

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

In the Matter of)	
)	
Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium, LLC)	
)	
Petition for Declaratory Ruling and Motion for Stay of Auction No. 65)	
)	
Auction 65 Public Notice Regarding Long Form/ FCC Form 601 Applications Accepted for Filing)	
)	
Application of AC BidCo LLC for Authorization To Provide Air-Ground Radiotelephone Service in the 800 MHz Band)	FCC File No. 0002653156
)	
Application of LiveTV LLC for Authorization To Provide Air-Ground Radiotelephone Service in the 800 MHz Band)	FCC File No. 0002658043
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2012

Released: June 21, 2012

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny an application for review of the Wireless Telecommunications Bureau’s denial of a Petition for Declaratory Ruling filed jointly by two Auction 65 applicants controlled by Warren Havens, as well as their challenge to the auction itself.¹ The two applicants seek reversal of a series of staff-level decisions responding to their request for clarification of section 22.853 of our rules. This rule prohibits any individual or entity from holding a controlling interest in more than three megahertz of spectrum in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands, the spectrum available in Auction 65. The two applicants further seek to overturn the results of the auction, and they challenge the long-form applications of the winning bidders. We find that the staff correctly rejected the applicants’ earlier requests for relief and conclude that further clarification of section 22.853 is unnecessary and that the challenge to Auction 65 is without merit.

¹ See Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium LLC, Application for Review, filed April 8, 2007 (“Application for Review”).

II. BACKGROUND

2. On February 22, 2005, the Commission released the *Air-Ground Order*, in which it adopted a flexible regulatory approach to determine the future band configuration of the four megahertz of spectrum in the 800 MHz commercial Air-Ground Radiotelephone Service.² Based on the band configuration proposals submitted by interested parties in the proceeding, the Commission decided to assign nationwide air-ground licenses under one of three alternative band configurations, to be determined by the band plan receiving the highest gross aggregate bid in an auction.³ In light of specific circumstances relating to this spectrum, the Commission prohibited any party from obtaining a controlling interest, either at auction or by a post-auction transaction, in more than three megahertz of spectrum in the 800 MHz air-ground band,⁴ thereby preventing a party from holding a controlling interest in more than one of the two licenses offered in Auction 65.⁵

3. The Commission incorporated this eligibility restriction, along with guidance for determining controlling interest, into its rules for the Air-Ground Radiotelephone Service as section 22.853:⁶

No individual or entity may hold, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands (see § 22.857). Individuals and entities with either de jure or de facto control of a licensee in these bands will be considered to have a controlling interest in its license(s). For purposes of this rule, the definitions of “controlling interests” and “affiliate” set forth in paragraphs (c)(2) and (c)(5) of § 1.2110 of this chapter shall apply.⁷

4. On December 9, 2005, the Commission released the *Air-Ground Reconsideration Order and Report and Order*, resolving petitions for reconsideration of the *Air-Ground Order* and adopting competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service.⁸ On January 10, 2006, the Wireless Telecommunications Bureau (“Bureau”) announced that Auction 65, the auction of

² Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403, 4403 ¶ 1 (2005) (“*Air-Ground Order*”).

³ *Id.* at 4405-06 ¶ 1, 4418-22 ¶¶ 24-32.

⁴ *Id.* at 4423-27 ¶¶ 37-44.

⁵ *Id.* at 4405-07 ¶ 1, 4420-21 ¶ 29, 4426-27 ¶ 43. The Commission also requested comment on competitive bidding rules for the 800 MHz commercial Air-Ground Radiotelephone Service. *Id.* at 4464-69 ¶¶ 169-79.

⁶ *Id.* at 4482. See *id.* at 4427 ¶ 44; 47 C.F.R. § 1.2110(c)(2), (c)(5).

⁷ 47 C.F.R. § 22.853.

