

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

In the Matter of)
)
Petition for Reconsideration filed by)
Black Hills Broadcasting, L.L.C.)
)

ORDER

Adopted: September 28, 1999

Released: September 28,

1999

By the Auctions and Industry Analysis Division:

1. This *Order* is in reference to the Petition for Reconsideration ("Petition") filed by Black Hills Broadcasting, L.L.C. ("BHB") of the Auctions and Industry Analysis Division ("Division") decision denying BHB's request for waiver of the FCC Form 175 ("short-form application") filing deadline for Auction No. 25.¹ We deny BHB's Petition and affirm our underlying determination denying BHB's waiver request. Further, we reject BHB's request for postponement of Auction No. 25.² This request was predicated on the pendency of BHB's Petition, which we resolve in this *Order*.

2. BHB filed a letter, on September 8, 1999, requesting waiver of the FCC Form 175 filing deadline for Auction No. 25, claiming that it did not have notice of the short-form

¹ See Petition for Reconsideration filed by Black Hills Broadcasting, L.L.C., dated September 22, 1999 ("Petition").

² See Letter from Joseph P. Benkert, counsel for Black Hills Broadcasting, L.L.C., to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (September 24, 1999).

application filing deadline.³ Subsequently, on September 14, 1999, the Division issued a decision denying BHB's request for waiver, finding that BHB did not present unique circumstances sufficient to justify grant of the waiver request.⁴ The Division stated that notice of the auction and relevant filing deadlines was made via public notices and the *Federal Register*.⁵ We held that applicants have a responsibility to review such sources and that lack of actual notice did not excuse BHB's failure to meet the application deadline.⁶

3. In its Petition, BHB contends that because the Wireless Telecommunications Bureau ("Bureau") did not mail it a Bidder Information Package, BHB did not receive notice of the filing deadline for participation in Auction No. 25 until after the deadline had passed.⁷ In a *Public Notice* released on July 9, 1999, the Commission set forth the August 20, 1999 filing deadline for short-form applications.⁸ BHB argues, however, that the Bureau was obligated to mail BHB, and all other applicants, a Bidder Information Package and that the Bureau's failure to do so was directly contrary to its stated policy and violated the

³ See Letter from Jim Didier, Black Hills Broadcasting, L.L.C., to Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (September 8, 1999).

⁴ See Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Jim Didier, Black Hills Broadcasting, L.L.C., DA 99-1872 (rel. September 14, 1999) ("Division Letter").

⁵ Division Letter at 2.

⁶ *Id.* at 2-3.

⁷ Petition at 2.

⁸ See "Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-1346 (rel. July 9, 1999).

Commission's directive to the Bureau to mail applicants Bidder Information Packages.⁹ We disagree. We believe that the Commission has fully satisfied its obligations to inform the public of the filing deadlines and procedures for Auction No. 25 through the issuance of public notices and other documents.¹⁰

4. BHB relies on two public notices released in 1997 to support its contention that the Bureau was obligated to mail it a Bidder Information Package, or otherwise provide it with personal notice of the FCC Form 175 filing deadline.¹¹ These public notices, which set forth the Commission's auction schedule for 1998, encouraged parties to contact the FCC's National Call Center and request placement on the mailing list for the auction in which they were interested to ensure that they would receive a Bidder Information Package.¹² Nothing, however, in the Commission's rules requires that the Bureau compile or mail out Bidder Information Packages to individual auction applicants or otherwise make personal notifications of upcoming auctions-related deadlines. To the contrary, these notices strongly urge applicants to regularly visit the Commission's internet web site to keep apprised of the FCC's auction schedule and relevant

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Petition at 2-10.

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See, e.g., "Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-1346 (rel. July 9, 1999); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920 (1998), *recon denied*, *Memorandum, Opinion and Order*, FCC 99-74 (rel. April 20, 1999), *modified*, *Memorandum Opinion and Order*, FCC 99-201 (rel. August 5, 1999).

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Petition at 4.

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See "Spectrum Auction Schedule for 1998," *Public Notice*, 13 FCC Rcd 5950 (rel. September 18, 1997); "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, 12 FCC Rcd 19726 (rel. November 25, 1997).

documents.¹³ Further, the Public Notice released on November 25, 1997 stated that the auction for broadcast licenses would take place in the fourth quarter of 1998.¹⁴ In light of the fact that the auction did not take place in 1998, an interested party, in the exercise of due diligence, should have made inquiries about the scheduling of the broadcast auction prior to this time. It is incumbent upon interested parties to assume responsibility for keeping abreast of all developments and information regarding auctions in which they have an interest.

5. Moreover, the Bidder Information Package is but one tool the Bureau utilizes to provide important information to auction participants. It can provide such information through other means, such as public notices and other publicly released documents. In fact, the public notices issued for Auction No. 25 contain all the information needed by bidders to participate in the auction. The decision whether or not to issue a Bidder Information Package in connection with any specific auction is squarely within the Bureau's delegated authority.¹⁵ While the Bureau must, of course, notify interested parties of the terms and conditions of an auction, it is not under any obligation, whatsoever, to provide such notification specifically through a Bidder Information Package. Thus, BHB is simply incorrect in asserting that the Bureau is under a Commission directive to mail Bidder Information Packages to individual applicants.¹⁶ Although BHB cites *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976), to support its argument that it was entitled to receive personal notice of the requirements for participation in Auction No. 25, that case is inapposite. In *Gardner*, the court found that personal notice of a Commission decision was required in the case

¹³ "Spectrum Auction Schedule for 1998," *Public Notice*, 13 FCC Rcd 5950, 5951 (rel. September 18, 1997); "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, 12 FCC Rcd 19726, 19729 (rel. November 25, 1997).

¹⁴ "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, 12 FCC Rcd 19726, 19728 (rel. November 25, 1997).

¹⁵ See 47 C.F.R. § 0.331.

¹⁶ See Petition at 7-10.

of adjudicatory opinions and orders pursuant to Section 0.445 of the Commission's Rules.¹⁷ Establishment of a pre-auction deadline is not an adjudicatory action under Section 0.445. Thus, the Bureau was not required by Commission rules to mail BHB notice of auction-related deadlines. Finally, by not issuing a Bidder Information Package, the Bureau did not violate the Administrative Procedure Act.¹⁸ That Act requires the Commission to seek notice and comment when amending a rule or creating a new rule, but not when modifying an internal Commission procedure.¹⁹

6. For the reasons discussed above, BHB's Petition for Reconsideration IS DENIED. In light of this finding, BHB's request to postpone Auction No. 25 IS DENIED. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.²⁰

Sincerely,

Amy J. Zoslov
Chief, Auctions and Industry
Wireless Telecommunications

Analysis Division
Bureau

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See 47 C.F.R. § 0.445.

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5 U.S.C. §§ 551 *et seq.*

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5 U.S.C. § 553(b).

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47 C.F.R. § 0.331.