Commission order was in error, we dismiss and also alternatively deny his petition.

II. BACKGROUND

2. ***Withdrawal payment requirement.*** Under section 1.2104(g)(1) of the Commission's rules, a bidder that withdraws a provisionally winning bid during an auction must pay the difference between the withdrawn bid and the subsequent winning bid for that authorization in the same or a later auction if the subsequent winning bid is less than the withdrawn bid.¹ When a subsequent winning bid is not made in the same auction, the withdrawing bidder's final withdrawal payment amount cannot be determined until a subsequent auction is held. In such cases, the withdrawing bidder must make an interim payment equaling a percentage of the withdrawn bid.² In 2004, when Auction 37 took place, the interim payment was set by rule at three percent of the withdrawn bid.³ In the auction, Lunderville withdrew a \$422,000 bid for the FM broadcast construction permit for Groveton, NH, and no bid for that permit was made subsequently during the course of that auction.⁴ Accordingly, the amount Lunderville owed and paid as an interim payment was \$12,660.⁵

¹ 47 C.F.R. § 1.2104(g)(1).

² *Id.* § 1.2104(g)(1).

³ *Id.* § 1.2104(g)(1) (2004). Under the current version of the rule, an interim payment percentage is set for each auction at between three and twenty percent of the withdrawn bid. *Id.* § 1.2104(g)(1).

⁴ A subsequent winning bid for the corresponding construction permit was not made until 2006, during the course of Auction 62.

⁵ Lunderville appears to have made an error in the petition before us, suggesting that the amount of his deposit is only \$12,350, rather than the actual \$12,660 amount. Barry P. Lunderville, Petition for Reconsideration at 9 ¶ 17,

3. **Bureau Order.** After the close of Auction 37, the Bureau assessed interim bid withdrawal payments for Lunderville and other Auction 37 withdrawing bidders.⁶ Lunderville and four other bidders jointly requested that the Commission reduce the amount they owed to the difference between each of their provisionally winning bids and the next highest bid in the auction for the same permit.⁷ They also requested a waiver of section 1.2104(g)(1) “to the extent necessary.”⁸ In the 2008 *Bureau Order*, the Bureau denied these joint requests.⁹

4. In refuting the claims that the bid withdrawal obligations called for by the Commission’s rules were excessive, the Bureau distinguished *Advance*, a 2007 order in which the Bureau had granted a waiver request by Advance Acquisition, Inc. (“Advance Acquisition”), another Auction 37 bidder seeking a reduction of its final bid withdrawal obligation.¹⁰ In *Advance*, the Bureau concluded that Advance Acquisition’s final payment obligation, which had exceeded \$4 million and represented more than 200 percent of the subsequent winning bid for the permit, was higher than necessary to serve the section 1.2104(g)(1) purpose of deterring insincere bidding.¹¹ The Bureau therefore reduced Advance Acquisition’s withdrawal payment obligation to the \$205,500 that the company had already paid as an interim amount.¹² In the *Bureau Order*, the Bureau explained that only in exceptional circumstances would the comparison of ratios of bid withdrawal payments to winning bids between auctions or services constitute a basis for reconsidering a bid withdrawal payment and that it could find no exceptional circumstances in the cases of Lunderville and his co-filers.¹³

5. In addition, the Bureau rejected a claim by Lunderville and his co-filers that the Commission could have reduced the final bid withdrawal payments by awarding the permits to the next highest bidders in Auction 37.¹⁴ The Bureau explained that the Commission rules identified by the parties provide discretion to award a permit or license to the next highest bidder only when the winning bidder

(Continued from previous page) _____
filed Feb. 13, 2013 (“2013 Petition”). In an earlier joint petition, Lunderville correctly described the amount as \$12,660. College Creek Broadcasting, Inc.; Cumulus Licensing, LLC; and Barry P. Lunderville, Petition for Reconsideration at 2, filed Aug. 1, 2008 (“2008 Petition”). The \$12,660 figure, which equals three percent of Lunderville’s withdrawn bid, accords with the specific requirements established for Auction 37 and, as reflected in the Commission’s records, is in fact the amount he submitted to the Commission as an interim deposit.

⁶ FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021, Attachment C (WTB/MB 2004).

