

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

In the Matter of
Motion of Ranger Cellular and Miller
Communications, Inc. for a Stay of the
Cellular Rural Service Areas Auction No. 45

ORDER

Adopted: May 24, 2002

Released: May 24, 2002

By the Deputy Chief, Wireless Telecommunications Bureau:

1. We have before us a motion filed by Ranger Cellular and Miller Communications, Inc. ("Ranger and Miller") to stay Auction No. 45, which is scheduled to begin on May 29, 2002. Specifically, Ranger and Miller ask the Federal Communications Commission ("Commission") to delay the auction of three cellular Rural Service Area (RSA) licenses, and stay the auction rules pending judicial review of the Commission's decision to allow any qualified bidder to participate in Auction No. 45. For the reasons set forth below, we deny Ranger and Miller's Motion to Stay Auction No. 45.

2. In their Motion to Stay, Ranger and Miller contend that they are likely to prevail in their pending legal challenge because the Commission's decision to permit open eligibility in Auction No. 45 is contrary to relevant statutory language and to the Commission's own precedent. Ranger and Miller argue that the auction should be restricted to former lottery applicants that filed their applications prior to

1 Motion to Stay Auction Rules Pending Judicial Review, filed by Ranger and Miller on March 26, 2002 ("Motion to Stay").

2 Motion to Stay at 1-5. In a rulemaking proceeding in which Ranger and Miller participated, the Commission concluded that it is in the public interest to allow open eligibility to participate in the cellular RSA auction. Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Report and Order, 17 FCC Rcd 1960, 1966 ¶ 10 (2002) ("Cellular RSA Report and Order"). In response to that decision, Ranger and Miller filed a petition for review with the United States Court of Appeals for the D.C. Circuit, asking the court to reverse the Commission's order establishing open eligibility and require the Commission to restrict participation in Auction No. 45. That petition is pending. Ranger Cellular and Miller Communications, Inc. v. FCC, No. 02-1093 (D.C. Cir. filed March 18, 2002).

3 We note that the Wireless Telecommunications Bureau ("Bureau") rejected Ranger and Miller's request to delay Auction No. 45 on other grounds. See Cellular Rural Service Areas Auction Scheduled for May 29, 2002, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Auction Procedures, Public Notice, DA 02-470 (rel. March 4, 2002), 67 Fed. Reg. 16383 (rel. April 5, 2002) ("Auction No. 45 Procedures Public Notice").

4 Motion to Stay at 2-3.

July 1997 and that continue to contest the Commission's dismissal of their applications.⁵ In support of their position, Ranger and Miller maintain that Section 309(l) of the Communications Act of 1934, as amended, restricts eligibility for auction participation to former lottery applicants and that limiting eligibility to participate in Auction No. 45 would be consistent with Commission precedent.⁶ Based on these assertions, Ranger and Miller contend that they are likely to be successful in their appeal,⁷ thereby requiring a re-auction of the cellular RSA licenses with a more limited number of participants.⁷

3. Ranger and Miller further argue that proceeding with the auction as scheduled will cause irreparable harm to the public.⁸ They contend that the pendency of their legal challenge creates uncertainty in the auction process, which will have a chilling effect on bidding and result in the Commission's receipt of "diminished proceeds."⁹ In addition, Ranger and Miller assert that if they participate in the auction as scheduled, the amounts that they and other bidders bid in the auction will be a matter of public record.¹⁰ They contend that if they subsequently win their appeal, participants in the re-auction will "know how much each party was willing to bid the first time."¹¹ Ranger and Miller argue that this kind of information would be extremely useful for competing bidders in a re-auction and that the Commission's anti-collusion rules guard against dissemination of such information.¹²

4. Ranger and Miller claim that a stay of the auction will not harm other parties because cellular operators that have been granted interim operating authority will continue to offer cellular service to these rural markets until "permanent" licenses, free of any legal challenges, are granted.¹³ Ranger and Miller further argue that if their Motion to Stay is granted, parties will avoid having to make upfront payments and tie up such money indefinitely pending the outcome of the legal challenge.¹⁴ According to Ranger and Miller, even if they lose their pending appeal, all interested parties can then file applications to participate in the auction and will have lost nothing by the delay.¹⁵

5. Ranger and Miller rely on the four-prong test for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*.¹⁶ Under the *Virginia Petroleum Jobbers* test, as modified by

⁵ Motion to Stay at 2.

⁶ Motion to Stay at 2-3.

⁷ *Id.*

⁸ Motion to Stay at 3-4.

⁹ Motion to Stay at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Motion to Stay at 3-4.

¹³ Motion to Stay at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*").

Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm, absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.¹⁷ Upon examination of Ranger and Miller's Motion to Stay, we find that Ranger and Miller fail to meet this standard. Ranger and Miller have neither demonstrated that they are likely to prevail on appeal, nor have they made a substantial case under the other criteria for issuance of a stay. We reject Ranger and Miller's assertion that they are likely to prevail in their judicial appeal as highly speculative. Ranger and Miller's assumptions are based on nothing more than their belief in the merits of their own case. In the *Cellular RSA Report and Order*, the Commission rejected Ranger and Miller's interpretation of Section 309(l)¹⁸ as well as other arguments made in favor of restricting auction eligibility.¹⁹ Ranger and Miller have not presented any new legal authority to support a different conclusion. In addition, we note that completion of Auction No. 45 will have no effect on the power of the court to decide Ranger and Miller's appeal and order appropriate relief in the event that Ranger and Miller prevail on the merits and overcome the presumption of validity that supports the Commission's regulations.²⁰

6. We further find that Ranger and Miller have failed to demonstrate that they would suffer irreparable harm in the absence of a stay. An injury qualifies as "irreparable harm" only if it is "both certain and great; it must be actual and not theoretical."²¹ Therefore, to demonstrate irreparable harm, Ranger and Miller must provide "proof indicating that the harm [it alleges] is certain to occur in the near future."²² Ranger and Miller have not supplied such proof. Ranger and Miller have not demonstrated any specific harm to themselves from proceeding with the current auction schedule, nor can they. Their fear of revealing bidding strategies and tying up their upfront payment will not be realized because Ranger and Miller did not apply to participate in Auction No. 45.²³ Moreover, Ranger and Miller's arguments that, absent a stay, irreparable harm would befall parties that *did* apply to participate in the auction does not meet the standards for grant of a stay under *WMATC*.²⁴ Parties seeking a stay must show that absent the stay they, and not third parties, will suffer irreparable harm.²⁵ In any case, Ranger

¹⁷ *Washington Metro Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*WMATC*").

¹⁸ *Cellular RSA Report and Order*, 17 FCC Rcd at 1969-70 ¶¶ 16-17.

¹⁹ *Cellular RSA Report and Order*, 17 FCC Rcd at 1970-72 ¶¶ 18-21.

²⁰ *See FCC v Radiophone, Inc.*, 516 U.S. 1301, 116 S.Ct. 283 (1995) (Justice Stevens vacating a stay of an auction).

²¹ *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

²² *Id.*

²³ Ranger and Miller did not file a short-form application to compete in Auction No. 45 by the April 17, 2002 deadline. Auction of Licenses For Cellular Rural Service Areas, Status of FCC Form 175 Applications to Participate in the Auction, *Public Notice*, DA 02-965 (rel. April 29, 2002).

²⁴ *See WMATC*, 559 F.2d at 844 (motion to stay is appropriate "when denial of the order would inflict irreparable injury on the movant").

²⁵ *Id.* *See also United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 1991 WL 243270, (S.D.N.Y.) (the court found that the plaintiff did not meet the second prong when it argued that "third parties will be harmed absent a stay").

and Miller's claim of harm to third parties is without merit because the Bureau advised prospective participants in Auctions No. 45, that in formulating their business strategies they should take into account the impact of pending proceedings on the availability of spectrum for cellular RSA licensees.²⁶ As a general matter, we expect that applicants bidding on licenses subject to litigation take such litigation into account in determining their bidding strategies, lowering the level of risk that results from bidding on licenses subject to pending proceedings.

7. Further, we find that grant of Ranger and Miller's Motion for Stay would not serve the public interest, because doing so would defeat one of the underlying policy objectives of Section 309(j), which requires the Commission to promote the "rapid deployment of new technologies, products and services for the benefit of the public."²⁷ If we were to accept Ranger and Miller's general arguments for granting a stay of Auction No. 45, subsequent spectrum auctions would be at risk of substantial postponement while courts review the myriad issues that parties raise in attempts to circumvent auctions for their individual purposes. Moreover, even if we were to conclude that it is appropriate in this instance to consider the impact of Ranger and Miller's pending appeal on the Commission's receipt of auction revenues, we have no basis on which to conclude that an open auction that is the subject of a pending legal proceeding would result in lower auction revenues than a closed auction in which bidding is limited to a few former lottery applicants. Additionally, we disagree with Ranger and Miller's assertion that a re-auction, if needed, would permit an exchange of information that is prohibited by the Commission's anti-collusion rules. This argument is premised on Ranger and Miller's claim that bidders in a re-auction would have knowledge of the value that bidders in a previous auction placed on the licenses. We do not agree with Ranger and Miller that the anti-collusion rules are implicated when the Commission conducts a re-auction. Behavior by a set of bidders in one auction does not reveal bidding strategy for a subsequent re-auction, since the pool of bidders may change, market conditions may vary, and the business plans of bidders may have changed markedly in the period of time between auctions. The information revealed by the original auction is public information which prospective bidders are free to make use of in determining their bidding strategies, just as they consider the results of other previous auctions of comparable spectrum. As discussed above, Ranger and Miller's insubstantial arguments on the merits do not warrant the extraordinary relief it seeks.

8. Accordingly, IT IS ORDERED pursuant to sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and the authority delegated pursuant to section 0.331 of the Commission's rules, as amended, 47 C.F.R. § 0.331, that the Motion to Stay filed by Ranger and Miller on March 26, 2002, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

²⁶ *Auction No. 45 Procedures Public Notice* at 4-5.

²⁷ 47 U.S.C. § 309(j)(3)(A).