

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
CLEARCALL, INC.)
)
Request for Waiver of)
47 C.F.R. § 1.2105(b)(2))

ORDER

Adopted: January 21, 1997

Released: January 21, 1997

By the Chief, Wireless Telecommunications Bureau:

I. Introduction

1. On August 29, 1996, ClearCall, Inc. ("ClearCall") filed a Petition for Reconsideration of the denial of its request to change its designated entity status in connection with the 900 MHz Specialized Mobile Radio ("SMR") auction. ClearCall initially claimed eligibility as an entity with gross revenues of not more than \$15 million. After the completion of the auction, ClearCall filed a waiver request seeking to change its status to a small business with gross revenues of not more than \$3 million and to receive the accompanying financial benefits afforded such small businesses.² By a letter ruling, dated July 30, 1996, the Auctions Division ("Division") of the Wireless Telecommunications Bureau ("Bureau") denied ClearCall's Waiver Request.³ For the reasons set forth below, ClearCall's reconsideration petition is denied and the Division's decision is affirmed.



¹ ClearCall, Inc., Petition for Reconsideration, Request for Waiver of Section 1.2105(b)(2) of the Commission's Rules ("Petition").

² ClearCall, Inc., Request for Waiver, Application of ClearCall, Inc. for Authority to Construct and Operate a CMRS Station in the 900 MHz Band ("Waiver Request").

³ See Letter to Terry J. Romine, Esquire and Pamela Gaary, Esquire, Counsel for ClearCall, from Kathleen O'Brien Ham, Chief, Auctions Division (July 30, 1996) ("Division Letter").

II. Background

2. On September 15, 1995, the Commission issued a Public Notice announcing the start of the 900 MHz SMR auction on November 28, 1995.⁴ The Public Notice further provided that the short-form applications (FCC Form 175) were due on October 26, 1995, and that applicants were required to indicate their designated entity status on their short-form applications.⁵ Pursuant to Section 90.814 of the Commission's rules,⁶ there were two categories of small businesses for that auction: (1) those with average gross revenues of not more than \$3 million for the three preceding years, and (2) those with average gross revenues of not more than \$15 million for the three preceding years. Bidders within the first category were eligible for a larger bidding credit and a more favorable installment payment plan than bidders within the second category.⁷ ClearCall indicated on its short-form application that it was a small business with gross revenues of not more than \$15 million.

3. On April 15, 1996, the Commission concluded the 900 MHz SMR auction.⁸ ClearCall was the winning bidder for Licenses YSM0221I and YSM022T in the Denver, Colorado Metropolitan Trading Area ("MTA").⁹ On April 29, 1996, after the close of the 900 MHz SMR auction, ClearCall filed a waiver request with the Division seeking permission to change its status to a small business with gross revenues of not more than \$3 million.¹⁰ ClearCall claimed that because the Commission did not allow sufficient filing time, it was unable to accurately review the income of its affiliate, Frontier Radio Communications, Inc. ("Frontier Radio"), before the short-

⁴ See *Public Notice*, Report No. AUC-95-07, Auction No. 7, released Sept. 15, 1995 ("September 1995 Public Notice").

⁵ *Id.* The auction actually commenced on December 5, 1995. *Public Notice*, Mimeo No. 60654, released Nov. 13, 1995, announced a change in the start of the auction to December 4, 1995, in the event of a government-wide shutdown. A further *Public Notice*, released Nov. 20, 1995, announced that the auction would commence on December 5, 1995.

⁶ 47 C.F.R. § 90.814.

⁷ 47 C.F.R. §§ 90.810 and 90.812. Under the rules, an entity having no more than \$3 million in gross revenues was entitled to: (i) use a bidding credit of 15 percent to lower the cost of its winning bid; (ii) make interest-only payments for the first five years of the license term, with interest to accrue at the U.S. Treasury note rate, and payments of interest and principal to be amortized over the remaining five years of the license term. An entity having gross revenues of not more than \$15 million was entitled to: (i) a bidding credit of 10 percent to lower the cost of its winning bid; (ii) interest-only payments for the first two years of the license term, with interest to accrue at the U.S. Treasury note rate plus an additional 2.5 percent, and payments of interest and principal to be amortized over the remaining eight years of the license term.

⁸ See *Public Notice*, DA 96-586, released Apr. 15, 1996.

⁹ *Id.*, Attachment "A" at 3.