⁸ Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission’s Rules, Amendment of Parts 1 and 22 of the Commission’s Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, *Order on Reconsideration and Report and Order*, 20 FCC Rcd 19663 (2005).

new licenses in the 800 MHz Air-Ground Radiotelephone Service, would begin on May 10, 2006, and sought comment on various procedures for the auction.⁹

5. On February 21, 2006, the Bureau released its *Auction 65 Procedures Public Notice*, announcing procedures and deadlines for applicants wishing to participate in Auction 65.¹⁰ The Bureau explained that two nationwide commercial licenses in the 800 MHz band would be offered in each of three alternative band configurations¹¹ and that two licenses in only one of the three mutually incompatible band configurations would be awarded.¹² The Bureau established a short-form application filing deadline of March 24, 2006, and an upfront payment deadline of April 17, 2006.¹³ On April 28, 2006, the Bureau released a public notice identifying the nine bidders that had qualified to participate in Auction 65, among which were Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium LLC (together, the “Havens Parties”),¹⁴ both controlled by Warren Havens.¹⁵

6. ***Auctions Division Order.*** On May 1, 2006, nine days prior to the scheduled start date for Auction 65, the Havens Parties filed a combined petition for declaratory ruling regarding Auction 65 and motion to stay the auction (“Petition for Declaratory Ruling” and “Motion for Stay”).¹⁶ They requested an explanation of section 22.853 and portions of the *Air-Ground Order* discussing the license eligibility restriction, as well as a stay of the auction until at least 21 days after the release of a public notice providing the explanation or the release of any subsequent related public notice. The Havens Parties posed four questions about the license eligibility restriction. Two of the questions asked how the restriction would affect bidding agreements among otherwise qualified Auction 65 applicants,¹⁷ and the other two questions concerned the meaning of “controlling interest” as used in section 22.853 and in the *Air-Ground Order*’s discussion of the license eligibility restriction.¹⁸

7. On May 4, 2006, the Bureau released the *Auction 65 Supplemental Procedures Public Notice*, explaining that the computerized competitive bidding system for Auction 65 would not select as provisionally winning more than one bid placed by any single applicant or by multiple applicants that,

⁹ “Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures for Auction No. 65,” *Public Notice*, 21 FCC Rcd 4 (WTB 2006).

¹⁰ “Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 65,” *Public Notice*, 21 FCC Rcd 1278 (WTB 2006) (“*Auction 65 Procedures Public Notice*”).

¹¹ *Id.* at 1280 ¶ 2, 1281 ¶¶ 5-6, 1303 ¶ 88, 1305 ¶ 101, 1312 ¶ 136.

¹² *Id.* at 1281 ¶¶ 5-6, 1303 ¶ 88, 1312 ¶ 136.

¹³ *Id.* at 1300 ¶ 76, 1301 ¶ 81.

¹⁴ “Auction of 800 MHz Air-Ground Radiotelephone Service Licenses; 9 Bidders Qualified to Participate in Auction No. 65,” *Public Notice*, 21 FCC Rcd 4266, 4275-76 (WTB 2006).

¹⁵ See Auction 65 FCC Form 175 filed by AMTS Consortium LLC, file no. 0002543227, and Auction 65 FCC Form 175 filed by Intelligent Transportation & Monitoring Wireless, file no. 0002543254. See also Petition for Declaratory Ruling and Motion for Stay and Rescheduling of Auction 65 of Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, filed May 1, 2006, at 4-5 n.6 (“Petition for Declaratory Ruling” and “Motion for Stay”).

¹⁶ Petition for Declaratory Ruling and Motion for Stay.

¹⁷ Petition for Declaratory Ruling at 6, 8-9.

¹⁸ *Id.* at 6, 7-8, 9-10.

based on their short-form auction applications, shared a common controlling interest.¹⁹ The Bureau observed that the Havens Parties had reported on their short-form applications that they shared a common controlling interest.²⁰

8. The Havens Parties then filed a supplement to their Petition for Declaratory Ruling (“Petition Supplement”), dated May 8, 2006, contending that, although the *Auction 65 Supplemental Procedures Public Notice* had, “in minor part,” addressed the issues that they had raised in their Petition, it had raised additional questions requiring clarification.²¹ They claimed that the requested additional clarification would be subject to the requirements of the Administrative Procedure Act and said that, for this reason, they were now seeking a 30-day stay of the auction rather than the previously requested 21 days.²² The Havens Parties also suggested for the first time that section 22.853 was, without the additional clarification or amendment they demanded, unconstitutionally vague and therefore unenforceable.²³

9. On May 9, 2006, the Auctions and Spectrum Access Division (“Auctions Division”) denied the Havens Parties’ Petition for Declaratory Ruling and dismissed their Motion for Stay.²⁴ The Auctions Division discussed the four questions raised in the Petition for Declaratory Ruling, noting that it would be premature to make any decision regarding the application of the rules to the particular circumstances of the Havens Parties or any other applicants.²⁵ The Havens Parties’ Petition Supplement, dated only the day before, was not directly addressed in the *Auctions Division Order*.

10. **Bureau MO&O.** On May 10, 2006, the Havens Parties submitted a request for reconsideration of the *Auctions Division Order* (“Reconsideration Petition”) in which they argued that the Commission lacked authority to hold Auction 65, because, they said, the Auctions Division had failed to fully address their issues.²⁶ Also on May 10, 2006, Auction 65 bidding began, with both Havens Parties participating. The auction closed on June 2, 2006, with two winning bidders, AC BidCo LLC (“BidCo”) and LiveTV, LLC (“LiveTV”).²⁷

11. On August 7, 2006, the Havens Parties filed a “Petition for Clarification, and Action Deemed Appropriate, Under Sections 1.939, 1.2108, and 1.41” (“Auction 65 Applications Petition”) in which they

¹⁹ “Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006; Clarification of Treatment of Bids by Bidders Sharing a Controlling Interest,” *Public Notice*, 21 FCC Rcd 5058, 5058-60 (WTB 2006) (“*Auction 65 Supplemental Procedures Public Notice*”).

²⁰ *Id.* at 5058 n.4.

²¹ AMTS Consortium LLC, and Intelligent Transportation and Monitoring Wireless LLC, Supplement to Petition for Declaratory Ruling, and Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65 Expedited Action Requested (filed May 8, 2006) at 2 (“Petition Supplement”).

²² *Id.* at 5, 7, 9-10.

²³ *Id.* at 5 and 10 & n.13.

²⁴ Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Petition for Declaratory Ruling and Motion for Stay of Auction No. 65, *Order*, 21 FCC Rcd 5117 (WTB/ASAD 2006) (“*Auctions Division Order*”).

²⁵ *Id.* at 5119-22 ¶¶ 7-13.

²⁶ Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Response to and Informal Request for Reconsideration of Order Regarding Petition for Declaratory Ruling, and Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65 Expedited Action Requested, filed May 10, 2006 (“Reconsideration Petition”).

²⁷ “Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Closes; Winning Bidders Announced for Auction No. 65,” *Public Notice*, 21 FCC Rcd 6304, 6312 (2006).

reiterated their request for clarification of the rules as applied to Auction 65, “including with regard to the long forms of the parties who won Auction 65 licenses[,]” i.e., BidCo and LiveTV.²⁸ The Havens Parties attached and incorporated by reference their prior petitions and supplement in this proceeding.²⁹ BidCo and LiveTV filed oppositions to the Auction 65 Applications Petition,³⁰ and the Havens Parties filed a reply.³¹

12. The Bureau’s Mobility Division dismissed the Auction 65 Applications Petition on October 31, 2006, determining that because the petition raised the same issues as did the pending Reconsideration Petition, the Bureau would address these Havens Parties’ concerns when it resolved the Reconsideration Petition.³² The Commission concurrently issued a public notice granting the BidCo and LiveTV long-form applications.³³ On November 30, 2006, the Havens Parties sought reconsideration of the Mobility Division order (“Auction 65 Applications Reconsideration Petition”),³⁴ and BidCo and LiveTV filed oppositions.³⁵ On March 9, 2007, the Bureau, in the *Bureau MO&O*, denied both the Reconsideration Petition and the Auction 65 Applications Reconsideration Petition.³⁶

13. **Pending pleadings.** On April 8, 2007, the Havens Parties filed an application for review of the *Bureau MO&O* (“Application for Review”),³⁷ which we address today. We also consider oppositions filed by LiveTV³⁸ and BidCo³⁹ and the Havens Parties’ reply to BidCo’s opposition.⁴⁰

²⁸ Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, Petition for Clarification, and Action Deemed Appropriate, Under Sections 1.939, 1.2108 and 1.41, filed Aug. 7, 2006 (“Auction 65 Applications Petition”).