⁷ Barry P. Lunderville; Bigglesworth Broadcasting, LLC; College Creek Broadcasting, Inc.; Cumulus Licensing LLC; and Kemp Communications, Inc., Request for Reduction of Auction 37 Withdrawal Payments, dated Nov. 20, 2006 (“2006 Request”), at 1. When the 2006 Request was filed, Bigglesworth Broadcasting, LLC, had recently been renamed as Connoisseur Media, LLC, but the filers chose to refer to it as “Bigglesworth” throughout the pleading. 2006 Request n.4.

⁸ 2006 Request at 1-2 n.4.

⁹ Barry P. Lunderville, Connoisseur Media, LLC, College Creek Broadcasting, Inc., Cumulus Licensing LLC, and Kemp Communications, Inc. Request to Reduce Bid Withdrawal Payments; Connoisseur Media, LLC Petition for Reconsideration and Request for Refund of Bid Withdrawal Payment; Nassau Broadcasting Holdings, Inc. Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Payment Rule, *Order*, 23 FCC Rcd 10390 (WTB 2008) (“*Bureau Order*”).

¹⁰ *Id.* at 10400-01 ¶¶ 23-26, 10406-07 ¶¶ 39-41.

¹¹ Advance Acquisition, Inc. Request for Waiver of Bid Withdrawal Payment, *Order*, 22 FCC Rcd 18846, 18851-52 ¶ 10, 18853 ¶ 16 (WTB 2007) (“*Advance*”).

¹² *Id.* at 18853 ¶ 16.

¹³ *Bureau Order*, 23 FCC Rcd at 10401 ¶ 26.

¹⁴ 2006 Request at 7; *Bureau Order*, 23 FCC Rcd at 10402 ¶ 29.

withdraws its winning bid *after* the auction closes (i.e., when a bidder defaults), and that the rules provide for no such discretion in the context of a permitted withdrawal of a bid during an auction.¹⁵

6. **Commission Order.** Lunderville and two of his previous co-filers together filed for reconsideration of the *Bureau Order*, arguing primarily that they had not received the same relief as had the bidder in *Advance*.¹⁶ Because this petition raised issues similar to those involved in an application for review of the *Bureau Order* filed directly with the Commission by another party, the Bureau exercised its discretion under our rules to refer the joint petition to the Commission.¹⁷ The Commission denied their petition and affirmed the *Bureau Order*.¹⁸ In so doing, the Commission explicitly overruled the Bureau's earlier analysis in *Advance*, disagreeing with the finding that a bid withdrawal payment could ever be so excessively high, either in absolute terms or relative to the withdrawn bid amount, as to alone warrant a waiver of the withdrawal payment rule.¹⁹ The *Commission Order* also cited well-established law to show that the Commission is not bound by prior Bureau decisions, such as the one issued in *Advance*.²⁰

7. **Lunderville's Petition.** Lunderville now seeks reconsideration of the *Commission Order*.²¹ He continues to argue that the Commission's refusal to accord him the same relief as certain other Auction 37 bidders, particularly Advance Acquisition, is inconsistent with the Commission's obligation under *Melody Music* to explain its different treatment of Advance Acquisition.²² Lunderville also claims that the *Commission Order* constitutes a "retroactive decision to apply a different standard" to him and is therefore unconstitutional.²³ And he claims that the Commission could have implemented different bidding rules for the auction.²⁴

III. DISCUSSION

8. Under section 1.106(c) of our rules, if a petition for reconsideration of any order other than an order denying an application for review relies on facts or arguments not previously presented to the Commission or its designated authority, it may be granted only (1) if those newly raised facts or arguments concern events (i) that have occurred or circumstances that have changed since the petitioner's last opportunity to present such matters to the Commission or (ii) that were unknown to the petitioner until after the last opportunity to present such matters and that the petitioner could not, through the exercise of ordinary diligence, have learned of prior to such opportunity; or (2) if the Commission or the designated authority determines that consideration of the facts and arguments relied on is required in the

¹⁵ *Bureau Order*, 23 FCC Rcd at 10402 ¶ 29; see 47 C.F.R. §§ 1.2109(b), 1.2104(g).

¹⁶ 2008 Petition at 4-10. The Commission considered the 2008 Petition along with the pleadings of two other parties whose requests had been denied in the *Bureau Order*. See Connoisseur Media, LLC, Application for Review ("Connoisseur"), filed Aug. 1, 2008; Nassau Broadcasting Holdings, Inc. ("Nassau"), Petition for Reconsideration of Denial of Request for Waiver of Bid Withdrawal Penalty Rule, filed Aug. 1, 2008.

