



Federal Communications Commission  
Washington, D.C. 20554

DA 02-1574  
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**Re: Request for a Remedial Bidding Credit, Auction No. 3**

Dear Mr. Gutierrez:

This letter responds to the Request for a remedial bidding credit filed on behalf of your client, Instapage Network Ltd. ("Instapage").<sup>1</sup> The Request seeks a forty percent remedial bidding credit for a license won by Insta-Check Systems ("Insta-Check"), the original licensee for the Southern Region, Market No. R002 (frequency block 5).<sup>2</sup> For the reasons set forth below, the Request is dismissed with prejudice.

**1. Background**

From October 26, 1994 through November 8, 1994, the Federal Communications Commission ("Commission") conducted an auction of thirty Regional Narrowband Personal Communication Service ("Regional Narrowband PCS") licenses ("Auction No. 3") pursuant to rules adopted in the *Competitive Bidding Third MO&O*.<sup>3</sup> Those rules allowed women-owned and minority-owned businesses to apply for

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<sup>1</sup> Informal Request for Remedial Bidding Credit filed by Thomas Gutierrez on November 12, 1999 ("Request"). Since the filing of the Request, Instapage's license automatically terminated due to its failure to meet the construction notification requirement and the minimum coverage benchmarks pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's Rules. Instapage Network, Ltd., *Order*, 16 FCC Rcd 14029 (2001) (reconsideration pending); *see also* Letter to Mr. Thomas Gutierrez, Esq., Attorney for Instapage, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 14728 (2001) (Instapage's request for a grace period dismissed as moot after its licenses automatically canceled) (reconsideration pending).

<sup>2</sup> Announcing the High Bidders in the Auction of 30 Regional Narrowband (PCS) Licenses; Winning Bids Total \$490,901,787, *Public Notice* (rel. Nov. 9, 1994) ("*Regional Narrowband PCS Closing Public Notice*"). Insta-Check Systems was the winning bidder for the license in Market R002-05 with a bid of \$8,000,013. On February 14, 1997, the Wireless Telecommunications Bureau ("Bureau") approved the transfer and assignment of the Channel 16 southern regional license from Insta-Check to Instapage. Wireless Telecommunications Bureau Commercial Wireless Service Information, Report No. LB-97-19, *Public Notice* (rel. Feb. 14, 1997).

<sup>3</sup> Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS and Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 (1994) ("*Competitive Bidding Third MO&O*"). The Auction No. 3 rules were similar to rules adopted in the Interactive Video and Data Service ("IVDS") Auction ("Auction No. 2"), upon which Instapage premises its relief request, in that both auctions made bidding credits available for qualifying women-owned and minority-owned businesses. However, the Auction No. 3 rules restricted bidding credits to ten specific licenses of the thirty that were auctioned,

a forty percent bidding credit on ten specific Regional Narrowband PCS licenses,<sup>4</sup> all of which were subsequently won by women-owned and minority-owned businesses in Auction No. 3.<sup>5</sup> Bidding credits were not offered on the twenty remaining licenses.<sup>6</sup> Insta-Check, which qualified both as a small business and a minority-owned business, was the winning bidder on a license for which no bidding credit was offered, Southern Region, Market No. R002 (frequency block 5).<sup>7</sup>

On June 12, 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that any federal program in which the “government treats any person unequally because of his or her race” must satisfy the “strict scrutiny” constitutional standard of judicial review.<sup>8</sup> More than four years later, in alleged reliance upon the *Adarand* decision, Instapage filed its Request for remedial bidding credits for the Regional Narrowband PCS license originally won by Insta-Check in Auction No. 3.<sup>9</sup> The Request did not contend, however, that Instapage or Insta-Check had ever raised any concerns regarding the constitutionality of bidding credits in Auction No. 3, in either the comment and reply-comment process in the rule making proceeding<sup>10</sup> or in a petition for reconsideration of either the *Competitive Bidding Second R&O*,<sup>11</sup> the *Competitive Bidding Third R&O*,<sup>12</sup> the *Competitive Bidding Third MO&O*,<sup>13</sup> or the public notice<sup>14</sup> announcing the winning bidders for Auction No. 3.<sup>15</sup>

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while bidding credits were offered on all licenses in Auction No. 2. Compare 47 C.F.R. § 24.309(b) (1994) with 47 C.F.R. § 95.816(d) (1994).

<sup>4</sup> 47 C.F.R. § 24.309(b)(2) (1994); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Third Report And Order*, 9 FCC Rcd 2941, at 2945 ¶ 10 (“*Competitive Bidding Third R&O*”); *Competitive Bidding Third MO&O*, 10 FCC Rcd at 232-34.