²⁹ *Id.*

³⁰ AC BidCo LLC, Opposition to Petition for Clarification, and Action Deemed Appropriate, filed Aug. 14, 2006; LiveTV, LLC, Opposition to Petition for Clarification and Action, filed Aug. 14, 2006.

³¹ Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium LLC, Reply to Oppositions to Petition for Clarification and Action Deemed Appropriate, Under Section 1.939, 1.2108 and 1.41, filed Aug. 21, 2006.

³² Auction 65 Public Notice Regarding Long Form/FCC Form 601 Applications Accepted for Filing, *Order*, 21 FCC Rcd 13010, 13011-12 ¶¶ 5-7 (WTB/MD 2006).

³³ “Wireless Telecommunications Bureau Grants 800 MHz Air-Ground Licenses, Auction No. 65,” *Public Notice*, 21 FCC Rcd 13022 (WTB 2006).

³⁴ *See* Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, Petition for Reconsideration, filed Nov. 30, 2006 (“Auction 65 Applications Reconsideration Petition”); FCC File Nos. 0002653156, 0002658043.

³⁵ AC BidCo LLC, Opposition to Petition for Reconsideration, filed Dec. 7, 2006, FCC File No. 0002653156; LiveTV, LLC, Opposition to Petition for Reconsideration, filed Dec. 12, 2006, FCC File No. 0002658043.

³⁶ Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Petition for Declaratory Ruling and Motion for Stay of Auction No. 65, *Memorandum Opinion and Order*, 22 FCC Rcd 4788, 4793-94 ¶¶ 16-17 (WTB 2007) (“*Bureau MO&O*”).

³⁷ *See supra* note 1.

³⁸ LiveTV, LLC, Opposition to Application for Review (filed April 23, 2007) (“LiveTV Opposition”).

³⁹ AC BidCo LLC, Opposition of AC BidCo LLC to Application for Review (filed April 20, 2007) (“AC BidCo Opposition”).

⁴⁰ Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium LLC, Reply to Opposition to Application for Review (filed May 3, 2007) (“Havens Parties Reply to BidCo”).

14. In their Application for Review, the Havens Parties allege that the staff orders in this proceeding have not adequately responded to their request for clarification.⁴¹ They argue that, in the absence of further clarification, section 22.853 is unconstitutionally vague and unenforceable.⁴² They dispute the Bureau's characterization of their Reconsideration Petition as a belated effort to obtain reconsideration of the *Air-Ground Order*.⁴³ They maintain their challenge to the Auction 65 results.⁴⁴ Finally, they charge that the Commission's powers regarding licensing "and other matters 'in the public interest'" are unconstitutional.⁴⁵

III. DISCUSSION

15. The Commission will grant an application for review of a final action taken on delegated authority only when the action under review conflicts with statute, regulation, precedent, or established Commission policy; involves a question of law or policy which has not previously been resolved by the Commission; involves application of a precedent or policy that should be overturned; makes an erroneous finding as to an important or material factual question; or involves prejudicial procedural error.⁴⁶ As we explain, the Havens Parties' Application for Review fails to establish any of these grounds.

16. **Requested clarification.** The Havens Parties allege that the staff orders in this proceeding have not adequately responded to some of the issues they posed in their previous pleadings.⁴⁷ In their Petition for Declaratory Ruling, the Havens Parties presented their issues as four questions, which the Auctions Division addressed in the *Auctions Division Order*.⁴⁸ Questions 2 and 3 concerned the effect of the air-ground eligibility restriction on the participation in the auction of applicants with a bidding agreement.⁴⁹ The Reconsideration Petition did not raise any issues regarding the responses provided in the *Auctions Division Order* to these two questions, and neither does the Application for Review. We thus conclude that the responses to only Questions 1 and 4 are being challenged here and accordingly do not consider Questions 2 and 3 in this order.⁵⁰

⁴¹ Application for Review at 1-6.

⁴² *Id.* at 3.

⁴³ *Id.* at 5-6.

