

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

In the matter of
Connoisseur Media, LLC Petition for Refund of
Winning Bid in Auction 37 for FM Construction
Permit for Pacific Junction, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2011

Released: February 24, 2011

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a request for refund of a winning bid paid by Connoisseur Media, LLC ("Connoisseur") for an FM construction permit for Pacific Junction, Iowa, that it won in Auction 37. As a result of interference issues raised by the Federal Aviation Administration ("FAA") on behalf of itself and the United States Air Force ("Air Force") after the close of the auction, the Commission's Media Bureau recently deleted the Pacific Junction allotment from the FM Table of Allotments, and Connoisseur is no longer authorized to operate an FM radio station on channel 299 in the vicinity of Pacific Junction. In light of the specific circumstances of this case, we find that it is appropriate to refund the winning bid amount to Connoisseur.

II. BACKGROUND

2. In a Commission auction of FM permits conducted in 2004 (Auction 37), Connoisseur won an FM construction permit for the Pacific Junction, Iowa allotment with a net winning bid of \$4,397,250.1 Connoisseur filed a long-form license application and paid in full the winning bid amount. Connoisseur was found to have complied with applicable requirements and was thus awarded a construction permit on March 18, 2005.2 Subsequently, Connoisseur filed for a minor modification of its original authorization in which it proposed operation on the same existing tower at the same antenna height, and the modification of its permit was granted on July 5, 2007.3

3. A few months later, on November 30, 2007, the FAA issued a Notice of Presumed Hazard objecting to Connoisseur's proposed operation of the FM station on the 107.7 MHz frequency (Channel 299), because of potential interference to FAA localizer frequencies used for air traffic control

1 FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, Public Notice, 20 FCC Rcd 1021 (MB/WTB 2004).

2 File No. BNPH-20041228AAI.

3 File No. BMPH-20061019AAM.

and as navigational aids for aircraft.⁴ In an effort to address interference concerns and/or locate alternate frequencies, Connoisseur hired consultants and requested that its July, 2010 construction deadline be tolled while it pursued possible solutions.⁵

4. Connoisseur has documented its numerous attempts, employing engineers, attorneys and FAA consultants, to resolve the concerns regarding its construction permit.⁶ In conjunction with the FAA, Connoisseur attempted to identify substitutes for the FAA localizer frequencies that were predicted to suffer interference from a station operating on the Pacific Junction frequency. Because one of the localizer frequencies subject to potential interference is used by the Air Force, Connoisseur sought to work with the Air Force to resolve outstanding issues. It also sought to determine whether there were any other FM channels that could be substituted for Channel 299 at Pacific Junction, a process that involved negotiations with other FM licensees. Connoisseur states that it became evident after additional examination that the frequency was essentially unusable in the Pacific Junction area.⁷

5. On March 27, 2009, Connoisseur filed a request for a refund of all of the payments that it had made in connection with its winning bid for the Pacific Junction FM permit, as well as interest, arguing that it was awarded a channel that cannot be constructed because of FAA interference issues unknown at the time of auction, and that those issues cannot be resolved through technical changes and/or negotiations with the FAA and the Air Force.⁸ Connoisseur supplemented its request on June 26, 2009, providing further background information, including additional details on the extent of its due diligence research efforts undertaken prior to the start of Auction 37.⁹

6. On November 25, 2009, Connoisseur submitted its Second Supplement, in which it reported that the FAA had again issued a Notice of Presumed Hazard objecting to the use of the Pacific Junction channel due to predicted interference to the Instrument Landing System frequency configurations for Eppley Airfield at Omaha, Nebraska, and Offutt Air Force Base.¹⁰ The FAA also determined that replacement frequencies could not be found.¹¹

7. On May 14, 2010, the Audio Division of the Commission's Media Bureau issued a Notice of Proposed Rule Making, proposing, on its own motion, the deletion of the FM Channel 299C2 at

⁴ Federal Aviation Administration, "Notice of Presumed Hazard," Aeronautical Study No. 2007-ACE-3320-OE, issued Nov. 30, 2007.

⁵ Letter from David D. Oxenford, Esq. to Marlene H. Dortch, Secretary, Request for Tolling of Construction Period, New, Pacific Junction, Iowa, FCC File No. BMPH-20061019AAM (Dec. 20, 2007).

