



Federal Communications Commission
Washington, D.C. 20554

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DA 02-2077

Dr. Jo Anne Y. McFarland
President
Central Wyoming College
2660 Peck Avenue
Riverton, WY 82501

Mr. Peter W. Morrill
General Manager
State Board of Education, State of Idaho
1455 North Orchard
Boise, ID 83706

Re: **Central Wyoming College and State Board of Education, State of Idaho – FCC
Form 175 Applications to Participate in Auction No. 44**

Dear Dr. McFarland and Mr. Morrill:

This letter responds to the Central Wyoming College's ("Central Wyoming") and the State Board of Education, State of Idaho's ("State Board") requests that their short-form applications to participate in the Lower 700 MHz band auction ("Auction No. 44") be accepted and processed outside of the Commission's competitive bidding process. This letter also responds to Central Wyoming and the State Board's Joint Emergency Motion for Partial Stay of Auction No. 44.¹ In claiming that they are exempt from the requirement to participate in Auction No. 44 to obtain the licenses they selected on their short-form applications (FCC Form 175), Central Wyoming and the State Board assert that they are not required to submit upfront payments or make any other payments in connection with the competitive bidding process.² In addition, Central Wyoming and the State Board seek a waiver of the requirement to submit certain financial information to establish their eligibility for bidding credits.³ For the reasons explained below, we dismiss Central Wyoming's and the State Board's requests as moot.

I. Background

Central Wyoming and the State Board filed timely short-form applications to participate in Auction No. 44.⁴ In their Applications, Central Wyoming and the State Board state that they are

¹ Joint Emergency Motion for Partial Stay of Central Wyoming College and the State Board of Education, State of Idaho (filed June 14, 2002).

² See, e.g., 47 C.F.R. §§ 1.2104(g) (withdrawal, default, and disqualification payments), 1.2106 (requirement to submit upfront payments); 1.2107 (requirement of high bidders to submit downpayments).

³ See 47 C.F.R. § 1.2110(b) (requirement of applicants to disclose gross revenues). Central Wyoming and the State Board's waiver requests are premised on a notion that, in seeking to obtain licenses included in the Auction No. 44 inventory without making any payments, they are essentially seeking a 100 percent bidding credit. Central Wyoming College, FCC Form 175 Application to Participate in Auction No. 44 (filed May 8, 2002); State Board of Education, State of Idaho, FCC Form 175 Application to Participate in Auction No. 44 (filed May 8, 2002) (collectively, the "Applications"). For the reasons set forth below, we need not address Central Wyoming's and the State Board's assertions that their requests are tantamount to a request for a 100 percent bidding credit.

noncommercial educational (“NCE”) entities and intend to use the Lower 700 MHz (698-746 MHz) band spectrum to provide new digital noncommercial educational television broadcast service.⁵ Further, they claim that, pursuant to Section 309(j)(2)(C) of the Communications Act of 1934, as amended (the “Act”),⁶ they are exempt from any requirement to participate in the competitive bidding process that the Commission will use to assign new licenses for the Lower 700 MHz band.⁷ In support of their assertions that they are not required to bid at auction for the Lower 700 MHz band licenses they seek, and their request for waiver of the requirement to provide financial information demonstrating their eligibility for bidding credits, Central Wyoming and the State Board cite *National Public Radio v. FCC*.⁸

Instead of submitting an upfront payment by the May 30, 2002, deadline, Central Wyoming and the State Board each submitted a “Position Statement Regarding Upfront Payments,” in which they further argue that their status as NCEs under Section 309(j)(2)(C) of the Act requires that we accept their applications and process them outside of the competitive bidding process.⁹ Because Central Wyoming and the State Board did not submit upfront payments, which determine an applicant’s eligibility to bid in an auction, these applicants could not become “qualified bidders” in Auction No. 44.¹⁰ Accordingly, in a

⁴ See Applications.

⁵ See *id.*, Further Bidding Credit Explanation/Auction Exemption, Exhibit C, at 1 (filed May 30, 2002).

