



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
TTY 202 / 418-2555
Internet: <http://www.fcc.gov>
ftn fcc.gov

DA 01-2122
September 10, 2001

Wireless Telecommunications Bureau Staff Provides Guidance on Completing the Short-Form Application (FCC Form 175) for Auction No. 40, Auction of Licenses for Lower and Upper Paging Bands

Report No. AUC-01-40-H

In this Public Notice, the staff of the Wireless Telecommunications Bureau (“Bureau”) provides guidance on completing the short-form application, FCC Form 175, for Auction No. 40. Common questions are presented and answered below in the order in which they may arise as an applicant fills out a short-form application.

Pursuant to Commission rule, applicants must file their FCC Form 175 short-form applications electronically.¹ For Auction No. 40, applicants may file with the Commission at any time beginning at noon ET on Wednesday, September 5, 2001, until 6:00 p.m. ET on Monday, September 17, 2001. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. Applicants may update or amend their electronic applications multiple times until the filing deadline of 6:00 p.m. ET on Monday, September 17, 2001. Late applications will not be accepted.

Applicants are cautioned that the Commission’s rules and decisions control the processing of short-form applications and that the advice and rule interpretations provided in this Public Notice constitute informal staff opinion, not official Commission decisions or rulings.² Part 1 of the Commission’s rules generally governs the auction process, including short-form applications, in conjunction with additional service-specific rules.³

In addition, applicants are reminded that they must comply with all of the Commission’s rules governing short-form applications and not merely those rules discussed in this Public Notice. This Public Notice supplements the previously released *Auction No. 40 Procedures Public Notice*,⁴ which addresses

¹ See 47 C.F.R. § 1.2105(a).

² See *AMOR Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990); *P & R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984); *Request of 220 Television, Inc., Dayton Ohio*, 81 FCC 2d 575, 577 (1980).

³ See 47 C.F.R. § 1.2101 *et seq.*

⁴ Lower and Upper Paging Bands Auction Scheduled for June 26, 2001; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedural Issues, *Public Notice*, DA 01-850 (rel. April 9, 2001), 66 Fed Reg. 21143 (“*Auction No. 40 Procedures Public Notice*”).

aspects of the short-form application not discussed herein. Applicants should review all applicable rules, as well as the *Auction No. 40 Procedures Public Notice*.⁵

I. PROFILE PAGE

- Q. Why does the profile page state “no P.O. Boxes” for the address of the applicant’s contact person?
- A. The Commission may send time-sensitive information to an applicant’s contact person using overnight delivery services that will not deliver to post office box addresses. For example, the Commission sends information regarding incomplete applications by such a service. Applicants may need this information in order to revise their applications properly prior to the deadline for resubmission. Thus, it is in each applicant’s interest to provide the Commission with an accurate street delivery address to which overnight deliveries can be sent.

Applicants should be careful when copying letterhead addresses. Occasionally, letterheads that include both a post office box address and a street address list only one zip code, which may be correct for the post office box address but not the street address.

In addition, applicants indicating “[s]ame as applicant” for a contact person’s address should be careful not to give a post office box address for the applicant.

II. OWNERSHIP INFORMATION

- Q. What information must applicants disclose about Commission-regulated entities?
- A. Together with other ownership information, all applicants must list any FCC-regulated entity or applicant for an FCC license in which the applicant or any party disclosed as having an ownership interest in the applicant owns 10 percent or more of any class of stock. This list must include a description of each regulated entity’s principal business and its relationship to the applicant.⁶

III. BIDDING AGREEMENTS

- Q. If an applicant shares authorized bidders with other applicant(s) for licenses in the same geographic area, must the applicant have formal bidding agreements with those other applicants?
- A. Applicants for licenses in the same geographic area that share authorized bidders risk allegations concerning the possibility of communications that violate the Commission’s anti-collusion rule. Applicants that enter into a formal bidding agreement with each other prior to filing their short-form applications are not subject to the prohibitions of that rule with respect to each other, provided that they identify the parties to any such agreement in their short-form applications.⁷ Alternatively,

⁵ Various deadlines announced in the *Auction No. 40 Procedures Public Notice* subsequently have been changed. See Lower and Upper Paging Bands Auction Scheduled for October 30, 2001, DA 01-1961 (rel. Aug. 17, 2001) (“*Auction No. 40 Scheduling Notice*”).

⁶ 47 C.F.R. § 1.2112(a)(6). Page D-3 of Attachment D to the *Auction No. 40 Procedures Public Notice* should have included the phrase “owns 10 percent or more of the stock, whether voting or nonvoting, common or preferred,” after “applicant” in the sixth line from the bottom of page D-3. Also, consistent with the current language of Section 1.2112(a)(6), page D-3 should have referred to “[a]ny FCC-**regulated** entity or applicant for an FCC license,” rather than to “any FCC-**licensed** entity or applicant for an FCC license.”

⁷ 47 C.F.R. §§ 1.2105(a)(2)(viii) & (ix) and 1.2105(c).

applicants that share authorized bidders can take steps to ensure that the individual authorized bidders (e.g., individual members of a firm that serves as the authorized bidder for more than one applicant) will be limited to knowing the bids or bidding strategies of only one applicant until the down payment deadline.⁸

- Q. What if an applicant has controlling or ownership interests in common with other applicants for licenses in the same geographic area? Is it required to have formal bidding agreements with those other applicants?
- A. Applicants having controlling interests, which includes all officers and directors of the applicant, or ownership interests in common with other applicants should review the Commission's anti-collusion rule carefully. For purposes of the anti-collusion rule, each applicant *includes* all controlling interests, as well as all holders of ownership interests amounting to 10 percent or more of the applicant.⁹ If, for example, an applicant's director also is the director of a second applicant, the director's knowledge of one applicant's bids or bidding strategies may be imputed to the other applicant. Absent a properly disclosed bidding agreement between the two applicants, these applicants risk allegations of anti-collusion rule violations.

IV. BIDDING CREDIT ELIGIBILITY

Applicants are reminded that they certify to the accuracy of information and their compliance with the Commission's rules when they submit their short-form applications. In particular, applicants seeking bidding credits as a small business must certify that they qualify as a small business. Winning bidders at the close of the auction must be prepared to document revenues reported in their short-form applications when they submit their long-form application(s) following the auction.¹⁰

- Q. Must applicants seeking bidding credits list all of their officers and/or directors?
- A. Yes. In addition to disclosing parties with ownership interests in the applicant,¹¹ all applicants seeking bidding credits must list "the names, addresses, and citizenship of **all** officers, directors, and other controlling interests[.]"¹² Relevant state laws vary regarding the number of required directors and officers, as well as whether one person may hold more than one directorship or office. To avoid

⁸ See, generally, Application of Nevada Wireless, *Memorandum Opinion and Order*, 13 FCC Rcd 11973 (1998).

⁹ 47 C.F.R. § 1.2105(c)(6)(i).

¹⁰ See 47 C.F.R. § 1.2110(j)(applicants must prove status on long-form applications).

¹¹ All applicants, regardless of whether they seek a bidding credit, may need to identify officers and/or directors in order to (1) identify a responsible officer or director and (2) comply with general ownership disclosure requirements. For example, "[i]f the applicant is a corporation, then the short-form application will require . . . the name and title of an officer or director." 47 C.F.R. § 1.2105(a)(2)(ii)(A). Entities with other business structures have analogous requirements. See *id.* Furthermore, all applicants must provide "[a]pplicant ownership information, as set forth in § 1.2112." 47 C.F.R. § 1.2105(a)(2)(ii)(B). Section 1.2112 may require the applicant to identify officers or directors (or analogous parties for partnerships and other forms of organization), depending upon the officers' and directors' ownership interests. See 47 C.F.R. § 1.2112(a).

¹² 47 C.F.R. § 1.2112(b)(1)(i) (emphasis added).

any uncertainty, applicants should state that their application provides a complete list of relevant parties.¹³

- Q. Does Part 1 or Part 22 of the Commission’s rules control what revenues are attributed to applicants seeking bidding credits?
- A. Part 1 of the Commission’s rules, **not** Part 22, controls what revenues are attributed to applicants seeking bidding credits.

This is a **change** from the previous auction of licenses for the upper paging bands, Auction No. 26. Part 1 of the Commission’s rules was amended following Auction No. 26.¹⁴ Currently, section 1.2110 of the Commission’s rules determines what revenues are relevant for bidding credit eligibility, regardless of redundant or contradictory rules in Part 22. As indicated in the *Auction No. 40 Procedures Public Notice*, “Part 1 rules that superseded inconsistent service-specific rules will control in Auction No. 40. Accordingly, the “controlling interest” standard [governing attribution of revenue] as set forth [in Part 1] will be in effect for Auction No. 40, even if conforming edits to the CFR [in Part 22] are not made prior to the auction.”¹⁵

Part 1 rules, however, incorporate portions of the Part 22 rules. As indicated in Section 1.2110(c)(1), the Commission “establish[es] the definition of a small business on a service-specific basis, taking into account consideration [of] the characteristics and capital requirements of the particular service.”¹⁶ With respect to the paging services, this means that the definition of small business in Section 22.223(b) remains in effect. Small businesses are defined in two groups, one with attributable average gross revenues of less than \$3 million and one with attributable average gross revenues of less than \$15 million.¹⁷

The Commission applies Part 1 rules regarding affiliation, controlling interests, and gross revenues, rather than Part 22, when determining whether an applicant qualifies as a small business within the definition of Section 22.223(b). **Applicants should take care not to rely on bidding credit eligibility information prepared for Auction No. 26 and should make sure that their applications comply with the Commission’s current rules.**

- Q. What is included in gross revenues?
- A. The Commission’s rules provide an explicit definition of “gross revenues” for purposes of determining bidding credit eligibility.¹⁸ “Gross revenues” includes both earned and passive income, before any deductions are made for the cost of doing business.

¹³The state of organization should be provided when an applicant identifies the citizenship of any entity, e.g., when an applicant provides the “names, addresses, and citizenship of . . . controlling interests.”

¹⁴ See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (“*Part 1 Fifth Report and Order*”).

¹⁵ *Auction No. 40 Procedures Public Notice* at 15 (emphasis in original) (citing in part *Part 1 Fifth Report and Order* at 15330 ¶78).

¹⁶ 47 C.F.R. § 1.2110(c)(1).

¹⁷ 47 C.F.R. § 22.223(b).

¹⁸ 47 C.F.R. § 1.2110(n).

Q. How many years of gross revenue information must be provided?

A. Three.¹⁹ Applicants should report audited financial information for their three most recently completed fiscal years. If operating on a calendar years basis, for Auction No. 40, those years would be 1998, 1999, and 2000.²⁰

Q. What should applicants do if the audit for the most recently completed fiscal year has not been finished?

A. In that case, applicants should provide information from the three most recently completed fiscal years for which they have audited financial statements.

For example, if an entity's fiscal year ends on August 31, the three most recently completed fiscal years prior to the September 17, 2001 deadline for filing short-form applications will be September 1, 1998 – August 31, 1999 (FY 98); September 1, 1999 – August 31, 2000 (FY 99); and September 1, 2000 – August 31, 2001 (FY 00). However, the entity may not have finished preparing audited financial statements for FY 00 (September 1, 2000 – August 31, 2001) before the September 17, 2001 short-form application deadline. In that case, an applicant reporting gross revenues for such an entity should indicate that the three most recently completely fiscal years for which the entity has audited financial statements are FY 97, 98, and 99 and provide information for those years.

Applicants can reduce any uncertainty by providing as much information as possible, *e.g.*, the dates of the entity's fiscal years and how long after the end of the fiscal year audited financial statements usually become available. The Commission has stated in a related context that it expects applicants to obtain financial statements within a reasonable period of time after the close of the applicable calendar or fiscal year and that they should base any claim to eligibility on those financial statements. If an applicant delays, or takes action that results in delay in, the generation or submission of current audited financial statements in order to qualify as a small business when it otherwise would not, the applicant will risk being declared ineligible to participate in the auction or to receive licenses or to continue to hold licenses.²¹

Q. What should applicants do if they do not prepare audited financial statements?

A. "When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles."²² In such cases, the applicant still would provide gross revenues for the three most recently completed fiscal years. If, however, an applicant uses audited financial statements, but simply does not have an audited financial statement for the most recent fiscal year because one has not yet been prepared, the applicant should report the three most recently completed fiscal years for which it has prepared audited financial statements.

¹⁹ 47 C.F.R. § 1.2110(b)(1).

²⁰ Attachment D to the *Auction No. 40 Procedures Public Notice* includes an example that uses gross revenues for 1997, 1998 and 1999. *Auction No. 40 Procedures Public Notice* at D-5. That example does **not** mean that those are the years for which information should be provided.

²¹ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266, 16284 (2000).

²² 47 C.F.R. § 1.2110(n).

- Q. What if an entity was created less than three years ago?
- A. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest.²³ If there is no identifiable predecessor-in-interest for any relevant years, the applicant should so state while providing gross revenues for all relevant years in existence.
- Q. If an entity and any identifiable predecessor-in-interest were created less than three years ago, how will three-year "average" gross revenues for that entity be determined?
- A. If an entity and any identifiable predecessor-in-interest were created less than three years ago, average gross revenues will be determined by dividing the cumulative gross revenues of the entity and any identifiable predecessor-in-interest by the number of years they have been in existence.

For example, a one-year-old entity, with no predecessor-in-interest, that has gross revenues totaling \$3,000,001 will be deemed to have average gross revenues of \$3,000,001 (or \$3,000,001 divided by 1 year). For entities that can be traced back three years (or more) but that had no gross revenues during some portion of the previous three years, applicants should expressly state that the entity or its predecessor-in-interest was in existence during the relevant year(s) and had gross revenues of \$0. For entities that cannot be traced back three years, applicants should state so expressly and should **not** report gross revenues of \$0 for years that neither the entity nor any predecessor-in-interest were in existence.

- Q. Must an applicant include the personal income of individuals when reporting gross revenues?
- A. The Commission does not consider most personal income to be gross revenue for purposes of determining bidding credit eligibility.²⁴ For example, the Commission distinguishes the personal income of an applicant's officers and directors, such as salaries, from the revenues those individuals receive from their business activities. If an officer or director of an applicant operates a business as a sole proprietor, however, the gross revenues derived from that proprietorship should be reported and attributed to the applicant.

V. STATEMENT REGARDING PRIOR DEFAULTS OR DELINQUENCIES

- Q. Must all applicants provide a separate statement regarding prior defaults on Commission licenses or delinquencies on non-tax debts to other Federal agencies?
- A. Yes. All applicants are required to provide "[a]n attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency."²⁵

²³ *Id.*

²⁴ See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10086 ¶100 (1999) ("Personal income is treated as an element of personal net worth, and thus is not attributable" as gross revenues for purposes of determining bidding credit eligibility.)

²⁵ 47 C.F.R. § 1.2105(a)(2)(xi).

This statement is in addition to and separate from the required certification that the applicant is not currently in default. Applicants currently in default cannot file complete applications because they cannot certify that they are not currently in default.²⁶ For this certification, “applicant” includes the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests.²⁷

- Q. Must applicants provide information regarding other entities’ prior defaults on Commission licenses or prior delinquencies on non-tax debts to other Federal agencies?
- A. Yes. For purposes of reporting prior defaults or delinquencies, each applicant should state whether or not it, or its affiliates or controlling interests, or the affiliates of its controlling interests, have ever been in default on any Commission license or delinquent on any non-tax debt owed to any Federal agency.²⁸

Finally, applicants are reminded that the statement must cover delinquencies on non-tax debts to any Federal agency as well as any defaults on Commission licenses.

- - - FCC - - -

²⁶ All applicants must certify that they are not *currently* “in default on any commission license and . . . not delinquent on any non-tax debt owed to any Federal agency.” 47 C.F.R. §1.2105(a)(2)(x).

²⁷ See *Part 1 Fifth Report and Order* at n. 142 (construing 47 C.F.R. §§ 1.2110, 1.2105(a)(2)(x)).

²⁸ *Part 1 Fifth Report and Order* at 15317 ¶42 (discussing newly adopted 47 C.F.R. §1.2105(a)(2)(xi)).