<sup>5</sup> *Regional Narrowband PCS Closing Public Notice*; “FCC Announces the Receipt of Down Payments from the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses,” *News Release* (rel. Nov. 29, 1994).

<sup>6</sup> 47 C.F.R. § 24.309(b)(2); *Competitive Bidding Third R&O*, 9 FCC Rcd at 2945, ¶ 10; *Competitive Bidding Third MO&O*, 10 FCC Rcd at 232-34.

<sup>7</sup> *Regional Narrowband PCS Closing Public Notice*; 47 C.F.R. § 24.309(b)(2) (1994).

<sup>8</sup> *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 229-30 (1995).

<sup>9</sup> Request. As noted above, the Commission consented to the assignment of the license from Insta-Check to Instapage on February 14, 1997. Note 2 *supra*.

<sup>10</sup> Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Notice of Proposed Rulemaking*, PP Docket No. 93-253, 8 FCC Rcd. 7635 (1993).

<sup>11</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348 (1994) (“*Competitive Bidding Second R&O*”).

<sup>12</sup> *Competitive Bidding Third R&O*, 9 FCC Rcd 2941.

<sup>13</sup> *Competitive Bidding Third MO&O*, 10 FCC Rcd 175.

<sup>14</sup> *Regional Narrowband PCS Closing Public Notice*.

<sup>15</sup> The constitutionality of bidding credits for designated entities was explicitly considered by the Commission in the rulemakings that affected the regional Narrowband PCS auction: *Competitive Bidding Second Report & Order*,

In its Request, Instapage alleges that the bidding credits offered to women-owned and minority-owned businesses were unconstitutional and had the effect of skewing the results of the auction as women-owned and minority-owned businesses “bid up” the price for spectrum.<sup>16</sup> Instapage argues that the passage of time does not bar review of its claim because the Commission granted a post-auction bidding credit to eligible small businesses in the 218-219 MHz service.<sup>17</sup> Lastly, Instapage argues that because the Commission granted a post-auction bidding credit to eligible small business in the 218-219 MHz service, it should do the same here in order “to eliminate the effects of past discrimination.”<sup>18</sup>

## 2. Discussion

Instapage filed its Request under Section 1.41 of the Commission’s rules, which provides that a request for Commission action may be submitted informally “except where formal procedures are required.”<sup>19</sup> Informal requests have no set filing deadline, unlike petitions for reconsideration of Commission rulemakings, which have mandatory filing deadlines. By statute, Congress limited the Commission’s jurisdiction to review petitions for reconsideration to those filed within a specific time.<sup>20</sup> Sections 1.106(f) and 1.429(d) of the Commission’s rules implement this statutory mandate and require that a petition for reconsideration be filed within thirty days from the date of public notice of the Commission’s action.<sup>21</sup>

Despite Instapage’s styling of its Request as informal, the Request essentially challenges the rulemaking that culminated in the adoption of the competitive bidding rules for Auction No. 3. As a challenge to a rulemaking, it is subject to the filing deadline set forth in Section 1.429(d) for petitions for reconsideration.<sup>22</sup> Instapage failed to observe this filing deadline, however, and filed its Request on November 12, 1999, more than five years after public notice of the adoption of the Auction No. 3 competitive bidding rules, and well after the mandatory thirty-day deadline.<sup>23</sup> As such, Instapage’s

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9 FCC Rcd 2348, 2357-58 ¶¶ 54-58, 2398-00, ¶¶ 289-97; *Competitive Bidding Third R&O*, 9 FCC Rcd 2941, 2973 n.47.

<sup>16</sup> Request at 3.

<sup>17</sup> Request at 3-4 (*citing Graceba Total Communications, Inc. v. FCC*, 155 F.3d 1038 (D.C. Cir. 1997); Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (“218-219 MHz Order”).

<sup>18</sup> Request at 4.

<sup>19</sup> 47 C.F.R. § 1.41.

<sup>20</sup> 47 U.S.C. § 405 (limiting the Commission’s power to consider petitions for reconsideration to those filed within 30 days from public notice of the order, decision, report or action complained of); *see also Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (1986) (narrowly construing judicially created “extraordinary circumstances” exception to statutory time limit for filing petitions for reconsideration).

<sup>21</sup> 47 C.F.R. §§ 1.106(f), 1.429(d).

<sup>22</sup> 47 C.F.R. § 1.429.

