



Federal Communications Commission
Washington, D.C. 20554

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DA 13-2273

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Dear Counsel:

By this letter, we deny the request made by Ztark Communications, LLC (Ztark) for an extension of time to pay the balance due on its winning bids in Broadband Radio Service (BRS) Auction 86 for its long form application for BRS licenses BTA008, Albuquerque, New Mexico, and BTA244, Las Cruces, New Mexico.

On October 30, 2009, the Commission completed Auction 86 for BRS licenses in the 2496-2502, 2602-2615, and 2616-2673.5 MHz bands.¹ Pursuant to the Commission's designated entity ("DE") rules, which are designed to encourage auction participation by small businesses, eligible bidders in Auction 86 were permitted to apply for bidding credits as entrepreneurs, small businesses, or very small businesses, depending on their attributed average annual gross revenues for the three years immediately preceding the auction.² In its long form application, Ztark certified to average gross revenues of \$579,335.84 for itself and all its affiliates for the three years preceding the auction (*i.e.*, 2006, 2007, and 2008),³ and sought a 35% entrepreneur bidding credit, which was available to entities with average gross revenues of \$3,000,000 or less for the three years immediately preceding the auction.⁴

¹ See Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced For Auction 86, *Public Notice*, 24 FCC Rcd 13572 (WTB 2009) ("*Auction 86 Closing PN*").

² See 47 C.F.R. § 1.2110; Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277, 8296 ¶ 71 (WTB 2009) ("*Auction 86 Procedures PN*"). The level of bidding credit was determined as follows:

- A bidder with attributed average annual gross revenues that exceeded \$15 million but did not exceed \$40 million for the preceding three years ("small business") would receive a 15 percent discount on its winning bid.
- A bidder with attributed average annual gross revenues that exceeded \$3 million but did not exceed \$15 million for the preceding three years ("very small business") would receive a 25 percent discount on its winning bid.
- A bidder with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years ("entrepreneur") would receive a 35 percent discount on its winning bid.

Auction 86 Procedures PN, 24 FCC Rcd at 8296 ¶ 73.

³ File No. 0004041872, Revenue Information.

⁴ Ztark's gross winning bids totaled \$1,182,000. *Auction 86 Closing PN*, 24 FCC Rcd at 13582, 13583 Attachment A. Thus, a bidding credit received pursuant to the entrepreneur credit would equal \$413,700.

In adopting rules to determine eligibility for small business benefits, the Commission sought to ensure that family members could not be used to evade its bidding credit eligibility requirements.⁵ The Commission therefore adopted a rule that immediate family members will be presumed to have an identity of interest with an applicant or its controlling interest.⁶ Ztark requested a ruling that it had rebutted the presumption that Tyler Kratz has an identity of interest with his father Douglas Kratz.⁷

On October 29, 2013, the Broadband Division (“Division”), Wireless Telecommunications Bureau released an order holding that Ztark failed to demonstrate its eligibility for an auction bidding credit.⁸ The Division held that Ztark had failed to rebut the presumption that Tyler Kratz has an identity of interest with Douglas Kratz.⁹ Because Ztark did not provide Douglas Kratz’ gross revenues, the Division was unable to conclude that Ztark was eligible for a bidding credit.¹⁰ The Division ordered Ztark to pay \$413,700, the difference between Ztark’s gross winning bids and its net winning bids, by 6:00 pm on November 28, 2013.¹¹

On November 13, 2013, Ztark requested an additional 60 days to make the \$413,700 payment directed in the *MO&O*.¹² Ztark argues that winning bidders in other auctions have been given more time to make their additional payment.¹³ Ztark also cites the Wireless Telecommunications Bureau’s decision to give Baker Creek Communications an additional twenty days (for a total of 34 days) to make an additional payment after they were deemed ineligible for a bidding credit.¹⁴

Ztark argues that the rejection of a bidding credit is “a relatively rare occurrence” and that it should have additional time “to consider its legal and financial options.”¹⁵ Ztark also contends that it is in

⁵ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7262 ¶ 102 (1994) (“*Competitive Bidding 2nd MO&O*”).