¹⁷ 47 C.F.R. § 1.106(a)(1).

¹⁸ Barry P. Lunderville, College Creek Broadcasting, Inc., and Cumulus Licensing, LLC; Connoisseur Media, LLC; and Nassau Broadcasting Holdings, Inc., *Memorandum Opinion and Order*, 28 FCC Rcd 665 (2013) ("*Commission Order*").

¹⁹ *Id.* at 670 ¶ 10, 673 ¶ 18.

²⁰ *Id.* at 673 n.63.

²¹ 2013 Petition.

²² *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) ("*Melody Music*"). Lunderville and his co-petitioners also cited *Melody Music* in their earlier petition for reconsideration. See 2008 Petition at 7.

²³ 2013 Petition at 5-6 ¶ 8.

²⁴ *Id.* at 9 ¶ 16.

public interest.²⁵ If a petitioner relies on new facts or circumstances, those facts or circumstances must, in addition to being new, be relevant to the question before the Commission.²⁶

9. **Claims Based on Advance.** Most of Lunderville’s current arguments constitute a single claim – that the Commission should have reduced his total withdrawal payment obligation to the amount of his interim payment because the Bureau had reduced the withdrawal payment for Advance Acquisition in *Advance*.²⁷ Although Lunderville acknowledges that the *Commission Order* overruled the Bureau’s waiver analysis in *Advance*,²⁸ he persists in relying on *Advance* in his arguments. Lunderville appears to disagree with the Commission’s explanation that *Advance*, as a bureau-level order, was not binding on the Commission.²⁹ This position ignores the judicial and Commission precedent cited by the Commission as the basis for its ruling. In particular, Lunderville makes no mention of *Comcast*, in which the D.C. Circuit Court of Appeals explains its “well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.”³⁰ Instead, Lunderville continues to rely on *Melody Music*.³¹ However, *Melody Music*, which faulted the Commission for failing to explain apparent inconsistencies between two Commission-level decisions, did not implicate the ability of an agency to overrule a staff holding with which it disagrees.³² The decision therefore provides no support for Lunderville’s position.³³ Moreover, the *Commission Order* contained precisely the kind of explanation

²⁵ 47 C.F.R. § 1.106(c).

²⁶ See Warren C. Havens, *Third Order on Reconsideration*, 26 FCC Rcd 10888, 10891 ¶ 9 (2011) (“[U]nder Section 1.106(b)(2), a petition for reconsideration of an order denying an application for review must rely on new facts or circumstances. Such new facts or circumstances must also be relevant to the question before the Commission.”) By its terms, section 1.106(c)(1) incorporates the standard of section 1.106(b)(2); accordingly, the *Havens* precedent applies equally to decisions under section 1.106(c)(1).

²⁷ 2013 Petition at 2-3 ¶ 4, 3-4 ¶ 5, 5-8 ¶¶ 8-14, 8 ¶ 15, 9 ¶ 17.

²⁸ See *id.* at 3-4 ¶ 5 (“The Commission in FCC 13-7, says in footnote 63 that ‘it is well established that the Commission is not bound by the Bureau’s decision in “Advance”’”)

²⁹ See *id.* at 3-4 ¶ 5; *Commission Order* at 673 ¶ 18 n.63 (citing, *inter alia*, *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) (“*Comcast*”).

³⁰ See 2013 Petition at 3-4 ¶ 5; *Comcast*, 526 F.3d at 769-70.

³¹ 2013 Petition at 3-4 ¶ 5.

³² See *Melody Music*, 345 F.2d 730.