⁶ 47 U.S.C. § 309(j)(2) (C) states that the FCC’s competitive bidding authority “shall not apply to licenses or construction permits issued by the Commission” for “stations described in section 397(6).” 47 U.S.C. § 397(6) defines a “noncommercial educational broadcast station” to mean “a television or radio broadcast station which (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.”

⁷ See Applications, Bidding Credit Explanation/Auction Exemption, Exhibit C (as amended May 30, 2002); Position Statement Regarding Upfront Payments, Exhibit F (as amended May 30, 2002). Although each of the Applications indicates that the applicant claims eligibility as an “entrepreneur” under Section 27.702 of the Commission’s rules, 47 C.F.R. § 27.702(a)(1), and the associated 35 percent bidding credit, the applicants contend that they did so only because those choices were the highest available credit allowed on the form. See *id.*, Exhibits C and G.

⁸ See *id.*, Bidding Credit Explanation/Auction Exemption, Exhibit C, at 2; Position Statement Regarding Upfront Payments, Exhibit F, at 5-6 (citing *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (holding that Section 309(j)(2)(C) exempts NCEs from participating in auctions for broadcasting spectrum, whether or not the spectrum has been reserved for educational use)).

⁹ *Id.*, Position Statement Regarding Upfront Payments, at 6 (filed May 30, 2002).

¹⁰ See 47 C.F.R. § 1.2106(c) (“If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.”); see also “Auction of Licenses in the 698-736 MHz Band Scheduled For June 19, 2002; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, DA 02-563, at 23 (rel. March 20, 2002) (“In order to be able to bid in the auction, applicants must submit an upfront payment accompanied by an FCC Remittance Advice Form (FCC Form 159).”). The Commission has long recognized that the upfront payment requirement is necessary to provide “assurance that each bidder is a bona fide applicant and that each bid is sincere.” Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2378 ¶ 175 (1994). This requirement is also integral to the auction process because the amount of a bidder’s upfront payment determines that bidder’s maximum eligibility to bid on licenses during an auction.

public notice released on June 7, 2002, Central Wyoming and the State Board were listed as unqualified to participate in Auction No. 44.¹¹

On June 12, 2002, Central Wyoming and the State Board filed with the Commission a Joint Emergency Motion for Partial Stay of Auction No. 44 with respect to the Lower 700 MHz licenses listed on their short-form applications.¹² At the time that they made their joint filing, Auction No. 44 was scheduled to commence on June 19, 2002.¹³ The NCEs stated that they would file with the United States Court of Appeals for the District of Columbia Circuit a motion for judicial stay of Auction No. 44 if the Commission did not act on the stay request by noon on June 14, 2002.¹⁴

On June 14, 2002, the Commission released a Memorandum Opinion and Order addressing issues that had been raised in petitions for reconsideration of the *Lower 700 MHz Report and Order*.¹⁵ After rejecting an argument that public safety eligibles are permitted to apply for licenses in the Lower 700 MHz band without participating in an auction, pursuant to the “public safety radio services” exemption of Section 309(j)(2)(A) of the Communications Act,¹⁶ the Commission decided on its own motion that NCEs are not eligible to apply for initial licenses for new services in the Lower 700 MHz band.¹⁷ The Commission determined that prohibiting NCEs from applying for licenses in this flexible-use band “will eliminate uncertainties about the outcome of the competitive bidding process and promote our goals of assigning these licenses expeditiously and promoting the intensive and efficient use of this spectrum.”¹⁸

¹¹ “Auction of Licenses for 698-746 MHz Band,” *Public Notice*, DA 02-1346, Attachment C (rel. June 7, 2002) (“*Auction No. 44 Qualified Bidders Public Notice*”). That public notice also states that the licenses selected by Central Wyoming and the State Board on their short form applications are subject to resolution of the issues discussed herein. *Id.* at n. 2.

¹² *See* Joint Emergency Motion for Partial Stay.