⁴⁴ The Havens Parties suggest in their Application for Review that they are willing to abandon their challenge to Auction 65 and to the auction's winning bidders, so long as they can still pursue their claim that section 22.853 is unconstitutionally vague. *Id.* at 7; *see infra* para. 25. However, they withdraw this suggestion in a subsequent pleading. Havens Parties Reply to BidCo at 1.

⁴⁵ Application for Review at 6-7.

⁴⁶ *See* 47 C.F.R. § 1.115. *See also* Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, In re Jay Lubliner and Deborah Galvin, Potomac, Maryland, *Memorandum Opinion and Order*, 13 FCC Rcd 16107, 16109 ¶ 4 (1998).

⁴⁷ Application for Review at 2, 6.

⁴⁸ *See Auctions Division Order*, 21 FCC Rcd at 5119-22 ¶¶ 7-13.

⁴⁹ Petition for Declaratory Ruling at 6, 8-9.

⁵⁰ Our decision today addresses only the arguments explicitly raised by the Havens Parties in their Application for Review. Although the Havens Parties assert that "[t]here is no need in an administrative appeal to recite the actual language of issues previously clearly presented, and [that they] do not do so[.]" our rules do in fact require that they plainly state in their application for review the questions they are presenting for review and all relevant arguments and facts. *See* Application for Review at 2; 47 C.F.R. § 1.115(b)-(c). The Commission has made clear that incorporation by reference of pleadings and other filings in the same or other proceedings by an applicant for review is not sufficient to meet the requirements of section 1.115. *See* Tama Radio Licenses of Tampa, Florida, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 7588, 7589 ¶ 2 (2010) ("The Commission is not required to sift

17. The remaining two questions, Questions 1 and 4, concerned the definition of “controlling interest”:

1. Does “controlling interest” in Section 22.853 include all “affiliates” as defined [in] Section 1.2110?⁵¹

. . . .

4. In the Air-Ground Order, paragraph 44 . . . , what is meant by: “together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band?”⁵²

18. The *Auctions Division Order* explained that section 22.853 and the *Air-Ground Order* provided extensive detail about what constitutes a controlling interest, as well as specific guidance on when entities are considered to have control on the basis of their affiliation.⁵³ The order then addressed Questions 1 and 4 insofar as they presented issues that could be relevant to Auction No. 65. The Auctions Division explained that to the extent that the Havens Parties were seeking an explanation of how the Auction 65 eligibility rules would apply to them, the question had already been answered.⁵⁴ The *Auction 65 Supplemental Procedures Public Notice* had specified that the Havens Parties could not be assigned more than one license in the auction, because they had both reported on their Auction 65 short-form applications that they were controlled by Warren Havens.⁵⁵ The Auctions Division further explained that to the extent that the Havens Parties were trying to extract a ruling in advance of the auction on how these rules would apply to other auction applicants, a pre-auction ruling based on information required to be submitted by the winning bidders only after the auction closed would be premature.⁵⁶ Rather, as detailed in the *Auction 65 Procedures Public Notice*, the appropriate time to challenge the eligibility of other applicants would come after the conclusion of bidding, at the long-form application stage.⁵⁷ Accordingly,

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through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review.”); Red Hot Radio, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 6737, 6745 n.63 (2004) (“Such incorporation by reference is not allowed under our rules. Our rules do not allow for a ‘kitchen sink’ approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.”).

⁵¹ Petition for Declaratory Ruling at 6, 7-8.

⁵² *Id.* at 6, 9-10.

⁵³ *Auctions Division Order*, 21 FCC Rcd at 5119 ¶ 8.

⁵⁴ *Id.* at 5120 ¶ 9.

⁵⁵ *Id.* at 5119 ¶ 6, 5120 ¶ 9; see *Auction 65 Supplemental Procedures Public Notice*, 21 FCC Rcd at 5058 & n.4. Both Havens Parties reported on their short forms that Warren Havens held a 100 percent interest in them. See Auction 65 FCC Form 175 filed by AMTS Consortium LLC, file no. 0002543227, and Auction 65 FCC Form 175 filed by Intelligent Transportation & Monitoring Wireless, file no. 0002543254.