³³ Lunderville additionally argues that two other Auction 37 bidders, Fireside Media and Nassau, received more favorable treatment than he did. 2013 Petition at 4-5 ¶¶ 6-7. We find no merit in this argument. Neither bidder’s situation is analogous to Lunderville’s, because neither bidder was granted a waiver of the Commission’s bid withdrawal payment rules. The principal of Fireside Media sought and received elimination of his bid withdrawal obligation under federal debt compromise provisions after establishing, consistent with those provisions, that he could not afford to pay. Fireside Media, *Order*, 23 FCC Rcd 13138 (2008) (citing 31 U.S.C. § 3711). Nassau owed no bid withdrawal payments on the two Auction 37 construction permits on which Lunderville focuses, because Nassau did not withdraw its winning bids for those permits. Rather, Nassau later failed to meet the environmental requirements for the tower sites associated with the permits, and, as a result, its applications for the two FM facilities were dismissed. Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission (Jul. 14, 2011) (Facility ID No. 164219, Jefferson, NH); letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, Federal Communications Commission (Jul. 14, 2011) (Facility ID No. 164220, Hardwick, VT). Thus the proceedings involving Nassau implicate none of the policies for ensuring fair and efficient auction bidding procedures at issue here. Moreover, notwithstanding Nassau’s continued listing in the Commission’s Consolidated Database System as the “Permittee” of the two stations, see 2013 Petition at 4-5 ¶¶ 6-7, the database also states that Nassau’s applications for these two permits have been dismissed. Lunderville’s concern that Nassau has not yet fully paid the amounts of the two winning bids is misplaced, because Nassau, having defaulted on its winning bids, is obligated to make a default payment, and the Commission has not waived that obligation. See Nassau Broadcasting Holdings, Inc., *Notice of Interim Default Payment Obligation for*

(continued....)

that was found lacking in *Melody Music*, i.e., that the decision was a “correction of a previously erroneous ruling.”³⁴ In light of this explanation, there is no lack of clarity about “what [the] decision means.”³⁵

10. Lunderville also contends that the Commission violated the Constitution by retroactively applying to him a standard different from that applied by the Bureau to Advance Acquisition.³⁶ However, application of the withdrawal payment rule to Lunderville was not retroactive, and Lunderville makes no attempt to show that it was.³⁷ Lunderville further characterizes the *Commission Order* as “arbitrary and capricious” in that “it does not provide a single modicum or arguable difference between all the entities who withdrew their bids” in Auction 37 and Advance Acquisition.³⁸ Again, Lunderville ignores the Commission’s express overruling of the Bureau’s analysis in *Advance*. The Commission, having determined that *Advance* was wrongly decided, was not then obligated to perpetuate the Bureau’s error in order to remain consistent with *Advance*.³⁹

11. In addition, Lunderville’s arguments based on *Advance* largely repeat those previously rejected by the Commission in this proceeding. A petition that simply reiterates arguments previously considered and rejected will be dismissed.⁴⁰ Accordingly, in addition to denying these claims, we dismiss them as repetitious.⁴¹

12. ***Claims Based on Auction Procedure.*** Lunderville also objects to certain of the procedures under which Auction 37 was conducted. He criticizes the Commission for not addressing the possibility of awarding a construction permit on which a bid has been withdrawn to the next highest

(Continued from previous page) _____

Auction 37 Construction Permits FM216-A (Jefferson, NH) and FM325-A (Hardwick, VT), DA 15-126 (rel. Jan. 29, 2015) (assessing an interim default payment against Nassau and ordering that funds Nassau has on deposit with the Commission be applied toward that payment obligation).

³⁴ See 345 F.2d at 732 n.4.

³⁵ See *id.* at 733.

³⁶ 2013 Petition at 5-6 ¶ 8, 7 ¶ 11.

³⁷ The withdrawal payment rule was in effect when Lunderville applied to participate in Auction 37, and therefore its application to him could not have been retroactive. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2373-75 ¶¶ 146-147, 2407 (1994) (adopting the withdrawal payment rule).

³⁸ 2013 Petition at 2-3 ¶ 4.

³⁹ See Alpine PCS, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 469 498 ¶ 52 & n.201 (2010); *Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977). None of the judicial decisions Lunderville cites in support of these arguments applies to the situation at hand, where a government agency has refused to perpetuate an incorrect standard applied by its staff, and thus none is relevant. See 2013 Petition at 5-8 ¶¶ 8-14 (citing, e.g., *CBS Corp. v. FCC*, 535 F.3d 167 (3rd Cir. 2008); *Ramaprakash v. FAA*, 346 F.3d 1121 (D.C. Cir. 2003); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459 n.8 (2d Cir. 2007); *ICO Global Communications (Holdings) Ltd. v. FCC*, 428 F.3d 264 (D.C. Cir. 2005)).

⁴⁰ See WQAM License Limited Partnership, *Memorandum Opinion and Order*, 15 FCC Rcd 13549, 13549 ¶ 2 (2000). See also, e.g., Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., for Renewal of License for Station WCBM(AM), Baltimore, Maryland, *et al.*, *Memorandum Opinion and Order*, 8 FCC Rcd 3986 ¶ 3 (Rev. Bd. 1993).

