

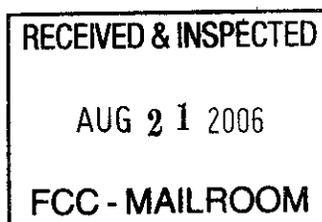
DOCKET FILE COPY ORIGINAL

Denise Berger

From: wchavens@aol.com
Sent: Monday, August 21, 2006 11:58 PM
To: WTBSecretary; jstobaugh@telesaurus.com
Subject: Reply filed under FCC 01-345

Please see attached. This is also being filed on ULS under the two file numbers.

Warren Havens
President
• IATT Tech JV
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• AMTS Consortium LLC
• Telesaurus Holdings GB LLC
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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of:)
)
AUCTION 65)
Public Notice Regarding Long Forms) FN: 0002658043
Accepted for Filing) FN: 0002653156

In the Matter of:)
)
Amendment of Part 22 of the Commission's) WT Docket No. 03-103
Rules To Benefit the Consumers of Air-)
Ground Telecommunications Services)
)
Biennial Regulatory Review—Amendment of)
Parts 1, 22, and 90 of the Commission's Rules)
)
Amendment of Parts 1 and 22 of the) WT Docket No. 05-42
Commission's Rules To Adopt Competitive)
Bidding Rules for Commercial and General)
Aviation Air-Ground Radiotelephone Service)
)
Application of Verizon Airfone Inc. for) File No. 0001716212
Renewal of 800 MHz Air-Ground)
Radiotelephone License, Call Sign KNKG804)

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau

Reply to Oppositions to
Petition for Clarification, and Action Deemed Appropriate,
Under Sections 1.939, 1.2108, and 1.41

Petitioners, defined in the above-captioned petition (“Petition”), hereby reply to the two oppositions filed by LiveTV and AC Bidco LLC.

LiveTV first argues that: (1) the Petition acknowledges it does not seek to challenge the winning bidders, and (2) the Petition does not provide specific allegations of fact that support denial of LiveTV’s application, and that the Petition does not meet requirements of Section 309(d)(1) of the Communications Act.

No. of Copies rec'd _____ 0 _____
List A B C D E

In reply: (1) First, JiveTV deliberately mischaracterize Petitioners' statement which was that while they "do not seek to challenge the winning bidders *per se*" (emphasis added), the Petition nevertheless challenged the auction, the auction results, and the consequent long forms, for the reasons explained in the Petition text and in the referenced and incorporated attachment. (2) The Petition did indeed provide at length specific allegations of fact the support grant of the Petition under the broad public interest standards cited in these Sections 1.939 and 309 (and Section 1.2108 that supplements 1.939). There is nothing in either of these related sections that restrict a petition to deny to matters relating to the faults in the subject application or applicant. In addition, Petitioners put on notice all bidders as to their arguments and intention to challenge the auction: see the attachment to the Petition and the footnote below. Seeking the fruits of a governmental auction under unfair, unclear, and defective rules is itself subject to challenge, along with the subject rules and the conduct of the auction.

LiveTV further argues that: (3) the Petition consists of only re-filed arguments regarding the Auction No. 65 rules, and that the Petition should be characterized as a Petition for Reconsideration of the Commission's auction rules, citing a certain alleged applicable precedent.

In reply, that precedent concerned an "inappropriate" petition to deny, and to cite it merely asserts that the subject Petition is "inappropriate." Petitioners' clear position, stated before the auction and restated at the time at which it was entitled to submit a formal Petition-- during the challenge period of the long forms-- is that: it is the cited rules that are "inappropriate," thus the auction was defective, not since the rules were not favorable as they may be or the like, but since they were unconstitutionally vague, otherwise defective, and thus unenforceable. That is not the same as an effective petition for reconsideration of duly passed rules.

AC BidCo LLC's argues that (1) the Petition was not timely filed and thus should be dismissed, (2) the Petition did not contain the required affidavit, (3) the Petition did not provide specific allegations of fact to show that grant of the application would be contrary to the public interest, and did not provide substantial and material questions of fact, and did not mention AC BidCo or its application, (4) ACL and ITL lack standing to file the Petition since they did not submit bids for the C block license won by AC BidCo, and (5) the Petition involves delaying tactics that do not implicate the substance of AC BidCo's application, (6) a delay in granting the application would be inequitable, (7) the Petition's attachments concern the Commission's definition and handling of "controlling interests" and "bidding agreements," both of these have been settled by various Commission decisions, including in favor of Petitioners, and (8) the Bureau must not allow delay of AC BidCo's application by the Petition since it is not in the public interest: there is a need for air-ground communications service.