<sup>23</sup> *Competitive Bidding Third MO&O*, 10 FCC Rcd 175 (rel. Aug. 17, 1994), 59 Fed. Reg. 44070 (Aug. 26, 1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Erratum to Third Memorandum Opinion and Order*, 10 FCC Rcd 173 (rel. Sept. 21, 1994), 59 Fed. Reg. 50511 (Oct. 4 1994).

Request is nothing more than an untimely petition for reconsideration of the competitive bidding rules adopted for Auction No. 3.<sup>24</sup>

Attempting to avoid dismissal of its untimely filing, Instapage relies upon *Graceba Total Communications*.<sup>25</sup> Such reliance is misplaced.<sup>26</sup> Graceba Total Communications (“Graceba”), a participant in the 218-219 MHz auction, raised the issue of constitutionality of the bidding credit in a post-*Adarand* supplement to its timely-filed petition for reconsideration of the public notice announcing the results in the 218-219 MHz auction. Instapage’s Request is neither a timely-filed petition for reconsideration nor a supplement to a timely filing. Rather, Instapage’s Request for a retroactive bidding credit is analogous to the facts of *Community Teleplay* and *Weblink*, in which the Wireless Telecommunications Bureau rejected requests for retroactive bidding credits because the filings were untimely.<sup>27</sup> Like the requestors in those cases, Instapage filed a belated request and relies upon *Graceba* to argue that its filing is not untimely. In addition, like those requestors, Instapage’s request was not filed as a supplement to a timely-filed petition for reconsideration. Accordingly, as we did in *Community Teleplay* and *Weblink*, we dismiss Instapage’s Request as untimely under sections 1.106(f) and 1.429(d)<sup>28</sup> of our rules.

Not only is Instapage’s Request untimely under section 1.429(d)<sup>29</sup> of the Commission’s rules, it is also barred by the doctrine of waiver, *i.e.*, a party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it subsequently.<sup>30</sup> Insta-Check was obligated under the Commission’s rules to bring any challenge to the bidding credit rules to the Commission’s attention in a timely manner. Insta-Check had the opportunity to file comments objecting to the constitutionality of the proposed bidding credit rules in the proceedings resulting in the *Competitive Bidding Second R&O*, *Competitive Bidding Third R&O* and

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<sup>24</sup> See Request at 3 (wherein Instapage claims that it was injured by the availability of bidding credits for certain designated entities, which bidding credits were adopted as part of a rulemaking proceeding, as set forth *supra*).

<sup>25</sup> Request at 4 (citing *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997)).

<sup>26</sup> Instapage’s argument also ignores other distinguishing factors between itself and Graceba. First, as previously noted, in this instance, no bidding credits were offered on the particular license won by Insta-Check. Thus, any bidder who participated in the auction would have recognized that under no circumstances would the winning bidder for that license have been able to obtain a bidding credit. Second, Insta-Check was a minority owned business. Accordingly, even if Insta-Check had filed a timely objection to the rules that governed Auction No. 3, it would be difficult for it to properly state a claim alleging a constitutional injury.

<sup>27</sup> *Community Teleplay, Inc., et. al., Order*, 13 FCC Rcd 12426, 12428-29 (WTB 1998) (“*Community Teleplay*”); *Weblink Wireless, Inc., Order*, 16 FCC Rcd 9420, 9423 ¶ 6 (2001) (WTB) (“*Weblink*”) (reconsideration pending).

<sup>28</sup> 47 C.F.R. §§ 1.106(d), 1.429(d).

<sup>29</sup> *Id.*

<sup>30</sup> *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwest Indiana Telephone Company, Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); *Weblink*, 16 FCC Rcd at 9423, ¶ 6; *Community Teleplay*, 13 FCC Rcd at 12428, ¶ 5.

the *Competitive Bidding Third MO&O*, but did not do so.<sup>31</sup> Insta-Check failed to raise the constitutional issue upon conclusion of Auction No. 3 in 1994, and also did not file a timely objection to the payment conditions attendant to the license grant.<sup>32</sup> Further, to the extent that Instapage argues that the issuance of the *Adarand* decision excused its earlier failures, Instapage's did not file its Request until four years after *Adarand* was issued.<sup>33</sup> In light of this record of inaction, it is clear that Instapage has waived its challenge to the bidding credit provisions of the regional Narrowband PCS service rules. Accordingly, in view of the fact that both the original licensee, Insta-Check, and the current licensee, Instapage, failed to timely raise a constitutional challenge despite repeated opportunities to do so, we dismiss Instapage's Request as untimely.

Finally, Instapage contends that under *Melody Music* the Commission's actions with respect to the 218-219 MHz service require it to grant a retroactive bidding credit here because, Instapage alleges, it is similarly situated to those small business that won licenses in the 218-219 MHz service auction and were granted remedial bidding credits.<sup>34</sup> This contention is misplaced. It is based upon the errant assumption that the retroactive credit afforded to the winning bidders in the 218-219 MHz Service auction was a direct remedy for race and gender discrimination. It was not. Rather, as the Commission has explained, the extent of any "remedy" provided in response to the timely-filed challenge<sup>35</sup> to the auction rules was the elimination of the race-based and gender-based bidding credits.<sup>36</sup> Thus, all minority-owned and women-owned businesses lost the bidding credit they had previously received in Auction No. 2.<sup>37</sup> At the same time, to fulfill the Commission's statutory mandate of encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women, the Commission granted a retroactive twenty-five percent bidding credit to the accounts of "every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction."<sup>38</sup> The Commission noted that this approach minimized the disruption to entities that have previously received a bidding credit and the public,<sup>39</sup> and that similar

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<sup>31</sup> See *supra* notes 10-12.

<sup>32</sup> Section 1.110 of the Commission's rules provides that if the Commission grants an application with conditions, the applicant must accept those conditions unless it rejects them within thirty days. 47 C.F.R. § 1.110. Thus, Insta-Check similarly waived any challenge to the payment conditions on the licenses by the passage of time.

<sup>33</sup> See *Weblink*, 16 FCC Rcd at 9424, ¶ 9; *Community Teleplay*, 13 FCC Rcd at 12429, ¶ 6.

<sup>34</sup> Request at 4 (citing *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)).

<sup>35</sup> See *Graceba Total Communications, Inc. v. FCC*, 115 F3d 1038 (D.C. Cir. 1997).

<sup>36</sup> Amendment of Part 95 of the Commission's Rule to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 25020, 25041-42 ¶ 44 (2000) ("*218-219 MHz Second Order on Reconsideration*"); Amendment of Part 95 of the Commission's Rule to Provide Regulatory Flexibility in the 218-219 MHz Service, *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, FCC 02-130, at ¶ 9, 16 (rel. May 3, 2002) ("*218-219 MHz 3<sup>rd</sup> Order on Recon.*"); *Weblink*, 16 FCC Rcd at 9424, ¶ 9.

<sup>37</sup> *218-219 MHz Order*, 15 FCC Rcd at 1533-34, ¶¶ 60-61; *218-219 MHz 3<sup>rd</sup> Order on Recon.*, FCC 02-130, at ¶ 9, 16 (rel. May 3, 2002).

<sup>38</sup> *218-219 MHz Order* at 1533, ¶ 61; *218-219 MHz 3<sup>rd</sup> Order on Recon.*, at ¶ 9.

<sup>39</sup> *218-219 MHz Order* at 1534, ¶ 63; *218-219 MHz 3<sup>rd</sup> Order on Recon.*, at ¶ 9.

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bidding credits had been provided to bidders in other Services.<sup>40</sup> Instapage does not present analogous circumstances.

In the instant case, neither Insta-Check nor Instapage filed a timely challenge to the Regional Narrowband PCS rules.<sup>41</sup> As discussed, *supra*, the absence of a timely challenge distinguishes Instapage's challenge from that of Graceba, and the limited relief that was granted in the 218-219 MHz Service. Therefore, the directive in *Melody Music* to accord the same treatment to similarly situated parties is not implicated by Instapage's Request. Accordingly, Instapage cannot rely upon the issuance of the *218-219 MHz Order* to cure the untimely nature of its filing and we dismiss Instapage's Request as untimely under section 1.429(d)<sup>42</sup> of our rules.

### 3. Ordering Clause

Accordingly, for the foregoing reasons, IT IS ORDERED that the Informal Request for Remedial Bidding Credit filed on November 12, 1999 is HEREBY DISMISSED WITH PREJUDICE. This action is taken pursuant to authority delegated by Section 0.331<sup>43</sup> of the Commission's Rules.

Sincerely,

Kathleen O'Brien Ham  
Deputy Chief  
Wireless Telecommunications Bureau

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<sup>40</sup> *218-219 MHz Order* at 1533-34, ¶¶ 61- 62; *218-219 MHz 3<sup>rd</sup> Order on Recon.*, at ¶ 9.

<sup>41</sup> *See James Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991) (wherein the Supreme Court upheld a party's responsibility to comply with procedural requirements); *see also Weblink*, 16 FCC Rcd. at 9424, ¶ 8.

<sup>42</sup> 47 C.F.R. § 1.429(d).

<sup>43</sup> 47 C.F.R. § 0.331