¹³ *See Auction No. 44 Qualified Bidders Public Notice*, at 1. Subsequently, on June 19, 2002, the President signed into law legislation that directed the Commission to delay indefinitely the auction of initial licenses in Blocks A, B and E of the Lower 700 MHz band (and licenses in the Upper 700 MHz band), and to conduct an auction of initial licenses in Blocks C and D of the Lower 700 MHz band before September 19, 2002. *See* Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715 (2002). Pursuant to this legislation, the auction of Block C and D initial licenses is scheduled to commence on August 27, 2002. *Id.*; *see also* “Auction 44 Revised Schedule, License Inventory, and Procedures,” *Public Notice* DA 02-1491 (rel. June 26, 2002).

¹⁴ *See* Joint Emergency Motion for Partial Stay, at 4.

¹⁵ *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

¹⁶ 47 U.S.C. § 309(j)(2)(A) provides that the Commission’s competitive bidding authority does not apply to licenses or construction permits issued by the Commission “for public safety radio services.”

¹⁷ *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Memorandum Opinion and Order*, FCC 02-185, at ¶¶ 35-38 (rel. June 14, 2002).

¹⁸ *Id.* at ¶ 39. In arriving at this decision, the Commission did not reach the issue of whether the Section 309(j)(2)(C) exemption would apply to mutually exclusive license applications for new services in the Lower 700 MHz band if NCEs were eligible to apply for such licenses. *See id.* at n.102.

Because the Commission did not act on their requests by noon on June 14, 2002, Central Wyoming and State Board filed a joint emergency motion for partial stay of the auction and joint petition for writ of mandamus with the D.C. Circuit seeking to compel the Commission to address the issues raised in their Applications.¹⁹ On June 18, 2002, the court of appeals denied the joint emergency motion for stay, finding that the petitioners had not demonstrated the requisite irreparable injury to warrant a stay.²⁰

II. Discussion

The applicants' claim that they are exempt from competitive bidding procedures, pursuant to Sections 309(j)(2)(C) and 397(6) of Act, was rendered moot by the Commission's decision in its *Lower 700 MHz Reconsideration Order* that NCEs are not eligible to apply for initial licenses in this spectrum band. Because Central Wyoming and the State Board, as NCEs, are not eligible to apply for initial licenses in the Lower 700 MHz band, the Commission need not consider whether the Section 309(j)(2)(C) auction exemption would apply to their Applications.²¹ For the same reason, we dismiss the motion for stay, which was filed to defer the auction pending the Commission's action on the matters rendered moot by the Lower 700 MHz Reconsideration Order. We note that the D.C. Circuit denied the applicants' motion for stay on the merits.²²

III. Conclusion

For the reasons stated above, the requests filed by Central Wyoming College and the State Board of Education, State of Idaho to have their applications processed outside of the Commission's competitive bidding process and for waiver of the payment and disclosure requirements in connection with Auction No. 44 are dismissed as moot. Central Wyoming and the State Board's related Joint Emergency Motion for Partial Stay is also dismissed as moot.

¹⁹ See Joint Emergency Motion for Partial Stay and Joint Petition For Writ Of Mandamus, In re: Central Wyoming College and State Board of Education, State of Idaho, No. 02-1191 (D.C. Cir., filed June 14, 2002).

²⁰ See In re: Central Wyoming College and State Board of Education, State of Idaho, No. 02-1191 (D.C. Cir.), Order, filed June 18, 2002 (per curiam). On July 18, 2002, the Commission opposed the joint petition for writ of mandamus, requesting that the court dismiss the petition as moot. See Opposition to Joint Petition for Writ of Mandamus, No. 02-1191 (D.C. Cir. filed July 18, 2002). Subsequently, on July 24, 2002, Central Wyoming and the State Board notified the court that they do not oppose dismissal of the petition. See Comments, No. 02-1191 (D.C. Cir. filed July 24, 2002).

²¹ See Comments, No. 02-1191 (D.C. Cir. filed July 24, 2002).

²² See In re: Central Wyoming College and State Board of Education, State of Idaho, No. 02-1191 (D.C. Cir.), Order, filed June 18, 2002 (per curiam) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

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This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

cc: Anne G. Crump, Esq.