

## MEMORANDUM

To: Station Resource Group  
Fr: John Crigler  
Re: FM Auction No. 37  
Dt: January 31, 2001

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On January 19, 2001, the FCC released its Auction Notice which sets forth the filing requirements for FM construction permits being auctioned in Auction No. 37. The Notice and the revised list of upfront payments are available on the FCC's home page at "<http://www.fcc.gov/wtb/auctions>". In the Notice, the FCC delayed the auction from February 21, 2001, to May 9, 2001 and reduced the upfront payment amount for several communities. It also again rejected NPR's request that noncommercial applicants be exempted from the auction procedures.

### **Important dates:**

March 19, 2001	The short form application (Form 175) must be filed electronically to participate in the auction. The remote bidding software must be ordered from the FCC by this date, too. It costs \$175.00.
April 16, 2001	The Upfront Payment amount must be wired to the FCC.
May 9, 2001	Auction begins.

### **Pre-Auction Procedures:**

*The Short Form.* The first step to becoming eligible to bid in the auction is the electronic filing of Form 175 with the FCC. The filing window opens March 7 and closes March 19, 2001. Form 175 identifies the applicant, specifies the markets in which it is interested, allows it to specify preferred coordinates if it has already identified a site (otherwise the reference coordinates are used), and lists up to three people who are authorized to place bids on its behalf.

Exhibits must also be filed electronically. These exhibits reflect ownership information, any eligibility for new entrant bidding credits, agreements with other parties and joint bidding arrangements, and information relating to defaults in prior auctions or delinquency on any non-tax federal debt.

*New Entrant Bidder Credits.* One of the Form 175 exhibits allows applicants to claim a new entrant bidder credit if they are eligible for one. A 35% bidding discount is available to bidders who have no attributable interests in any other media of mass communications. A 25% bidding discount is available to any applicant who has no attributable interest in more than three

mass media facilities. Interests in noncommercial stations, including noncommercial stations operating on commercial frequencies, are not attributable, nor are interests in commercial low power television, television translators, or FM translators.

The cut-off date for determining attributable interests in a mass media facility is March 19, 2001, the Form 175 filing deadline. Thus if the applicant were selling a station in order to take advantage of a bidding discount, the transaction would have to be consummated by that deadline.

*Unjust enrichment.* A bidding credit may not be permanent in some circumstances. If the winning bidder uses a bidding credit, and seeks to assign or transfer control of its license or permit to an entity not qualifying for the same level of bidding credit, a payment of the difference between the bidding credit and the bid amount without that bidding credit, plus interest, must be paid to the government before the FCC will approve the assignment or transfer. The payment is reduced over time, according to the following schedule:

Date from Issuance of Construction Permit	Bidding Credit Re-paid to Government
Years 1 and 2	100%
Year 3	75%
Year 4	50%
Year 5	25%
Year 6	0%

Caution needs to be exercised where more than 50% of the ownership changes during years 1 through 5 since, if the new owners have attributable interests that would make the licensee ineligible for the bidding credit awarded, the unjust enrichment rule would apply.

*Anti-collusion rule.* Once the Form 175 is filed, applicants for the same markets may not discuss bid strategies, bid amounts, or settlements. The ban ends with the down payment deadline after the auction.

Applicants may enter consortia or joint bidding agreements prior to the filing of the Form 175, but the terms of such agreements must be disclosed in the Form 175. Applicants who have entered joint bidding arrangements that are disclosed can discuss bidding strategies during the course of the auction.

*Major Changes.* After the Form 175 is filed, no “major” changes may be made. A major change to a Form 175 is any change in control of the applicant, any change in the markets specified in the Form 175, and any change in bidding credits sought. Ordinarily, the change in one board member would not be sufficient to change “control” over the board. If, for example, there’s a nine member board and one member changes, that change is minor. If, however, a board consisted of only two members, each of whom exercises equal control, a change in one member would result in a major change, since the remaining member’s control has gone from negative control (veto power) to positive control. Clearly, if there’s a change of fifty percent or more of the board, this constitutes a major change in control. Minor changes include changes to

the persons authorized to bid on behalf of the applicant, changes in the contact person, and non-major changes to exhibits. As with any FCC application, the Form 175 must be kept current.

*Competing Applicants.* A week or so after March 19, 2001, the FCC will issue a Public Notice listing all properly filed Forms 175, identifying those applicants that have minor defects which may be corrected, and listing those applications that are not acceptable. If only one applicant specifies a given market, no mutual exclusivity arises. The applicant does not have to make an upfront payment and will have an opportunity to file a long form (Form 301 or a hybrid Form 301/340, if the winner wishes to operate the station on a noncommercial basis) without having to proceed to auction. If other applicants specify an applicant's market, it will have to make an upfront payment to participate in the auction.