⁶ *Id.*, see 47 C.F.R. § 1.2110(c)(5)(iii)(B).

⁷ See Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response.

⁸ Ztark Communications, LLC, *Memorandum Opinion and Order*, DA 13-2088 (WTB BD rel. Oct. 29, 2013) (“*MO&O*”).

⁹ *Id.* at ¶ 8.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 16. Because November 28, 2013 is a holiday, the actual deadline is Friday, November 29, 2013, the next business day. See 47 C.F.R. § 1.4(j).

¹² Letter from John Beahn, Esq. and Joshua Gruenspecht, Esq., Counsel to Ztark Communications, LLC to John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau (filed Nov. 13, 2013) (“*Extension Request*”).

¹³ *Id.* at 2, citing Minnesota Christian Broadcasters, *Memorandum Opinion and Order*, 18 FCC Rcd 614, 620 ¶ 12 (2003); FCC Announces it is Prepared to Grant FM Broadcast Construction Permit for Biltmore Forest, North Carolina After Final Payment is Made, Public Notice, 16 FCC Rcd 11184 (MB 2001) (directing applicant to make additional payment by June 15, 2001 in an order adopted April 12, 2001 and released May 25, 2001). See Liberty Productions, a Limited Partnership, *Memorandum Opinion and Order*, MM Docket No. 88-577, 16 FCC Rcd 12061, 12095 ¶ 77 (2001).

¹⁴ Extension Request at 2, citing Baker Creek Communications, L.P., *Order*, 14 FCC Rcd 11529, 11530 ¶ 2 (WTB PS&PWD 1999), citing Letter from Kathleen O’Brien Ham, Deputy Chief, WTB, to James F. Ireland, Esq., Cole Raywid & Braverman, L.L.P. (dated Sept. 30, 1998).

¹⁵ Extension Request at 3.

the best position to ensure that the spectrum it has applied for is put in use.¹⁶ Ztark writes, “The grant of 60 additional days therefore benefits the public by vastly increasing the likelihood that Ztark will acquire appropriate external financing and finalize its license purchase, thereby freeing the spectrum up for rapid use.”¹⁷ Finally, Ztark argues that granting an extension will increase the possibility that Ztark will be able to make full payment and “would appropriately balance the public interest in ensuring the fastest possible deployment of spectrum with the public interest in ensuring timely Commission auction payments.”¹⁸

“It is the policy of the Commission that extensions of time shall not be routinely granted.”¹⁹ After carefully reviewing the Extension Request, we conclude that Ztark has failed to show good cause for an extension. Ztark was required to pay the full amount of its winning bid within 10 business days after the deadline for submitting its down payment.²⁰ In addition to the initial 10 business days given to all winning bidders to make their final payment, the *MO&O* granted Ztark an additional thirty days to pay the additional balance it owed on the licenses because it was determined to be ineligible for a bidding credit. Furthermore, Ztark has known for over a year that its eligibility for a bidding credit was in question.²¹ It has had more than adequate opportunity to make contingency plans and obtain financing in case it needed to make an additional payment on its licenses. Ztark also fails to provide any assurance that it would be able to pay the monies due even if it receives an extension. Instead, it seeks additional time to evaluate its legal and financial options. We are not persuaded that Ztark needs additional time to evaluate such options when it made an unconditional winning bid for the two licenses over four years ago, in Auction 86.²²

The cases cited by Ztark do not support its Extension Request. The only precedent Ztark cites for a 90 day payment deadline, the *Minnesota Christian Broadcasters* case, involved an auction that substantially predates the Commission’s current practice of requiring final payment within ten business days after submission of the down payment. The 30 days Ztark received to make its additional payment is comparable to or more than the amount of time Liberty Productions (21 days)²³ and Baker Creek Communications (34 days) received to make their payments.

