

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

In the Matter of)
)
Small Business in Telecommunications)
)
Application for Review of)
Public Notice DA 97-1933)
)
Application for Review of)
Public Notice DA 97-1934)
)
800 MHz Specialized Mobile Radio Auction)
Upper 200 Channels)

ORDER

Adopted: October 21, 1999

Released: October 22, 1999

By the Commission:

1. The Commission has before it two Applications for Review (Applications), filed by Small Business in Telecommunications (SBT) on September 12, 1997. SBT seeks review of a public notice,¹ in which the Wireless Telecommunications Bureau (Bureau) announced changes to auction procedures for the 800 MHz Specialized Mobile Radio (SMR) auction (Auction No. 16), which was scheduled to start on October 28, 1997,² and a second public notice,³ in which the Bureau requested comment on the use of minimum opening bids and reserve prices. For the reasons set forth below, we deny SBT's Applications.

2. SBT first claims that, by these two public notices, the Bureau made substantive changes to the Commission's rules in violation of the Commission's rules regarding delegation of authority⁴ and the

¹ "FCC Announces Changes to Auction Procedures for the 800 Mhz SMR Auction (Auction No. 16)," *Public Notice*, DA 97-1934 (rel. September 5, 1997) ("*Public Notice DA 97-1934*").

² The auction of the 525 800 MHz SMR licenses began on October 28, 1997, and concluded on December 8, 1997, with 14 winning bidders. *See* "800 MHz SMR Auction Closes: Winning Bidders in the Auction of 525 Specialized Mobile Radio Licenses," *Public Notice*, 12 FCC Rcd 20417 (1997).

³ "Comments Sought on Balance Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions," *Public Notice*, DA 97-1933 (rel. September 5, 1997).

⁴ 47 C.F.R. §§ 0.131 and 0.331 (1997).

Administrative Procedure Act (APA),⁵ and therefore committed prejudicial procedural error.⁶ Specifically, SBT argues that the Bureau's actions in, first, implementing "click box" bidding⁷ and exponential smoothing⁸ in addition to setting upfront payment amounts and, second, requesting comment on the use of minimum opening bids or reserve prices for the 800 MHz SMR auction fall outside the parameters of its delegated authority. We disagree. Section 0.131 of the Commission's rules explicitly states that the Bureau has delegated authority to develop, recommend and administer policies, programs and rules concerning auctions of spectrum for wireless telecommunications.⁹ In our Part 1 rulemaking, we clarified that pursuant to 0.131 of our rules, the Chief of the Wireless Telecommunications Bureau has delegated authority to implement all of the Commission's rules pertaining to auctions procedures.¹⁰ This includes the authority to choose competitive bidding designs and methodologies, such as simultaneous multiple round auctions or oral outcry auctions and remote electronic bidding or on-site bidding; conduct auctions; administer application, payment, license grant and denial procedures; and determine upfront and down payment amounts as well as minimum opening bids.¹¹ These actions do not fall under the prohibited activities, set forth in Section 0.331 of the Commission's rules, which include acting upon complaints, petitions, requests, applications for review and notices of proposed rulemaking.¹² Accordingly, the modifications that SBT complains of were within the

⁵ 5 U.S.C. §§ 551 *et seq.*

⁶ Section 1.115 of the Commission's rules requires an application for review to specify, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) the action involves a question of law or policy which has not previously been resolved by the Commission; (iii) the action involves application of a precedent or policy which should be overturned or revised; (iv) an erroneous finding as to an important or material question of fact; (v) or prejudicial procedural error. *See* 47 C.F.R. § 1.115(b)(2) (1998).

⁷ Click box bidding frees bidders from having to type a bid amount on the Bid Submission screen. To place a bid at the minimum acceptable bid amount for a license, a bidder simply must click the appropriate box to put a check mark in it. In prior auctions, the Bid Submission screen showed the Minimum Bid Accepted for each license and provided an entry field where bidders would type their bid for a license. *See Public Notice DA 97-1934.*

⁸ The exponential smoothing formula calculates the bid increment based on a weighted average of the activity received on each license in the current and all previous rounds. This methodology tailors the bid increment for each license based on activity rather than setting a global increment for all licenses. *Id.*

⁹ 47 C.F.R. § 0.131(c).

¹⁰ *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 5686, 5697-5698 (1997) (*Part 1 Order*), where the Commission noted that the Bureau should, to the extent possible, carry out its duties under this authority through the use of orders, public notices, bidder packages, notices disseminated through the electronic bidding system, and other reasonable means and with the benefit of public comment where appropriate. The Commission also noted that such Bureau actions would be subject to review by the full Commission. *See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 454-456 (1997), in which the Commission clarified that the Bureau has the discretion to employ either minimum opening bids or reserve prices or both in future auctions after seeking comment from interested parties.

¹¹ *Id.* *See also* 47 C.F.R. 1.2104.

¹² 47 C.F.R. § 0.331.

Bureau's delegated authority. Furthermore, the Bureau's actions were in compliance with the APA. Pursuant to 5 U.S.C. Section 553(b), an agency may modify procedural rules without notice and comment. Because the rule modifications were procedural in nature and did not affect the substantive rights of interested parties, then the Bureau's actions fall within that exception.¹³

3. Moreover, we do not agree with SBT's contention that the Bureau's actions violate Section 309(j)(3)(E) of the Communications Act of 1934, as amended, which requires that the Commission "ensure that, in the scheduling of any competitive bidding, an adequate period is allowed after issuance of bidding rules, to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the ability of equipment for the relevant services."¹⁴ SBT argues that the proximity of the Bureau's modification of auctions procedures to the October 28, 1997, auction date rendered it impossible for prospective participants to develop business plans and assess market conditions. We have found no evidence that these two modifications had a significant effect on the parties' business plans so as to warrant delay of the auction start date. We believe that prospective participants in the 800 MHz SMR auction had ample time to develop auction strategies and assess market conditions prior to the start of the auction.

4. Finally, we disagree with SBT's claim that reserve prices or minimum opening bids are not in the public interest because they impede the dissemination of licenses to designated entities. The Bureau addressed this issue at length in an order ("*Order*"), released on October 6, 1997, and found, to the contrary, that minimum opening bids are in the public interest in this auction.¹⁵ We agree with the Bureau's reasoning in the *Order* and, therefore, reject SBT's claim.

5. ACCORDINGLY, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that SBT's Applications ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹³ See In the Matter of Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and To Make Changes in the Delegated Authority of Other Bureaus, *Order*, FCC 95-213, 10 FCC Rcd 12751 (1995).

¹⁴ 47 U.S.C. § 309(j)(3)(E) (1997).

¹⁵ See In the Matter of Auction of 800 MHz SMR Upper 10 MHz Band--Minimum Opening Bids or Reserve Prices, *Order*, DA 97-2147, 12 FCC Rcd 16354 (1997).