⁵⁶ *Auctions Division Order*, 21 FCC Rcd at 5119 ¶¶ 6, 10. The Commission is not obligated to issue advisory opinions in response to a request for declaratory ruling and in numerous cases has found it inappropriate to do so. See, e.g., *Adapso, the Computer Software and Services Industry Ass’n, Inc. et al.*, 10 FCC Rcd 12128, 12128-29 ¶ 5 (1995); *Petition of Motorola Satellite Communications for Declaratory Ruling Concerning Participation of Comsat Corporation in a New Inmarsat Satellite System Designed To Provide Service to Handheld Communications Devices*, 9 FCC Rcd 7693, 7699 ¶ 20 (1994).

⁵⁷ See *Auctions Division Order*, 21 FCC Rcd. at 5119-21 ¶ 7-11. The Auctions Division observed that the Bureau had rejected a similar eligibility-based petition and associated motion for stay filed by another Havens-controlled entity in advance of Auction 39. *Id.* at 5120-22 ¶ 11 (citing Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746, 19749-50 ¶ 7 (WTB 2002)). The Auctions Division

(continued....)

the *Auctions Division Order* denied in part and otherwise dismissed the Havens Parties' "Petition for Declaratory Ruling" and "Motion for Stay."⁵⁸

19. In affirming the *Auctions Division Order*, the *Bureau MO&O* augmented the answer to Question 1 by explaining that, contrary to the assertion of the Havens Parties, nothing in the *Air-Ground Order* or in section 22.853 required all affiliates to be considered per se controlling interests of an entity for purposes of air-ground license eligibility.⁵⁹ The Bureau likewise disagreed with the Havens Parties' claim that section 22.853 was unconstitutionally vague and therefore unenforceable.⁶⁰ The *Bureau MO&O* observed, moreover, that not only was the *Air-Ground Order*'s explanation of the provision unambiguous, but the *Auction 65 Supplemental Public Notice* described exactly how the section 22.853 eligibility restriction would affect bidders in Auction 65.⁶¹

20. We affirm the Bureau's determination that the *Air-Ground Order* sufficiently explains the meaning of section 22.853⁶² and that the *Auction 65 Supplemental Procedures Public Notice* articulated for commonly controlled applicants, like the Havens Parties, precisely how section 22.853 would affect their eligibility to win licenses in Auction 65.⁶³ We further believe that the Bureau's answer to Question 1 – that not every "affiliate," as defined in section 1.2110, is necessarily a "controlling interest," as the term is used in section 22.853 – should have eliminated any lingering uncertainty on the part of the Havens Parties about the meaning of the latter term as applied to air-ground license eligibility.⁶⁴ Nevertheless, we restate that the terms "controlling interests" and "affiliate," for purposes of the air-ground eligibility restriction, mean the same thing as they do for purposes of determining designated entity eligibility under section 1.2110.

21. The Havens Parties should not have required this additional guidance. Their common controlling interest, Warren Havens, is an experienced spectrum auction participant with knowledge of the operation of the rules in question. Since 2000, when the Commission adopted the controlling interest standard as its general attribution rule for determining designated entity eligibility, Havens or parties he controls have applied to participate as designated entities in eleven of our auctions and, using designated entity benefits, have won several hundred licenses.⁶⁵ Throughout this period, the definitions of

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noted further that "other Havens-controlled entities [had] also sought a stay of Auction No. 57, but [had] subsequently [withdrawn] that request." *Id.* (citing Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification, *Order*, 19 FCC Rcd 20482 (WTB 2004)).

⁵⁸ *Id.* at 5123 ¶ 17.

⁵⁹ *Bureau MO&O*, 22 FCC Rcd at 4791-92 ¶ 11 (explaining also that, "by noting that the definition of 'affiliate' would apply to determinations of Air-Ground eligibility, the Commission was merely indicating that a 'controlling interest' in an entity – the operative standard under the *Air-Ground Order* – may arise from certain relationships described under the affiliation definition").

⁶⁰ *Id.* at 4792-93 ¶¶ 12-13. The Havens Parties first presented this issue in their Petition Supplement and reiterated it in their Reconsideration Petition. *See* Petition Supplement at 5, 10; Reconsideration Petition at 4; *see also* Application for Review at 3-6.