*The Upfront Payment.* The upfront payment must be sent to the FCC's lockbox at the Mellon Bank in Pittsburgh by wire transfer. The wired funds must be received no later than 6:00 p.m., Eastern Time, on April 16, 2001. (Because the initiation of the wire transfer is under the control of the applicant's bank, applicants should arrange for the wire transfer well in advance of the deadline, and initiate the wire no later than Friday, April 13, 2001, the last business day preceding April 16, 2001.) One hour before the wire transfer is initiated, and on the same business day, the applicant must fax to Mellon Bank a Form 159 (Remittance Advice) identifying its payment. If an applicant is a former defaulter in a prior auction or defaulted on a non-tax federal debt, but has cured the default, that applicant will have to pay an upfront payment that is 50% higher than the normal upfront payment.

*Eligibility for Auction.* The FCC will issue a Public Notice identifying those applicants who made upfront payments. If an applicant is the only applicant to make an upfront payment among the applicants who specified the same frequency, that applicant will be able to buy its permit for the minimum bid.

*Auction Registration.* A week prior to the auction, the FCC will send to eligible bidders two separate mailings with log-on codes and bidder identification numbers. Registration is automatic for eligible bidders.

*Mock Auction.* Eligible bidders who ordered remote bidding software will receive the software package. The FCC will hold a mock auction on May 7, 2001, to allow bidders to become familiar with the bidding process.

*FM Freeze.* In order to make sure that existing stations do not file applications that will be mutually exclusive with the application of auction participants, the FCC will not accept applications for minor changes from March 7, 2001 to March 19, 2001. This new temporary freeze supplements the existing freeze on applications for new stations and "major" changes.

## **Auction Procedures:**

*Type of Auction.* The auction is a simultaneous, multiple round, ascending auction. That means that all of the FM allotments will be auctioned at the same time. New, higher bids, will be placed in each round. Bids are placed electronically or by telephone, although the FCC prefers bidders to bid electronically. At the beginning of the auction, there are likely to be four rounds per day, with each round open for an hour. The FCC will later add additional rounds per day, of shorter duration, to speed up the pace of the auction. Any schedule changes in the rounds will be announced when bidders log on to place their bids and through notices posted on the FCC's web page. The auction will remain open until no bids are placed on any markets.

*Bidding Units.* A combination of the markets listed by an applicant on the Form 175 and the amount of the upfront payment establishes the bidder's eligibility to bid on certain markets. The upfront payment translates into the number of bidding units a bidder has (*i.e.*, if an applicant pays \$125,000 as upfront payment, it will have 125,000 bidding units). For example, assume that an applicant listed two markets on its Form 175, each of which have a minimum upfront payment of \$125,000. If it wanted to win both markets, it would have to pay \$250,000 as an upfront payment. If it only wanted one of those markets, it could limit its upfront payment to \$125,000, and during the auction it could switch its bidding between those two markets because they each require the same number of bidding units – 125,000. It would not, however, be able to bid on both markets in the same round because it would not have a sufficient number of bidding units.

*Activity Rules and Activity Waivers.* In order to keep the pace of the auction moving, the FCC requires bidders to be "active" on all of their bidding units. To be active, an applicant must either be the high bidder from the last round, or place a bid in the current round. Each bidder receives five activity waivers. The waiver is automatically used when an applicant does not place a bid in a current round (or is not the standing high bidder from the prior round). After the five waivers are used, bidding units are reduced in portion to the applicant's level of activity. In the example from the prior paragraph, assume an applicant paid \$250,000 as its upfront payment, and was active on one market, but not on the second for five rounds. It would lose eligibility on the half of its bidding units (125,000) on which it had been inactive. Thereafter, it could not bid for both markets in the same round, but could still switch back and forth in its bidding on either market, as each market requires 125,000 bidding units. If an applicant uses up all its activity waivers and its bidding units are reduced to zero, it may request a refund of its upfront payment amount from the FCC, even though the auction of other markets continues. Waivers can also be used toward the end of the auction to force the FCC to keep the auction going even if no bids are submitted in any rounds – the so-called proactive waiver.

*Minimum Opening Bid.* The minimum opening bid for each market is the same as the upfront payment amount associated with each market. Only the minimum opening bid will be accepted as the first bid for any market. An upfront payment does not limit how much an applicant can bid on a given market in later rounds, but does limit the number of bidding units which an applicant is eligible to bid. If a bidder wants to end up with more than one frequency and bid on more than one frequency in any given round, the bidder will need to pay in more than the minimum opening bid for one frequency. In other words, the total upfront payment establishes the total number of bidding units a bidder has.