In reply: (1) The Petition was timely filed. The Notes to the ULS filing embedded the email to the FCC Secretary that showed the filing, under FCC 01-345 (which is still in effect and regularly used and cited by the Commission), at 11:59 pm on the due date. This was filed, as shown, by Warren Havens while at a location on the East Coast, and this time was verified by him as accurate (and the email timing was by AOL). The note above this embedded email that said the filing was on the next day, August 8, was in error. (2) no sworn statement was required since the asserted facts were all in Commission records, and it is well established that in such cases no affidavit is required (nor would it serve any purpose for a petitioner to attest to what is already placed in the Commission record by the Bureau and other parties), (3) see Petitioners response to this above, under the LiveTV section, (4) Petitioner have standing since the qualified for the auction to bid for any license, indeed bid for licenses, and were entitled to participate

under rules that were not unconstitutionally vague and otherwise defective, as their Petition (including referenced and incorporated attachment) clearly argued: had the rules been not so defective, then Petitioners may have raised and dedicated additional funds and bid for the other licenses in the auction including the subject C block license.¹ (5) There is nothing about the Petition that may be construed as a delay tactic, since Petitioners have nothing to delay: they do not have any winning application pending, or funds due, or action pending on matters relating to the challenged Auction 65 matters. Indeed, they seek a prompt resolution in this matter, as in all other FCC matters they are involved with, and regularly complain of delays in such proceedings caused by other parties or by FCC process. On the other hand, where rules are unconstitutionally vague and otherwise defective, as Petitioners assert here, then it is unlawful and not in the public interest to proceed with actions under such rules, since the foundation of a society governed by the rule of law, and competition under such, is clear and equitable rules. Petitioners made that assertion in the Petition: see the referenced attachment. (6) A “delay” in granting a long form where fundamental rules under which the subject license was won were defective, and are properly challenged, is not a delay but a correction in the public interest, and even time spent on consideration of such challenge is proper since appeals to the government are an essential part of the rule of law. As noted in the above-referenced footnote, AC BidCo could have responded to

¹ It is Petitioners contention, as stated in the Petition, and elaborated in Petitioners’ other pending challenges to Commission rules or Bureau interpretation and application thereof, that there is a clear pattern that is defective, chilling, unfair, evasive, anti-competitive, and unconstitutional. Petitioners do not believe that, under US Supreme Court (and other) precedents regarding FCC authority to wield its extremely broad “public interest” licensing and rulemaking standard, that it can lawfully act as it has in cases Petitioners challenge, including with regard the matters of this Petition, including since such authority exists only where the FCC in fact acts with required expertise, neutrality, and candor. Petitioners were entirely clear on their assertions in their filings attached to the Petition that were copied to all bidders. No bidder commented on these filings, but none can now say they were not fully informed of Petitioners clear assertions behind the Petition even before the auction.

Petitioner's challenge submitted to the Bureau before the auction, and by such attempted to mitigated the now asserted "delay," but it choose not to. The same applied to LiveTV. The same applies to the Bureau (it did not respond to the request attached to the Petition, nor did it directly address the preceding requests contained in that attachment). (7) While the Petition and its incorporated attachment concern Part 1 rules involving "controlling interests" and "bidding agreements," the challenge is to the vagueness and defects in certain Air-Ground service rules fundamental to the auction. The AC BidCo's assertions here simply avoid the clear language of the Petition. Furuther, AC BidCo references to a decision in favor of Petitioners in another auction, but that decision has no bearing on Petitioners' challenge in the Petition.2 (8) Responded to above. In addition, AC BidCo did not demonstrate the asserted need and urgency.

Respectfully,

(Filed electronically. Signature on file.)

Warren Havens
President:
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August 20, 2006

2 Even if that decision was relevant, it is likely to be and may be timely challenged, as was a similar decision regarding Auction 57: Auctions 57 and 61 each involved AMTS spectrum, where Petitioners bid against certain related competitors who coordinated challenges to Petitioners in both auctions, beforehand and afterward, using essentially the same arguments with regard to "commonly controlled" bidders.

Certificate of Service

The undersigned certifies that he has, on this 20th day of August 2006, caused to be served by depositing with the United States Postal Service, with first class mail postage prepaid, a copy of the foregoing "Reply" to the below listed parties:

Steven Harmrich
Flieshman and Walsh
1919 Pennsylvania Ave, NW, Suite 600
Washington DC 20006
(Attorney for AC BIDCO LLC)

Christina Burrow
Dow Lohnes
1200 New Hampshire Ave, NW, Suite 800
Washington DC 20036
(Attorney for LiveTV LLC)

[Filed Electronically. Signature on File.]

Warren Havens