

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FILED/ACCEPTED

JAN - 3 2011

Federal Communications Commission  
Office of the Secretary

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| In re                                   | ) |                      |
|   | ) |                      |
| Auction of FM Broadcast Construction    | ) | DA 10-2253           |
| Permits Rescheduled for April 27, 2011  | ) | AU Docket No. 10-183 |
| Notice and Filing Requirements, Minimum | ) |                      |
| Opening Bids, Upfront Payments, and     | ) |                      |
| Other Procedures for Auction 91         | ) |                      |

To: The Secretary  
 Attn: Chief, Auctions and Spectrum Division, Wireless Telecommunications Bureau  
 Chief, Audio Division, Media Bureau

**PETITION FOR RECONSIDERATION**

United States CP, LLC ("USCP"), by its counsel, files this Petition for Reconsideration of the Commission's Public Notice, *Auction of FM Broadcast Construction Permits Rescheduled for April 27, 2011, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 91*, 2010 FCC Lexis 6983 (2010) (the "Auction 91 Public Notice"). In the Public Notice, the Commission denied United States CP, LLC's ("USCP's") request to add the vacant allotments at White Sulphur Springs, West Virginia, and Iron Gate, Virginia, to the list of allotments offered in Auction 91.<sup>1</sup> USCP seeks reconsideration of this decision because it is arbitrary and capricious.

On September 21, 2010, the Commission released a public notice announcing Auction 91 and seeking comment on auction procedures.<sup>2</sup> USCP timely submitted Comments requesting that the Commission add White Sulphur Springs, West Virginia, and Iron Gate, Virginia, allotments to Auction 91. In the Auction 91 Public Notice, the Commission denied USCP's

<sup>1</sup> Auction 91 Public Notice at ¶ 5.

<sup>2</sup> *Auction of FM Broadcast Construction Permits Scheduled for March 29, 2011; Comment Sought on Competitive bidding Procedures for Auction 91*, Public Notice, 25 FCC Rcd 13034 (2010).

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request. USCP requests reconsideration of this denial because the decision is arbitrary and capricious under the standards set forth in the Administrative Procedures Act (the “APA”).<sup>3</sup>

The APA provides that an agency decision is unlawful if the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>4</sup> When making a decision, “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>5</sup> If the agency does not make this examination or explain its reasons for taking an action, the decision is arbitrary and capricious.<sup>6</sup>

The Commission’s policy is to offer allotments at auction in the order the allotments were added to the FM Table of Allotments.<sup>7</sup> USCP demonstrated in its Comments that the allotments for White Sulphur Springs and Iron Gate were added to the FM Table of Allotments long before allotments that are currently being offered in Auction 91.<sup>8</sup> In the Auction 91 Public Notice, the

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<sup>3</sup> 5 U.S.C. § 706(2)(A).

<sup>4</sup> *Id.*

<sup>5</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>6</sup> *Id.*

<sup>7</sup> *Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 79*, Public Notice, 24 FCC Rcd 4445, 4450 (2009).

<sup>8</sup> Comments at 2. The allotment for Channel 249C2 at Blanca, Colorado, was added to the FM Table Allotments only two short years ago on March 31, 2008, *Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Blanca, Colorado)*, 23 FCC Rcd 1913 (2008), and the allotment for Channel 281A at Silverton, Colorado, was added only three years ago on December 17, 2007. *Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Silverton, Colorado)*, 22 FCC Rcd 19225 (2007). See also *Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Dulac, Louisiana); (King City, California); (Fallon Station, Nevada); (Coachella, California); (Cambria, California); (Carbon, Texas); (Northport, Alabama)*, 20 FCC Rcd 8228 (2005) (adding Channel 293A at Cambria, California, to the FM Table of Allotments on June 13, 2005); *Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Wapanucka, Oklahoma); (Evant, Texas); (Comanche, Texas); (Hollis, Oklahoma); (Santa Anna, Texas); (Mooreland, Oklahoma); (Junction, Texas); (Alton, Missouri); (Taos, New Mexico); (McCamey, Texas); (Dickens, Texas); (Hamlin, Texas)*, 18 FCC Rcd 4474 (2003) (adding Channel 290A at Alton, Missouri, to the FM Table of Allotments on April 28, 2003); *Report and Order, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Alamo and Milan, Georgia)*, 18 FCC Rcd 4471 (adding Channel 287C3 at Alamo, Georgia, to the FM Table of Allotments on April 28, 2003).

