

MULLANEY ENGINEERING, INC.
9049 SHADY GROVE COURT
GAITHERSBURG, MD 20877

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)
)
Auction of FM Broadcast Construction) DA 05-1076
Permits Scheduled for November 1, 2005)
FM Auction No. 62)



To the Commission:

SUPPLEMENTAL REPLY COMMENTS

(late filed - request for waiver)

Mullaney Engineering, Inc. (“MEI”), hereby submits supplemental reply comments in response to the Public Notice released by the Commission on April 14, 2005, in DA 05-1076 (“PN”), which solicits comments concerning the reserve prices or minimum opening bids and other auction procedures for Auction 62. During the previous FM Auction (#37) MEI acted as a bidding agent, and therefore has direct experience in the procedures which are now being proposed. Based upon past experience, MEI does not expect favorable action on any of its suggestions, but has still decided to submit them nevertheless so as to establish a formal written record.

Request for Acceptance of Late Comments

MEI recognizes that these supplemental comments are **late filed** and requests that the FCC grant whatever waiver is necessary so as to permit these comments to be officially accepted. The information which caused the need for these supplemental comments is a notice of proposed rulemaking (NPRM) that the FCC issued on May 9, 2005 in MB Docket 05-184 (released just two day ago, thus, there is **good cause for this late filing**).

Supplemental Comments

The NPRM concerns the need, by motion of the staff, **to delete** two existing allotments on Ch. 228A at Leadville, CO and at Aspen, CO. It appears that although the Leadville allotment was **adopted prior to 1985, CDBS failed** to properly record its existence. The allotment had an initial license granted in 1986 but that license was eventually cancelled. Then in 1995 another 301 application at Leadville was filed and a CP was subsequently issued. However, this permit was eventually cancelled for what appears to be failure to complete construction in the authorized time. Both the original Leadville license and CP records **were correctly archived** (by the FCC staff) in the CDBS system so as to indicate that these specific sites or facilities **were no longer entitled** to protection. However, for some reason **CDBS failed** to contain the mandatory allotment record (FA record) indicating if this specific allotment was currently “used” or was “vacant”. Because of this obvious failure in the design & implementation of CDBS, the staff when considering Docket 00-215 was obviously unaware of the Leadville allotment (CDBS had no active records to use to alert the staff) and as a result the docket allotted Ch. 228A to Aspen, CO, which now is severely short spaced.

The dilemma the staff now finds itself in, is the statutory existence of two co-channel Class A FM allotments which are just 46 km apart while the FCC’s own rules mandate a separation of 115 km. The two allotments are nearly **69 km or 43 miles short spaced to each other**. To further complicate matters, there is no alternate channel available for use at **either** location and thus, the staff is now recommending to delete both

channels and await a further expression of interest at either location.

Due Diligence - Buyer Beware

The **purpose** of calling this dilemma to the attention of the Auction 62 request for comments, goes directly to the position of the Audio Division that it is the **sole responsibility of the American public to conduct its own “due diligence”** to insure that the allotment they are bidding on is **viable in all respects**. It is unbelievable that the Audio Division believes it is justified in **shifting the entire burden of due diligence** upon the unsuspecting American public who is forced to rely on the FCC’s own inadequate records which, as shown herein, are in terrible shape, **especially**, when it comes to documenting the status or existence of FM allotments. Today more than 70% of all new FM errors entered into CDBS concern FM rule makings or new FM allotments. Certainly, the **FCC can not be held responsible** for the **economic viability** of any specific allotment but the **FCC certainly has the inherent responsibility** to insure vacant allotments offered at auction **comply with** its own rules, has received any necessary foreign concurrence and is **not subject** to any on-going reconsideration to change or delete the allotment.

Questions to consider: if an FM allotment at the time the auction notice is issued is currently under consideration to move it from city A (population 10,000) to city B (population 150,000) would not the minimum bid change? Does the winning bidder automatically obtain the rights (at no additional cost) to operate at city B, if the pending rule making is subsequently granted?

While the Leadville allotment was missing from CDBS for the past 5-1/2 years **it is not the only such FM allotment which was not properly picked up** during the conversion from the previous engineering data base to the new “improved” CDBS data base. In **Auction 37**, the FCC offered for bid an existing allotment, as officially recorded in Section 73.202 of the FCC rules, on Ch. 287A at Roscoe, SD. However, what the staff was obviously unaware of when issuing the Auction 37 notice, was that similar to Leadville, **CDBS contained no record of the Roscoe allotment**. It was only as a result of my own attempt at due diligence that it was determined that the **Roscoe channel was never in CDBS** and as a result **was similarly (to Leadville) not being protected** from other allotments or applications for the at least the previous 4-1/2 years. Upon receiving an e-mail from myself discussing the problem, the Audio staff verified the facts and inserted the missing Roscoe allotment data into CDBS. Because the unrecorded Roscoe allotment was in the State of South Dakota, no similar technical conflict had developed over the previous 4-1/2 years which most likely **would not have been** the situation if the missing allotment had been located in the State of Texas (for example), a very popular state for new allotment proposals. Had the Audio staff expended **just 10% of** the due diligence the staff believes the American public must conduct, the Audio staff would have easily determined for themselves that the allotment data was missing from CDBS. I guess the American public is **lucky that they did not already purchase (\$\$\$) at auction the defective FM allotment** at either Leadville or Aspen.

Given that in FM Auction 37, the FCC received bids in excess of \$180 million dollars, it **would not appear to be** too much to expect that the FCC staff or the FCC's CDBS contractor had already conducted their own due diligence evaluation of the CDBS data **before expecting the American public to do so.**

Before due diligence on new FM allotments can be the responsibility of the "American public", it must first be the responsibility of the "Audio Division", since after all, it is part of their job to accurately maintain CDBS.

Respectfully submitted,

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