It’s Not Over ‘Til it’s Over

Nancy Maas, Editor in Chief nancy.maas@advantage media.comBy the time you read this column we will all most likely know the results of the FCC’s August 9th auction (also called “Auction 66”) for advanced wireless service spectrum. This auction has been in the works for years and expected to gross up to 15 billion dollars, the most revenue to date for a spectrum auction.

Shortly before the auction, a federal appeals court refused to delay the FCC’s August 9 auction of spectrum, finding that minority and small businesses failed to show irreparable harm was done by new bidding rules that were announced late in the game. The appeal was brought about by three petitioners who claimed that the modifications to the auction rules, which were made by the FCC in April ’06, would put many minority and small businesses at a disadvantage by limiting their access to much needed financing necessary to participate in the bidding process. Such businesses are referred to as “designated entities” or DEs. Designated entities are qualified small or minority-owned businesses that are granted discounts of up to 25% in bidding in the public airwave spectrum.

The new rules they are referring to extend DE’s spectrum lease restrictions from 5 years to 10, which means they must hold on to whatever they buy for at least 10 years before they can get out from under if they are unsuccessful in their business plans. And, the rules prevent DEs from leasing more than 50 percent of their spectrum or from leasing 25 percent of it to any single carrier.

They based their claim on two arguments. First, that these new changes are in violation of a 1993 law in which Congress directed the FCC to promote diversity and competition in the wireless industry by making bidding credits and other benefits to minority and small businesses in spectrum auctions. Second, that the process in which the FCC used to adopt these new rules was in violation of the Administrative Procedures Act because the FCC changed the rules without allowing the time to hear comments on the rules.

The FCC’s apparent purpose for modifying the auction rules when it did was to deter speculators whose goal was to be a successful bidder for the sole purpose of reselling the acquired spectrum for huge profits; i.e., the Mario Gabelli case. (The lawsuit alleges Gabelli set up sham companies in auctions from 1995 to 2000 to

obtain airwave licenses that were later sold for huge profits). At the same time, the opportunities for minority businesses should be protected to gain access to these rights. Whether the FCC violated the Administrative Procedures Act or the 1993 Minority Business Act will need to be determined by the court. Whether they went about it in the right way is also subject to question. This case is not over yet. The court denied the injunction because the petitioners were unable to establish that they have incurred irreparable harm as a result of the new bidding rules. We will need to await the auction results and what occurs in the months after to assess what impact, if any, these new rules will have on the industry.

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