⁶ See Petition for Refund of Winning Bid Payment, filed Mar. 27, 2009 ("Petition"); Supplement to Petition for Refund of Winning Bid Payment, filed June 26, 2009 ("Supplement"); Second Supplement to Petition for Refund of Winning Bid Payment, filed Nov. 25, 2009 ("Second Supplement").

⁷ See, e.g., Supplement at 8-9.

⁸ See Petition at 1.

⁹ In its Petition and its June 26, 2009, Supplement, Connoisseur submitted several consultant reports and asserted that it had performed all the due diligence that could reasonably be expected of a reasonable applicant for an FM station. See Supplement at 3. It noted that it had obtained an FAA No Hazard determination with regard to the tower specified in its initial authorization and that FAA issues surfaced only after it filed a modification application specifying the same antenna height on the same tower.

¹⁰ Second Supplement at 1-3.

¹¹ *Id.*

Pacific Junction, Iowa.¹² In that *NPRM*, the Audio Division recognized that the proposed deletion would deprive Pacific Junction residents of a new FM broadcast service, but acknowledged that “the FAA problems associated with Channel 299C2 appear to be too substantial to permit the construction and operation of a new Pacific Junction station” and that “the retention of the FM allotment at Pacific Junction would no longer serve the public interest.”¹³ Connoisseur was the only party to file comments.¹⁴

8. On November 24, 2010, the Audio Division issued a Report and Order deleting Channel 299C2 at Pacific Junction, Iowa from the Table of FM Allotments and cancelling Connoisseur’s construction permit.¹⁵

III. DISCUSSION

9. In view of the deletion of the Pacific Junction allotment from the Table of FM Allotments and the cancellation of Connoisseur’s construction permit as described above, we find it appropriate to refund Connoisseur’s winning bid payment.

10. The Commission’s competitive bidding rules are designed to maintain a fair and efficient license assignment process that promotes a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.¹⁶ Under this process as applied in Auction 37, the bidder who submits the highest gross bid is designated the winning bidder, assumes a binding obligation to pay its full bid amount, and is awarded a permit after it demonstrates its legal and financial qualifications to hold the authorization and makes full payment.¹⁷ Strict enforcement of each bidder’s obligation to pay its winning bid amount is critical to assuring that the Commission assigns licenses and construction permits to the parties that value them most highly and will best put them to use for the benefit of the public.¹⁸

11. In general, the post-auction discovery of circumstances (whether new or preexisting) relating to a construction permit does not relieve a winning bidder of its obligation to pay its winning bid.¹⁹ Indeed, the Commission’s auction process relies on each auction applicant to make determinations about the value of the permit or permits it seeks to win. For this reason, the Commission has long urged applicants to take great care in making such due diligence evaluations as part of their decision to

¹² Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations, Pacific Junction, Iowa, MB Docket No. 10-108, *Notice of Proposed Rule Making*, 25 FCC Rcd 4983 (MB 2010) (“*NPRM*”).

¹³ *Id.* at 4984 ¶ 4.

¹⁴ See Comments of Connoisseur Media, LLC, filed July 6, 2010.

¹⁵ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Pacific Junction, Iowa, MB Docket No. 10-108, *Report and Order (Proceeding Terminated)*, 25 FCC Rcd 16253 (Audio Division, MB 2010).

¹⁶ 47 U.S.C. § 309(j)(3)(A), (D).

¹⁷ See 47 C.F.R. §§ 1.2104(g)(2), 1.2108(d)(1), 1.2109(a).

¹⁸ See, e.g., *Morris Communications, Inc., Memorandum Opinion and Order*, 23 FCC Rcd 3179, 3194-95 at ¶¶ 34-35 (2008), *aff’d*, 566 F.3d 184 (D.C. Cir. 2009) (upholding denial of request for waiver of installment payment rules where licensee defaulted on its installment payment obligations and licenses automatically cancelled by operation of Commission’s rules); see *PCS Partners, L.P., Petition for Waiver and Request for Refund, Order*, 22 FCC Rcd 4143 (2007) (“*PCS Partners*”) (denying licensee’s request for waiver of its payment obligation and refund of its payment for licenses it won at auction on account of delay in awarding licenses where third party had filed petition to deny opposing grant of licenses).