Because Ztark also mentions standards relevant to a waiver of the Commission’s rules,²⁴ we will also evaluate the Extension Request under the waiver standard in Section 1.925(b)(3) of the Commission’s Rules.²⁵ To be granted a waiver of the November 29, 2013 payment deadline, Ztark must

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 1.46(a).

²⁰ 47 C.F.R. § 1.2109(a); Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced For Auction 86, *Public Notice*, 24 FCC Rcd 13572, 13573-13574 (WTB 2009).

²¹ *See, e.g.*, Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Mr. Tyler Kratz, Ztark Communications, LLC (Apr. 23, 2012).

²² “A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction.” 47 C.F.R. § 1.2104(g)(2).

²³ We believe the applicable period in Liberty Productions should be measured from the release date of the Commission order because the applicant would not have received notice of the requirement to make an additional payment until the order was released.

²⁴ Extension Request at 2-3.

²⁵ 47 C.F.R. § 1.925(b)(3).

show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁶ “The Commission’s competitive bidding rules are designed to maintain a fair and efficient license assignment process that promotes a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.”²⁷ “The payment requirements and default provisions of Section 1.2109 function, *inter alia*, to deter insincere bidding by entities that are not prepared to use the spectrum efficiently and effectively.”²⁸ Ztark has failed to demonstrate how enforcing our payment deadline would frustrate the underlying purpose of the rule. We reject Ztark’s assertion that a waiver is appropriate because they are allegedly in the best position to put the spectrum in use before anybody else could acquire the spectrum and place it in use. First, Ztark’s assertions that it has the ability to put the spectrum in use are unsupported. In light of its apparent inability or unwillingness to pay its gross winning bids, we cannot conclude that Ztark is able to utilize the spectrum. Second, even if Ztark had shown that it would promptly place the spectrum in use, the possibility of delay is not a valid public interest justification for a waiver. In the context of enforcing buildout requirements, the Commission recently wrote:

Any licensee who has not built could argue that its licenses should not be cancelled because there would be a delay in relicensing the spectrum. If this argument were taken to its logical conclusion, the Commission would never enforce buildout requirements so long as a licensee claimed the ability to build before a new licensee would have to build the spectrum. Such a result would remove any incentive licensees had to meet the buildout deadlines established by the Commission.²⁹

Ztark’s argument suffers from the same defect. If we refused to enforce our payment deadlines because there would be a delay in placing the spectrum in use, we would never enforce our deadlines, and applicants would have no incentive to make timely payments. The public interest in ensuring the integrity of our auction process outweighs any harm from delay, which can be attributed to Ztark’s inability to have its financial arrangements in order.

Ztark has failed to justify a waiver under the second prong of the waiver standard because there is nothing unique or unusual about its circumstances. We are not persuaded that Ztark’s own failure to comply with our designated entity eligibility rules and gross revenues reporting requirements is a unique circumstance warranting waiver of our payment procedures. Every bidder who places a bid and applies for a bidding credit assumes the risk that it will be determined to be ineligible for the bidding credit it seeks. Thus, Ztark knew or should have known that it had an obligation to comply with our rules from the time of its initial application. Furthermore, we see nothing inequitable in enforcing the *MO&O*’s payment deadline when Ztark has received more than adequate notice that its request for a bidding credit may be denied.

²⁶ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

²⁷ See PCS Partners, L.P., Petition for Waiver and Refund, *Order*, 22 FCC Rcd 4143, 4147 ¶ 11 (WTB 2007).

²⁸ *Id.*

²⁹ FiberTower Spectrum Holdings, LLC, *Memorandum Opinion and Order*, 28 FCC Rcd 6822, 6838 ¶ 34 (2013), *recon. pending*.

Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), and Sections 1.46 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.46, 1.925, that the request for extension of time to pay the \$413,700 balance on its gross winning bids filed by Ztark Communications, LLC on November 13, 2013 IS DENIED, and the deadline for Ztark to make that payment SHALL REMAIN November 29, 2013.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

Sincerely,

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau