

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

FILED/ACCEPTED

AUG 17 2010

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
)  
Paging Systems, Inc.'s Petition for ) DA 10-1242  
Reconsideration of a Public Notice ) FCC 93-253  
Announcing Procedures for Auction 61 ) FCC 01-270  
) WT 10-18

To: the Commission

Opposition of August 16, 2010 to Application for Review

The undersigned entities who are parties to this proceeding ("Opponents"), file this opposition ("Opposition") to the above captioned Application for Review (Application). The Application is procedurally defective and should be summarily dismissed for reasons shown below. Alternatively, it must be denied for reasons shown below. Herein, "PSI" means Paging Systems Inc. The above dockets are listed since the Applications challenges rules subject of those dockets.

Lack of Standing

PSI lacks standing, and this cannot later be created. *SunCom v. FCC*, 87 F. 3d 1386, 318 U.S. App. D.C. 377 (*Suncom*). The FCC's decisions to date on the subject PSI challenge to Auction 61 found that PSI lacked standing, and the FCC found the same with regard to PSI's adoption and continuation of the Mobex challenge to Auction 57. PSI's arguments in the Auction 61 challenge were made by adoption of its Auction 57 challenge. PSI lacked standing in Auction 57 since it qualified to bid and bid only on one license and was not subject to its alleged anti competitive activity, and for essentially the same reason in Auction 61.<sup>1</sup> The PSI challenge

<sup>1</sup> See Appendix 1 hereto. When PSI was found by the FCC to fail to have standing in its initial challenge attempts, in auctions 57 and 61, it shifted arguments that the auction applications of its non-defined (in any real corporate law terms, or FCC terms) "commonly controlled" entities

in both cases is actually against the bidding and resultant licenses won in bidding by Opponents. PSI cannot be deemed to be petitioning to deny or challenge its own long forms in those auctions: that would render its long forms frivolous and sanctionable (but that is in fact what the PSI challenges would, if granted, result in). PSI is thus also challenging Opponents licenses won in those auctions, but it did not compete for any of those licenses and thus lack standing.

Once standing to file any initial challenge is missing in the initial filing and its deadline, it cannot be created by an agency choosing for its own purposes to rule on the substance including since that would prejudice the parties subject to the challenge. A challenger does not have standing to make continue a challenge before the FCC or another Federal agency licensing action or procedure, in a case where it did not have standing in its initial filing or obtain it subsequently, and where the agency decided for its own purposes to rule on the merits of the challenge, although it could have dismissed the challenge for lack of standing without addressing the merits. The agency cannot create standing by choosing to address the merits of a request from a requester that lacks standing, at least where that prejudices a one or more parties subject to the challenge, including since that violates that parties rights under FCC rules, the Administrative Procedures Act, and other authority to due process, and non discriminatory fair and equal application of the law (where, in most cases, any such request is dismissed for lack of standing). Thus, on any appeal by the challenger of the agencies denial of the challenge, the agency can dismiss for lack of standing. If the appeal is eventually taken to court, in the case of an agency final order, the challenger will not have standing if it had no standing at the agency.

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scared PSI into not competing in the auctions—not submitting upfront payments to be able to bid, and not bidding, against said entities. That new argument was not only impermissibly late, and transparently specious, but devoid of common sense or support by legal precedent (that is actually on point and supportive). It is specious and devoid of common sense including since it would cost PSI nothing—no risk and no prejudice—to submit upfront payments and to bid against the entities which it believes may in fact (not just in theory) engage in anti competitive activity, and if no such activity arose, then PSI could of course proceed unaffected. However, for its own reasons, PSI failed to undertake said action: it had insufficient funds or no interest or both. Thus, PSI's lack of standing is clear, on this basis alone.

even if the agency elected to address the merits. See *Suncom*, above. Lack of standing is also discussed in other sections below.