*Minimum Bid Increments.* In each subsequent round, the next acceptable minimum bid will be 10% higher than the high bid from the prior round. Bidders will be allowed to increase bids in increments of one through nine – i.e., 10% to 90% of the prior high bid. The Commission designed the software to permit bid increments of only one through nine to avoid “fat finger bids” (when bidders entered their own bid amounts and typed in too many zeros, e.g., \$1,000,000 instead of \$100,000) or “bid signaling” (using the last three digits of the bid to signal which markets they intended to win, e.g., \$100,012 – for market FM12). Now, the software lets us enter the numbers 1 through 9, so that, if, in round 2, an applicant decided to bid \$150,000, it would enter “2” for two bid increments ( $\$125,000 \times 1.2$ ). If someone else raised the bid by three increments in that round, the applicant would still be considered “active,” even though it was not the high bidder in that round. It would, however, be required to bid in the next round to remain active since it is not the high bidder.

*Bid Withdrawals.* Before a round closes, an applicant can remove any bid it has entered in that same round without penalty. After a round closes, an applicant can withdraw a standing high bid from a prior round, but only in up to two different rounds. If someone else places the same or higher bid in a subsequent round before the close of the auction, there is no penalty. If the winning bid is lower than the withdrawn bid for that permit in the same or subsequent auction, the bidder who withdrew a bid is responsible for paying the difference between its withdrawn bid and the high bid in the same or subsequent auction. If no one places a new bid on that permit in the same auction, the FCC assesses an interim withdrawal payment of 3% of the amount of the withdrawn bid. The 3% interim payment will be applied toward any final bid withdrawal payment that is assessed at the close of a subsequent auction of that permit, when the amount of the payment can be determined.

*Round Reports.* As the auction proceeds, all bidders will be able to see all bids, including bid withdrawals, at the end of every round. After each round, the FCC will announce all of the winning high bids, all of the bids placed by bidders (even if not the high bid), bid withdrawals, and activity waivers remaining for bidders. Those reports will be available on the FCC’s web page.

*Stopping Rules.* The auction will continue until there are no new bids placed on any of the markets. The FCC has retained discretion to modify the stopping rule, such as declaring the auction will end after a specified number of rounds, or keeping the auction open even if no new acceptable bids or proactive waivers are submitted. The Commission also retains the discretion to delay, cancel or suspend the auction owing to technical glitches, security breach, natural disaster, weather necessity, or administrative necessity.

#### **Post Auction Procedures:**

*Down Payments.* At the end of the auction, the FCC will issue a Public Notice declaring the auction closed and listing the winning bidders. Within 10 days of the release of that Public Notice, winning bidders will have to bring the total amount on deposit with the government up to 20% of their net winning bids. The net winning bid is the total bid less any applicable bidding credit. Any bidders liable for any withdrawn bid payments also must pay the amounts due by that date. The FCC applies the upfront payment amount already on deposit toward the down payment and/or withdrawn bid payments.

*Long Form Applications.* Within 30 days of the release of the Public Notice announcing the close of the auction, winning bidders must file the long form application for the construction permit. After filing, the FCC will list the long form applications on a Public Notice, the release of which will trigger the 30 day period for filing petitions to deny.

*Final Payments.* The remaining 80% of the winning bid amount must be paid when the FCC announces via Public Notice that an application is ready to be granted. Typically, the Public Notice will set a date for making the final payment that is 10 business days after the release of the Public Notice. The construction permit will be granted after the total winning bid amount has been paid.

*Refunds.* If an applicant does not win any construction permit in the auction, the FCC will refund the amount of its upfront payment. Refund processing usually takes approximately two weeks. If an applicant has used up all of its activity waivers, and has not withdrawn any bids, it may request a refund before the close of the auction.

*Default.* If a high bidder fails to make the required down payment on time, fails to submit an acceptable long form application, fails to make the final full payment, or is otherwise disqualified (*e.g.*, auction misconduct or collusion, the long form is un-grantable, or a petition to deny raises qualification issues that the FCC determines to have merit), that bidder will be declared in default. The FCC may re-auction the permit in a later auction, or offer it to the next highest bidder from this auction at their final bid. The amount of the default penalty is the same as the withdrawn bid payment (discussed above) *plus* 3% of the non-defaulting winner's high bid, or if the non-defaulting winner's high bid turns out to be higher than the defaulting winner's bid, the 3% penalty is calculated based on the defaulter's high bid. If the default or disqualification is based on bad faith, gross misconduct, or misrepresentation, the FCC could also declare the applicant and its principals ineligible for future auctions and may take any other action it deems appropriate, such as initiating a proceeding to revoke that bidder's existing licenses.

*Construction.* Once an applicant has received a construction permit, it will have three years to build the station.

While some FCC auctions of high stakes wireless telecommunications frequencies have lasted over a month, the broadcast auction could be finished in roughly two weeks. Barring any petitions to deny or other complications, a winning bidder could have a construction permit in hand as early as three to four months from the close of the auction.