Commission did not articulate any explanation for its decision not to offer the White Sulphur Springs and Iron Gate allotments in Auction 91.

Interestingly, in the Auction 91 Public Notice, the Commission also declined a request by Three Rivers Broadcasting LLC (“Three Rivers”) to add the allotment for Channel 257A at Grants Pass, Oregon, to the auction.<sup>9</sup> The Commission, following its articulated policy, explained that, “The allotments [sic] proposed for inclusion by Three Rivers were added to the Table more recently than those listed in Attachment A of this Public Notice.”<sup>10</sup> The Commission goes on in the next sentence to state, “The Bureau will not offer the allotments identified by Three Rivers and US CP [sic] and will instead make them available in an upcoming auction of FM broadcast construction permits.”<sup>11</sup> The Commission explained its reasoning for denying Three Rivers’ request but did not explain its reasons for denying USCP’s request. The Commission simply lumped USCP’s request to add allotments that have been on the FM Table of Allotments for twenty-five years and four years together with Three Rivers’ request to add an allotment that has been on the Table for only three months.<sup>12</sup> Given the Commission’s articulated purpose of auctioning “older” allocations first, there appears to be no basis for denying USCP’s request. As a matter of policy, it makes sense to auction the allocations that have been pending the longest. The Commission’s failure to rationally explain a change from its normal practice is arbitrary and capricious – especially with respect to an allocation that has been pending for twenty-five years.

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<sup>9</sup> Auction 91 Public Notice at ¶ 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 100 F.C.C.2d 1332 (1985) (adding Channel 227A at White Sulphur Springs, West Virginia, to the FM Table of Allotments); *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Statesville and Clemmons, North Carolina, Iron Gate, Virginia)*, 21 FCC Rcd 57 (2006) (adding Channel 270A at Iron Gate, Virginia, to the FM Table of Allotments).

Not only did the Commission not follow its policy without articulating a reason, the Commission set forth a new policy without stating a reason. In *Federal Communications Commission v. Fox Television Stations, Inc., et al.*, 129 S. Ct. 1800, 1811 (2009), the Supreme Court stated, “An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . [T]he agency must show that there are good reasons for the new policy.”<sup>13</sup> The Commission previously articulated its policy for the selection of construction permits to be auctioned as follows: “FM allotments are auctioned in the order they are added to the Table, with older allotments being auctioned before more recently added ones.”<sup>14</sup> In the Auction 91 Public Notice, the Commission set forth a new policy stating, “The Bureaus generally offer FM allotments at auction in the order they are added to the Table of Allotments, with older allotments being auctioned before those more recently added, though we may depart from that practice for reasons of administrative convenience.”<sup>15</sup> The Commission did not offer an explanation for this change in policy.

Moreover, the new caveat that the Commission may depart from its practice for reasons of “administrative convenience” does not hold water. In the past, the Commission has revised the list of allotments being auctioned without concern for “administrative convenience.”<sup>16</sup> Further, if the Commission is following its policy of auctioning allotments in the order in which they were added to the FM Table of Allotments, the current situation should very rarely, if ever, occur. Adding the Iron Gate and White Sulphur Springs allotments should not cause an undue burden.

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<sup>13</sup> *Federal Communications Commission, et al. v. Fox Television Stations, Inc., et al.*, 129 S. Ct. 1800, 1811 (2009).

<sup>14</sup> *Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 79*, Public Notice, 24 FCC Rcd 4445, 4450 (2009).

<sup>15</sup> Auction 91 Public Notice at ¶ 5.

<sup>16</sup> See, e.g., *Removal of FM Broadcast Construction Permit from Auction No. 70*, Public Notice, 21 FCC Rcd 14159 (2006); *Removal of FM Broadcast Construction Permit from FM Auction No. 62*, Public Notice, 20 FCC Rcd 12478 (2005).

WHEREFORE, USCP respectfully requests the Commission (1) reconsider its decision concerning the addition of the White Sulphur Springs and Iron Gate allotments to Auction 91, as the decision is arbitrary and capricious (2) and include the White Sulphur Springs and Iron Gate allotments on the list of allotments to be auctioned.

Respectfully submitted,

**UNITED STATES CP, LLC**

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