⁶¹ *Bureau MO&O*, 22 FCC Rcd at 4792 ¶ 12.

⁶² *See id.* at 4790-93 ¶¶ 11-13.

⁶³ *See id.* at 4792 ¶ 12; *Auctions Division Order*, 21 FCC Rcd at 5120 ¶ 9; *Auction 65 Supplemental Procedures Public Notice*, 21 FCC Rcd at 5058 & n.4.

⁶⁴ *See supra* note 59 and accompanying text.

⁶⁵ *See* the Federal Communications Commission's Auctions website, http://wireless.fcc.gov/auctions/default.htm?job=auctions_home (Auctions 39, 43, 48, 57, 59, 61, 65, 72, 73, 76 and 87).

“controlling interests” and “affiliate” in paragraphs (c)(2) and (c)(5) of section 1.2110 have remained in essentially their current form.⁶⁶ Thus, for more than a decade, applicants and licensees controlled by Warren Havens have chosen to subject themselves to – and have been legally required to comply with – eligibility restrictions based on the very concepts of controlling interest and affiliation that are incorporated into the eligibility restriction of section 22.853. Moreover, the *Air-Ground Order*, section 22.853, the Auction 65 public notices, and the staff orders in this proceeding left no room for reasonable doubt that the Havens Parties were commonly controlled applicants and that, between the two of them, they would be eligible to win no more than one license in Auction 65.⁶⁷

22. In addition, we find no basis for the implication in the Havens Parties’ Question 4 that the last sentence of paragraph 44 of the *Air-Ground Order* is ambiguous.⁶⁸ Paragraph 44 states that, in connection with 800 MHz air-ground licensing, the Commission will use the section 1.2110(c)(2) definition of “controlling interests” and the section 1.2110(c)(5) definition of “affiliate.”⁶⁹ Both definitions are multi-faceted, each covering various aspects of its respective subject. In paragraph 44, the Commission highlighted three specific aspects discussed in section 1.2110(c)(2), the “controlling interests” definition – full dilution, management agreements, and joint marketing agreements. When the Commission ended paragraph 44 by concluding that these highlighted elements, together with “the other provisions of Section 1.2110(c)(2) and Section 1.2110(c)(5),” would ensure that no entity would exceed the limit on controlling interest,⁷⁰ there could be no doubt about the meaning, namely that, in determining whether control exists for purposes of 800 MHz air-ground band license eligibility, parties should rely on all facets of the two definitions and not just on the specific elements highlighted in paragraph 44.

⁶⁶ See 47 C.F.R. § 1.2110; Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15323-27 ¶¶ 58-67 (2000).

⁶⁷ Moreover, the Havens Parties have never claimed that their professed uncertainty about section 22.853 relates to any concerns about the eligibility of the other Auction 65 applicants, including the two Auction 65 winners. See *infra* text accompanying note 73.

⁶⁸ Paragraph 44 of the *Air-Ground Order* reads as follows:

We also will apply the definitions of “controlling interests” and “affiliate” currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission’s rules. These provisions have worked well to identify individuals and entities that have the ability to control applicants for Commission licenses and therefore are well-suited to our goal here of ensuring that no party will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band. We note that Section 1.2110(c)(2) includes the requirement that ownership interests generally be calculated on a fully diluted basis, and also provides that any person who manages the operations of an applicant pursuant to a management agreement, or enters into a joint marketing agreement with an applicant, shall be considered to have a controlling interest in the applicant if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, the types of services offered, or the terms or prices of such services. We find that, together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band.

20 FCC Rcd at 4427 ¶ 44 (citations omitted).

⁶⁹ *Id.* We note that Section 1.2110(c) comprises a list of defined terms – albeit detailed ones – and that all the details in a given subsection (c) term form the definition of that term.

⁷⁰ See *supra* note 68.

