

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Competitive Bidding Procedures)	AU Docket No. 06-101
For Auction No. 68)	FCC Auction No. 68
)	

Filed With: **Office of the Secretary**

To: **Chief, Media Bureau**

COMMENTS

Legacy Media Company, LLC (“Legacy”), by its attorney, hereby submits its Comments with respect to the proposed procedures for Auction No. 68.

In the *Public Notice* concerning proposed upfront payments and bidding procedures for Auction No. 68, the FCC proposed increasing the penalty imposed upon auction participants for withdrawn auction bids. Currently, any winning bidder that defaults is liable for a default payment under 47 C.F.R. § 1.2104(g)(2). Section 1.2104(g)(2) of the Commission’s Rules states in relevant part:

The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid.

47 C.F.R. §1.2104(g)(2)(i). Thus, currently, until there is a “winning bid” for a given allotment, under the Commission’s rules, there is no basis for determining the “deficiency payment” that is due and no final penalty is assessed against a given defaulting auction participant. In other words, it is in the best financial interest of the defaulting bidder if a long period of time elapses before a winning bidder for a given allotment is declared, because until a winning bidder is

declared for the allotment, no “deficiency payment” needs to be made. This is a loophole which must be examined, and eliminated.

This rule provision has been actively abused in at least four instances, *i.e.*, involving broadcast allotment auctions:

- For example, in Auction No. 37, Salvador Ceja submitted a high gross bid of \$769,000 (\$576,750 net bid) for Channel 291A, Tecopa, California. Salvador Ceja participated in Auction No. 62. In Auction No. 62, bids for the channel other than Ceja’s reached a high of only \$550,000 gross (\$357,500.00 net) in Round 19 of the auction which, if resulting in the high bid, would have resulted in Ceja being subject to a \$219,250 deficiency payment. This payment was avoided (or at least for now, delayed) by Ceja becoming the “high bidder” and then defaulting in Auction No. 62.
- In Auction No. 37, Visionary Related Entertainment, LLC submitted a high gross bid of \$1,777,000 gross (\$1,777,000 net bid) for Channel 298C2, Kihei, Hawaii. Visionary participated in Auction No. 62. In Auction No. 62, bids for the channel other than Visionary’s reached a high (in Round 22) of only \$726,000 gross (\$471,900.00 net) which, if resulting in the high bid, would have resulted in Visionary being subject to a \$1,305,100.00 deficiency payment. This payment was avoided (or at least for now, delayed) by Visionary becoming the “high bidder” and then defaulting in Auction No. 62.
- In Auction No. 37, Steven Bartholomew submitted a high gross bid of \$55,000 gross (\$35,750 net bid) for Channel 289C, Outlook, Montana. Bartholomew participated in Auction No. 62. In Auction No. 62, no high bids for the channel other than Bartholomew’s were submitted, which would have resulted in Bartholomew being subject to a \$35,750 deficiency payment. This payment was avoided (or at least for now, delayed) by Bartholomew becoming the “high bidder” and then defaulting in Auction No. 62.
- Finally, an of particular interest to Legacy Media, in Auction No. 37, Kemp Communications, Inc. submitted a high gross bid of \$875,000 gross (\$656,250 net bid) for Channel 300C2, Parowan, Utah. Kemp participated in Auction No. 62. In Auction No. 62, bids for the channel other than Kemp’s reached a high (in Round 23) of only \$639,000 gross (\$415,350 net) which, if resulting in the high bid, would have resulted in Kemp being subject to a \$240,900 deficiency payment. This payment was avoided (or at least for now, delayed) by Kemp becoming the “high bidder” and then defaulting in Auction No. 62.

The Commission has noted that “defaults weaken the integrity of the auctions process and impede the deployment of service to the public.” *Public Notice* at 9. Legacy Media agrees with

that assessment. In each of these cases, the public interest has been doubly harmed, both by the named participants delaying service to the public through the withdrawal of their bids; and by the harm caused by the delay in the receipt of an aggregate \$1,801,000 that would be due to the Commission and the United States Treasury had those participants not again been permitted to participate in an auction for an allotment a second time.