¹⁹ See *PCS Partners*, 22 FCC Rcd at 4148-49.

participate in any auction. In advance of each auction, the Commission cautions all potential auction participants that they “are solely responsible for investigating and evaluating all technical and market place factors” that may bear on the value and suitability of the authorizations being offered.²⁰ Potential applicants are strongly warned that the Commission “makes no representations or warranties” concerning any winning bidder’s ability to use a permit for that bidder’s intended use.²¹ As Connoisseur acknowledges, the Commission issued such a warning to potential bidders in Auction 37.²²

12. While the responsibility for due diligence assessments relating to construction permits offered at auction rests solely with auction participants, we believe that grant of relief would be equitable in this case. We note that because Connoisseur timely and fully paid its winning bid obligation, and has documented numerous post-auction attempts to resolve interference problems raised by the FAA, we have no reason to doubt the sincerity of Connoisseur’s winning bid. In addition, given that the Pacific Junction allotment has been deleted, the Commission cannot offer a new construction permit for the allotment and neither Connoisseur nor any other party can provide broadcast FM service as originally envisioned when the now-cancelled construction permit won by Connoisseur was offered in Auction 37. We therefore grant Connoisseur’s petition for refund of the amount of its winning bid for the Pacific Junction permit.

13. While Connoisseur also requests reimbursement of additional amounts beyond the amount of its net winning bid “representing the lost opportunity costs” that it claims to have incurred since the payment of its winning bid amounts,²³ we are unable to grant that portion of Connoisseur’s request because the Commission lacks legal authority to pay interest to auction applicants on money that it refunds to them.²⁴

²⁰ See, e.g., Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 10570, 10577-79 (2004) (“*Auction 37 Procedures Public Notice*”).

²¹ Specifically, Auction 37 participants were advised in a public notice issued prior to the start of the auction process:

Potential bidders are solely responsible for investigating and evaluating all technical and market place factors that may have a bearing on the value of the FM broadcast facilities. **The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that a FCC auction represents an opportunity to become a FCC permittee in the broadcast service, subject to certain conditions and regulations. A FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does a FCC construction permit or license constitute a guarantee of business success.** Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

Auction 37 Procedures Public Notice, 19 FCC Rcd at 10577 (emphasis in original).

²² See Supplement at 2.

²³ Specifically, Connoisseur seeks reimbursement of an additional amount of \$828,243,88, which it calculates based on the 10-year U.S. Treasury bond rate at the time its auction payments were made. Petition at 5.

²⁴ See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (applying the “no-interest rule,” under which interest cannot be recovered from the U.S. government in the absence of an express congressional authorization of the award of interest). See also 31 U.S.C. § 1341(a)(1)(B) (prohibiting any officer or employee of the U.S. government from involving the government in an obligation for the payment of money before an appropriation is made unless authorized by law); 47 U.S.C. § 309(j)(8) (requiring the Commission to deposit any upfront payments by qualified bidders in an interest-bearing account and to transfer the accrued interest to the Telecommunications Development Fund within 45 days of the conclusion of an auction).

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, Connoisseur may seek, in accordance with the instructions in Attachment A, a refund from the Commission's Office of Managing Director of \$4,397,250, which is the amount paid to the Commission in connection with its winning bid for the Pacific Junction, Iowa FM permit in Auction 37.

15. IT IS FURTHER ORDERED that this Order and an ACH Vendor Form (SF-3881, Version 2/03) shall be sent to Connoisseur and its representatives by certified mail, return receipt requested. This action is taken pursuant to authority delegated by section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman
Chief, Wireless Telecommunications Bureau

Attachment A – Refund Instructions
ACH Payment Enrollment Form – SF-3881

ATTACHMENT A

The Commission will make refunds upon compliance with the following procedures:

- For each payer of record submit, an Automated Clearing House Vendor/Miscellaneous Payment Enrollment Form (“ACH form”) (see sample attached).²⁵ You may obtain additional copies of this form at <http://www.fms.treas.gov/pdf/3881.pdf>.

The ACH form may be either faxed or mailed to the Commission. The fax number is: (202) 418-2843. The mailing address is: Federal Communications Commission, Office of the Managing Director, Attention: Auctions Accounting Group, Room 1-C864, 445 12th St. SW Washington, D.C. 20554. If you have any questions concerning the completion of this form, please contact Gail Glasser at (202) 418-0578.

Refunds will be processed within approximately two weeks of the Commission’s receipt of the ACH form and accompanying letter from the payer of record.

²⁵ Refunds will be processed via ACH credits. ACH is a domestic funds transfer system providing an electronic parallel to the Federal Reserve check clearing system. ACH is governed by the Rules of the National Automated Clearing House Association. Generally speaking, an ACH is an instrument for moving money electronically from one participating financial institution to another.