23. We also uphold the Bureau's rejection of the Havens Parties' argument that the provision is vague and therefore unconstitutional.⁷¹ While the Havens Parties cited in their Petition Supplement a few federal decisions to support the general proposition that rules need to be clear,⁷² they made no attempt to demonstrate that the rule at issue here – section 22.853 – is analogous to the rules that those decisions would classify as impermissibly vague. The Havens Parties' Application for Review similarly asserts that section 22.853 is unconstitutionally vague but provides no support for this assertion. Contrary to the Havens Parties' assertion, we conclude that section 22.853 sets forth a very clear and specific limitation on the amount of spectrum in which individuals and entities may hold a controlling interest in the 800 MHz commercial aviation Air-Ground Radiotelephone Service band, using terms defined in the rules and Commission precedent.

24. **Auction 65 challenge.** Having found no basis on which to grant the Application for Review, we have no basis on which to overturn Auction 65 or disturb the licenses of the winning bidders. As the *Mobility Division Order* observed, the Havens Parties never questioned the propriety of granting the LiveTV and BidCo long-form applications, acknowledging to the contrary that they did “not seek to challenge the winning bidders per se[.]”⁷³ Thus, we agree with the Bureau's refusal to reverse the *Mobility Division Order*⁷⁴ and, accordingly, deny the Application for Review as to the validity of Auction 65 and the license grants to BidCo and LiveTV⁷⁵

25. **Constitutional challenge to Commission.** In their Application for Review, the Havens Parties assert that the *Auctions Division Order* and the *Bureau MO&O* reflect the Commission's use of “nearly unbridled powers” to decide “licensing and other matters ‘in the public interest.’”⁷⁶ They allege further that these powers are “unconstitutional as codified and as used” and that their exercise has “arbitrary and capricious and other unlawful effects. . . .”⁷⁷ These grievances, which the Havens Parties never presented in their pleadings to Commission staff and for which they do not seek specific relief, have not been properly raised in this proceeding.⁷⁸ The challenge thus fails on several counts to satisfy our requirements for grant of an application for review, and we therefore deny it.⁷⁹ As an alternative and independent ground for rejecting the argument, because we find above that section 22.853 is not vague and we reject the Havens Parties' claim that the rule is unconstitutional, we need not reach their broader

⁷¹ See *Bureau MO&O*, 22 FCC Rcd at 4792-93 ¶¶ 12-13; Petition Supplement at 5 and 10. See also Application for Review at 4-6.

⁷² Petition Supplement at 10 n.13.

⁷³ *Mobility Division Order*, 21 FCC Rcd at 13011 ¶ 4; see Auction 65 Applications Petition at 2.

⁷⁴ See *Bureau MO&O*, 22 FCC Rcd at 4793 ¶ 15.

⁷⁵ See BidCo Opposition at 2, LiveTV Opposition at 3. BidCo and LiveTV each assert that the claims raised in the Application for Review should have no effect on their licenses won in Auction 65.

⁷⁶ Application for Review at 6-7. The Havens Parties state that they intend to bring this “broader problem to the courts for review.” *Id.*

⁷⁷ *Id.*

⁷⁸ See 47 C.F.R. § 1.115(b)(3)-(4), (c); Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the Los Angeles – San Diego Major Trading Area, *Order*, 11 FCC Rcd 19090, 19094-95 ¶ 9 (1996) (“Cox failed to substantiate its claims ‘with particularity,’ as required under our rules.” (citing 47 C.F.R. § 1.115[(b)](3))); Vodafone AirTouch, Plc and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 20 FCC Rcd 6439, 6446 ¶ 18 & n.50 (citing 47 C.F.R. § 1.115(b)(4)); Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order*, 27 FCC Rcd 1706, 1709 n.14 (“[P]ursuant to section 1.115(c) of our rules, we are barred here from considering this issue because the Bureau was not previously afforded an opportunity to consider this matter.”)

⁷⁹ See 47 C.F.R. § 1.115(b)(3)-(4), (c).

claim that the Commission has unconstitutionally broad powers, as codified in the Act and as exercised in licensing and other matters.⁸⁰

IV. CONCLUSION

26. For the reasons discussed above, we conclude that the Havens Parties have not shown that the *Bureau MO&O* was in error, and we accordingly deny their Application for Review.

V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review of Intelligent Transportation and Monitoring Wireless LLC and AMTS Consortium LLC, filed April 8, 2007, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸⁰ See, e.g., Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, *Third Report and Order*, 14 FCC Rcd 19098, 19127 ¶ 70 (1999).