⁴¹ See *Commission Order* ¶ 9 & n.34. See also James A. Kay, Jr., *Second Memorandum Opinion and Order*, 25 FCC Rcd 7639, 7640-41 ¶ 4 & n.5 (2010). The repetitious nature of Lunderville’s arguments, coupled with the failure to identify any material error in the *Commission Order* or to provide a basis for failing previously to raise his new arguments, would warrant dismissal or denial of his petition by the staff. 47 C.F.R. § 1.106(p). However, we have taken this action ourselves “in order to achieve absolute finality in this matter.” See *Kay*, 25 FCC Rcd at 7641 n.8.

bidder or to another bidder that bid the same amount.⁴² While Lunderville suggests that the public interest could have been served if the Commission had employed this procedure for Auction 37, he does not describe how the public could have benefited.⁴³ As we noted above, the Bureau previously considered and rejected largely the same argument in the *Bureau Order*.⁴⁴ In so doing, the Bureau observed that the rules identified by the parties provide discretion to award a permit or license to the next highest bidder only when the winning bidder defaults on its winning bid *after* the auction closes, and that the rules provide for no such discretion in the context of a withdrawal of a bid during an auction.⁴⁵ Although Lunderville and his joint petitioners failed to raise the issue again in their 2008 Petition,⁴⁶ the argument had been presented previously, so it is neither new nor previously unknown and therefore does not qualify for consideration under section 1.106(c)(1).⁴⁷ And as Lunderville has not provided a rationale for why the procedure might be in the public interest, there is no basis for considering it under section 1.106(c)(2).⁴⁸ In any event, this argument would not be sufficient to establish the basis for a waiver under the standards set forth in the Commission's rules.⁴⁹

13. Lunderville also appears to argue that the procedure for selecting among tied bids somehow singled him out unfairly or treated him differently.⁵⁰ Lunderville complains that the *Commission Order* did not discuss "the virtual Lottery method of determining the provisionally high bid every round when more than one bidder bid the same amount."⁵¹ Lunderville evidently refers to the Auction 37 procedure of using a random number generator for breaking ties in the event of identical high bids on a construction permit in a given round.⁵² Lunderville has not explained how or why this procedure for selecting among tied bids, which applied to all bidders in the auction, resulted in any disparate treatment of him. Further, Lunderville and his co-petitioners failed to raise this issue in their earlier petition considered by the Commission, and Lunderville has not offered any reason for failing to have done so.⁵³ Accordingly, under section 1.106(c)(1), we may not now consider it.⁵⁴

⁴² 2013 Petition at 9 ¶ 16.

⁴³ *Id.* at 9 ¶ 16.

⁴⁴ *See supra* ¶ 5.

⁴⁵ *Bureau Order*, 23 FCC Rcd at 10402 ¶ 29; *see* 47 C.F.R. §§ 1.2109(b), 1.2104(g). *See also supra* ¶ 5.

⁴⁶ 2008 Petition.

⁴⁷ 47 C.F.R. § 1.106(c)(1), (b)(2).

⁴⁸ *Id.* § 1.106(c)(2).

⁴⁹ *See* Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Gregory M. Schmidt, Vice-President, Banks Broadcasting, Inc. and Jonathan D. Blake, Counsel to Banks Broadcasting, Inc., 18 FCC Rcd 10431, 10434-37 (WTB/AIAD 2003) (rejecting claim that public interest would be served by offering unsold licenses to auction's second-highest bidder rather than re-auctioning them).

⁵⁰ 2013 Petition at 9 ¶ 16.

⁵¹ *Id.*

⁵² *See* Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, Public Notice, 19 FCC Rcd 10570, 10601 (WTB 2004) (announcing use of a random number generator to break tied bids).

⁵³ The Bureaus sought comment on using a random number generator to break ties prior to adopting that procedure for Auction 37. No comments were received on that proposal. *Id.*

⁵⁴ 47 C.F.R. § 1.106(c)(1), (b)(2). Lunderville has not explained why the tie-breaker procedure adopted for Auction 37 disserves the public interest. We accordingly do not consider this argument under section 1.106(c)(2). *Id.* at § 1.106(c)(2).

14. **Conclusion.** For the reasons discussed above, we conclude that Lunderville has failed to show that the *Commission Order* was in error, and we accordingly dismiss in relevant part and otherwise deny his petition for reconsideration.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Barry P. Lunderville on February 13, 2013, IS DISMISSED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary