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Stand By Your Bid
FCC imposes millions in penalties
for bids withdrawn in FM auction

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A staff decision issued in July makes clear that the Commission is serious when it advises potential auction participants that those who bid in an FCC auction do so at their own risk. Underscoring the draconian nature of its position, the FCC punctuated its decision by declaring that it does not consider the \$1.3 million penalty which it levied against one of the bidders in question to be excessive. All of the penalties stem from an FM auction conducted in 2004.

In the early days of broadcast auctions, bidders could bid up the price of a license and withdraw their high bid at the last minute. As a penalty for using a bid withdrawal, the withdrawing bidder was required to reimburse the FCC the difference between the withdrawn high bid and the eventual winning bid when the license finally sold. For example, assume that Bidder A had been the winning bidder for some spectrum with a bid of \$100,000, but Bidder A (perhaps suffering from buyer's remorse) chose to withdraw its bid. Assume also that the spectrum was later bid upon and won by another bidder for \$95,000. The withdrawal penalty for Bidder A would be \$5,000 – the difference between the high-but-withdrawn bid and what the FCC eventually sold the channel for.

In the 2004 auction, six different bidders employed bid withdrawals. However, unlike the above example, the penalties were much greater than \$5,000. In one case, Cumulus withdrew a \$1.5 million bid for a North Dakota license. When the license was later re-auctioned it fetched only \$125,000, thus triggering a penalty of more than \$1.3 million. Yowch!! Five other withdrawing bidders got similarly unpleasant news, with penalties ranging from a paltry \$112,250 (for Nankuli, HI) up to a more robust \$794,000 (for Windsor, NY). All six sought reconsideration. Cumulus, along with five other broadcasters, asked the FCC to reconsider its penalty rules.

In their plea to the FCC, the bidders decried the penalties as “unconscionably excessive”. The bidders pointed out that the huge penalties were higher than any other fine in the

standard list of rule violation fines included in the Commission's rules. Several of the bidders noted that the penalties were hundreds of times larger than the eventual winning bid. For obvious reasons, the bidders seemed to advance every conceivable argument for why they should not have to pay \$3.8 million in penalties.

There was doubtless not a dry eye at the FCC when the Commission's staff dismissed all of the arguments. In a 20-page order, the staff explained that the penalty-for-withdrawal rules were announced before the auction, bidders who participated did so subject to those rules, and there was no reason to waive the penalties. The FCC noted that it has since eliminated the use of withdrawals in broadcast auctions, so bidders in future auctions won't be tempted to try the same ploy that got these six bidders into trouble.

Readers are reminded that, while broadcast auctions may still be in the relatively early stages of development, the rules governing those actions derive from auction rules for other services which have been subject to auctions for more than a decade. Although it is unlikely that broadcast auctions will feature withdrawals again, there may still be many other pitfalls in the somewhat arcane auction process to which bidders should be alert. At a minimum, before embracing a bidding strategy which is based on the assumption that a completed bid might in some instances be withdrawn without significant penalty, bidders should consult counsel.