The PSI Challenge is Against Subject Rules and Decisions,  
And Fails to Challenge Those in Permitted Fashion

The subject PSI challenge is a challenge to the FCC rules that allow bidding agreements between two or more bidders that is properly disclosed, and the Auction 87 “Procedures” public notice confirming rules and procedures for Auction 61. See Appendix 1 hereto. However, no challenge to the Procedures public notice would be effective in this case, even if the PSI challenge is construed as made against said public notice, since PSI does not allege said rules are improperly made or applied, it merely argues that the rules cannot be deemed to allow what PSI fancies should not be allowed. That is a challenge to rules, but is untimely. Rules are inclusive of what the language allows. As stated elsewhere herein, said rules allow any two companies to bid under a disclosed bidding agreement, and that always includes de facto common coordination or control of said bidding. This principle that a party seeking to change a rule must utilize the ordinary rulemaking process is discussed in *WITN-TV v. FCC* 849 F.2d 752r1 270 U.S. App. D.C. 392.

Also, the PSI Application and entire challenge to Auction 61 is defective in that it challenges only an interim decision of the FCC, a preliminary notice in Auction 61 to which PSI submitted comments. PSI failed to challenge the actual FCC decisions involved: (1) the FCC decision adopting the rules that allow two or more entities to bid in auctions under properly disclosed bidding agreements (that includes allowance for entities under common de jure or de facto control in said bidding),<sup>2</sup> and (2) the Auction 61 final procedures public notice (however,

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<sup>2</sup> All such bidding agreements are, by FCC description, joint venture agreements that involve, for the coordinated bidding, common control of that activity, and that activity is all that the subject rule and the PSI challenge deals with. There is functionally and effectively no difference in that bidding, whether the two or more entities involved are—otherwise (other than in said

the former is the operative decision, if the PSI challenge's actual request and meaning is considered. Neither PSI nor anyone can challenge what is allowed under rules, except by seeking reconsideration of or change to those rules. Under FCC and other law, actions are allowed under rules unless prohibited. In this case, PSI merely asserts that the FCC should deem actions allowed under rules to not be allowed—rules that, in fact, were established for the very competitive environment PSI challenges.

### The PSI Challenge Fails Due to Being Repetition

The Application, despite its suggestions otherwise, repeats the PSI assertions and arguments in its petition for reconsideration disposed of in the captioned order. Thus, it fails to provide a basis for an Application for Review. PSI could have but chose not to submit the matter to the DC Circuit Court for review, and it is not beyond the time for it to do so. The Application must be rejected on this basis, also.

### Other Defects

The rejected supplement and new arguments.

The Application is spurious in arguing that the FCC had no basis to reject its late-filed supplements. First, PSI had no standing to start with, and as described above the FCC can at any time cease dealing with the "substance" of the PSI challenge and dismiss the challenge with no further comment. Thus, it had no obligation to deal with any supplement, even if it was not late. However, it was late and there was nothing in the supplement besides more specious and spurious assertions and arguments for PSI's sanctionable purposes (see below), and certainly nothing in the public interest.

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bidding)—under common control, and whether said common control is by said joint venture agreement only, or also has an additional layer of common control: de jure control on an ongoing basis. That is, all entities with said bidding agreement are under de facto common control by contract for that bidding function.

The Application is also spurious in arguing that the FCC in the Order captioned above did not address certain PSI assertions, whether deemed to be new arguments or not. There is nothing to the PSI challenge if its original pleadings are reviewed, but a few specious characterizations of fully permitted bidding under Bidding Agreements (see Appendix) under well-established PCC rules, as bidding that PSI asserts should not have been permitted. PSI does not even define in meaningful legal terms (see Appendix below) what it means by "common" and "control" and why that is not fully permitted under the rules, or any different from Bidding Agreements and actions thereunder that it does not challenge. From that nonsensical commencement, challenging an public notice that could not even be challenged, PSI attempted to build a proceeding, adding on the way various embellishments of asserted facts and law. In its initial decisions and in the Order captioned above, the FCC disposed fully of all of the fundamental PSI claims, to the degree then can even be comprehended. The Application is in error to assert otherwise.

A challenger's argument must be rejected, before the FCC or another Fed agency, that argues that a *general* agency policy-- in this case, against anti-competitive licensing actions in auctions-- should be deemed to disallow the licensing action and procedure being challenged, when the agency's specific rules established to provide for competitive auctions allow that action and procedure. That challenge is no different from seeking a change in those rules, and that cannot be done in any manner than a request for rule making under APA and agency rules, and not by challenging action and procedure that were in full accord with those rules.

#### Past Pleadings

Opponents refer to and incorporate all of their past pleadings opposing the PSI challenges to Auction 61 and PSI's virtually same challenge to Auction 57.

#### Sanctionable Abuse of Process

Since the PSI challenge to auction 61, based on its challenge to Auction 57, clearly lacks required threshold standing and is otherwise procedurally defective, and since it lacks any substantive merit, it is merely pursued to put a cloud over Opponents licenses and indeed, all FCC auctions since all allow bidding agreements which are a form of de facto "common control" that PSI alleges is not permissible. This is abuse of process and should be sanctioned for reasons in the authority cited by the FCC in 18 FCC Rcd 16605, \*; 2003 FCC LEXIS 4602, at n. 34 (a substantial presentation of authority on this issue).

Amendment

This filing will be amended for reasons given in the amendment.

Respectfully submitted, August 16, 2010,

*/s/ Warren Havens*

*{Submitted Electronically, Signature on File}*

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Warren C. Havens

President of each Opponent listed below

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Opponents:

Environmental LLC

Intelligent Transportation & Monitoring Wireless LLC

Verde Systems LLC

Warren Havens, individually

Telesaurus Holdings GB LLC

## Appendix 1

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This Appendix is part of this Opposition's text. The subject PSI challenge challenges FCC auction rules including most directly the following rules, and thus also parts of Section 309 of the Communications Act that orders the FCC to establish the following (and other) rules for competitive spectrum auctions.

(1) 47 CFR Section 1.2105(a)(2) (regarding "Bidding Agreements"):

(viii) An exhibit, certified as truthful under penalty of perjury, identifying 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.

(ix) Certification 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 paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

PSI challenges the above since auction applications<sup>3</sup> and bidding that is permitted in properly disclosed agreements, arrangements and understandings (together here, "Bidding Agreements") under "(viii)" above, and certified under "(ix)" above, are permitted by these rules and includes what PSI challenges. While PSI does not even define what it complains of – commonly controlled applicants and bidders—the sole meaning of the above permitted Bidding Agreements is that the entities involved have become, under legally binding contract law, under joint or common de facto control for the purposes of said Bidding Agreements—any manner of bidding strategy, bidding, and certain post-bidding matters. Thus, the PSI challenge is to all the above rules, and all auctions to which they pertain.

(2) 47 CFR Section 1.2110 Designated entities.

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<sup>3</sup> See footnote 1 in the text above.

The entire rule, including the part cited below, and parts of other rules dealing with designated entities.

(2) Controlling interests. (i) For purposes of this section, controlling interest includes individuals or entities with either de jure or de facto control of the applicant. De jure control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) The entity plays an integral role in management decisions.

PSI challenges the above since FCC rules on Designated entities define "control" in extensive examples and broad terms. Indeed, all legal authority does, as well. PSI speciously pretends that "commonly controlled" has legally clear meaning and is not fully contemplated in both the Designated entities rule sections, and the Bidding Agreements (see above) rule sections. However, the issue is "control" not "common control" – only "control" is the effective power to act or authorize action. Few, if any, legal entity that engages in any substantial business, including obtaining and using FCC licenses, has one and only one "control" for all purposes. Instead, most all such entities have various levels of control internally, take financing and enter material relations with affiliates (which involve some manner of giving up control), and engage in legally binding contracts which specifically involving giving up certain control to obtain some service or asset or thing; that may include Bidding Agreements permitted under FCC rules above.

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Petition to Deny, including all Exhibits, was prepared pursuant to my direction and control and that all the factual statements and representations of which I have direct knowledge contained herein are true and correct.

/s/ [Submitted Electronically. Signature on File.]

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Warren C. Havens

August 16, 2010

Certificate of Service

I, Warren Havens, certify that I have, on this 16th day of August 2010, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Petition for Reconsideration to the following:<sup>4</sup>

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.  
Audrey P Rasmussen  
1120 20th Street, N.W., Suite 700 North  
Washington, DC 20036

/s/ [Filed Electronically. Signature on File.]

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Warren Havens

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<sup>4</sup> The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.