In addition to the deficiency payment, defaulting auction participants are required to pay an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less. 47 C.F.R. § 1.2104(g)(2)(ii). Until recently, this additional payment for broadcast auctions has been set at 3 percent of the defaulter's bid or of the subsequent winning bid, whichever is less. In the *Public Notice*, the Commission has proposed to increase that additional amount to 10%. *Public Notice* at 9.

Legacy Media proposes if such a new penalty is set, that it be made clear that in the case of multiple defaults, the "additional payment" penalty imposed pursuant to Section 1.2104(g)(2)(ii) is ten percent of *each* defaulted bid, *i.e.*, 10% of the *each* high bid submitted by such defaulting party in *each* auction. Therefore, at the very least, the amount due from the defaulting party increases *substantially* if tactics such as those employed by Kemp/Visionary/Ceja/Bartholomew in Auctions 37 and 62 are employed again in the future.

Monetary penalties are not, however, the only appropriate solution to the abuse identified above. From a more pragmatic standpoint, parties such as Kemp, Bartholomew, Visionary, and Ceja are abusing the Commission auctions processes, possibly in an attempt to either (i) impede or delay service the commencement of new service to an area, or (ii) simply to delay payment of penalties they now owe. This prejudices other *bona fide* auction applicants who not only are

financially qualified, but who also sincerely wish to provide new service themselves through acquisition of the allotment and who wish to commence service on those allotments at the earliest possible time. Due in part to the current Commission rules, and in part by the defaulters *abuse* of those rules, those efforts and desires are being blocked.

Therefore, under the circumstances identified above, the Commission's rules and procedures should be clarified to provide that in instances of conduct such as that carried out by parties such as Visionary, Ceja, Bartholomew, and Kemp, such parties who have defaulted previously for an allotment are affirmatively **barred** from participating in further auctions for the frequencies in which they previously participated and defaulted. Further, to prevent the defaulting parties from simply forming a "new entity" to serve as the nominal auction participant, the ban should also extend to entities in which the defaulting applicants' principals have attributable interests. Such procedural or rule clarifications would help ensure that abuses such as those identified above are not permitted to occur again in the future.

Such a prohibition from participation would be especially appropriate in the case of the four parties identified above. In the case of Kemp, Visionary, Ceja, and Bartholomew, they each have now had the opportunity, twice, to obtain the named allotments; they twice had the right (as high bidders) to follow through with their high bid and to apply for permits for the named allotments; and they each twice defaulted, voluntarily. Despite the fact that they each certified that they were financially qualified to participate in the auction, they did not proceed on their financial obligation to the Commission.

Among the certifications that must be made on an FCC Form 175 to participate in the auction is the certification that "the applicant is not in default on any payment for Commission

licenses....” In light of the manner in which participants (such as Ceja, Visionary, Bartholomew, and Kemp) clearly are evading payment of default fees simply by taking advantage of a loophole in the Commission rules, not only should that loophole be removed, the Commission also should made clear that failing to make payment on an high bid voluntarily made by an auction participant is a “default on a payment for a Commission license” within the meaning of the certification; that such an auction applicant should be required to disclose that default on the FCC Form 175 in any subsequently auction; and in the proper circumstances (as here) and unless good cause is shown, such an applicant should be **barred** from participation in further auctions.

Legacy Media Company, LLC is attempting to assist the Commission in maintaining the integrity of its rules. This rule and procedural clarification will go a long way in achieving that goal.

WHEREFORE, it is respectfully requested that these Comments be accepted.

Respectfully submitted,

LEGACY MEDIA COMPANY, LLC

By: _____
Dan J. Alpert

Its Attorney

*The Law Office of Dan J. Alpert
2120 N. 21st Rd.
Arlington, VA 22201*

703-243-8690

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