¹⁰ Waiver Request at 1.

form application filing deadline.¹¹ Specifically, ClearCall claimed that it erroneously counted twice the gross revenues of Thomas G. Reuter ("Reuter"), the sole shareholder of Frontier Radio, and that a more accurate representation of Frontier Radio's records, including the counting of Reuter's gross revenues only once, showed that ClearCall qualified as a small business with gross revenues of not more than \$3 million.¹² ClearCall further claimed that because its proposed amendment was minor, it was entitled to make such a change pursuant to Section 1.2105(b)(2) of the Commission's rules.¹³

4. The Division denied ClearCall's request finding that, because of the significant benefits that the two small business categories confer on bidders, a modification to an applicant's small business status does not constitute a minor change within the meaning of Section 1.2105(b)(2). The Division also stated that a waiver of Section 1.2105(b)(2) to allow the amendment was not justified because ClearCall only showed that it made an error and failed to show that "unique circumstances are involved and that there is no reasonable alternative solution within existing rules," as required by Section 90.151 of the Commission's rules.¹⁴ Finally, the Division stated that the 42-day period between the announcement of the 900 MHz SMR auction and the short-form filing deadline provided adequate time for ClearCall to review its financial records in order to properly prepare its application.¹⁵

III. Arguments of ClearCall

5. In its Petition, ClearCall raises various arguments, some of which it previously raised in its Waiver Request. ClearCall contends that in preparing the long-form application (FCC Form 600), it realized that the information provided in its short-form was incorrect and that, pursuant to Section 1.65(a) of the Commission's rules, it was obligated to ensure that its pending application remained accurate. ClearCall notes that the corrected information resulted in its status as a designated entity changing from a small business with revenues of less than \$15 million to a small

¹¹ *Id.* at 2.

¹² *Id.* at 3.

¹³ *Id.* at 4. Section 1.2105(b)(2) of the Commission's rules provides:

The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

¹⁴ Division Letter at 2.

¹⁵ *Id.* at 2.

business with revenues of less than \$3 million (which ClearCall refers to as a "very small business").¹⁶

6. ClearCall further contends that its amendment is minor under Sections 1.2105(b)(2) and 90.164 of the Commission's rules. In support of this contention, ClearCall claims that this amendment is different from the specific examples listed in the rule as major amendments and that this amendment will not affect any other parties.¹⁷ ClearCall also contends that allowing the amendment will further Congressional and Commission goals to provide opportunities for small business to enter the wireless telecommunications industry and potentially provide additional competition to the marketplace.¹⁸ ClearCall states that if its status is not changed, ClearCall will lose its ability to compete as well as its flexibility to introduce additional services to consumers.¹⁹ ClearCall contends that this change will not adversely affect any other party because the bidding is completed "and the terms by which a certain bidder will pay its high bid has no affect [sic] on other applicants."²⁰ ClearCall further contends that the bidding in the Denver MTA was vigorous and competitive and the fact that bids higher than ClearCall's winning bids were made for other blocks in that market reflects that ClearCall's designated entity status was not a determining factor in the results of the auction.²¹

7. ClearCall also claims that unique circumstances exist which warrant the relief requested. ClearCall asserts that Section 90.814(d) of the Commission's Rules²² does not define "gross revenues" and, as such, ClearCall disclosed in its filings the gross income of Reuter. ClearCall states that because of the limited time provided for filing its short-form, it did not "have time to ponder whether inclusion of the Stockholder's gross income was required, or the

¹⁶ Petition at 4-5.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 6-7.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 7.

²¹ *Id.* at 8.

²² Section 90.814(d) provides:

For applications filed after December 31, 1994, *gross revenues* shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. 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 or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

duplicative nature of the gross revenues disclosed for Frontier Radio and Stockholder.²³ Also, for the first time, ClearCall now contends that Frontier Radio's revenues were inflated by an unknown amount by the embezzlement of funds by one of its employees.²⁴ ClearCall states that because of the destruction of records, the extent and the amount of the embezzlement and the effect on Frontier Radio's revenues are unknown.²⁵ ClearCall states that it was aware of this problem at the time it filed its short-form application but did not inform the Division of its situation because Reuter did not want the information to become public. ClearCall states that due to the Division's denial of the Waiver Request, ClearCall now has decided to divulge this information.²⁶

IV. Discussion

8. We agree with the Division's decision to deny ClearCall's request to change its small business eligibility status. As the Division correctly noted, because of the significant benefits that the two small business categories confer on winning bidders, modification of an applicant's small business status does not constitute a minor change within the meaning of Section 1.2105(b)(2).²⁷ Section 90.164, in relevant part, provides:

In general, a major filing is a request for Commission action that has the potential to affect parties other than the applicant.

The rule then lists the following as major filings: (a) initial station authorization; (b) substantial change in ownership or control; (c) renewal of authorizations; (d) having a significant environmental effect; (e) Specialized Mobile Radio Service filings which request or change various engineering/technical matters, such as a request to a change a frequency, increase in effective radiated power or antenna height, relocating an existing fixed transmitter, change a requested frequency, and other types of specified engineering/technical matters. 47 C.F.R. § 90.164.

9. The minor changes contemplated by the rule, such as typographical errors, can be undertaken by a bidder without any action on the part of the Commission. Here, ClearCall is seeking a change that requires the Commission to afford it different and more favorable benefits after the close of the auction. We do not believe that this type of change is one contemplated by the rule. Moreover, the fact that ClearCall is under a Section 1.65(a) obligation to maintain the

²³ Petition at 9.

²⁴ *Id.* at 9.

²⁵ *Id.* at 9.

²⁶ *Id.* at 9-10.

²⁷ Division Letter at 1.

accuracy and completeness of information furnished in an application cannot change an otherwise major change into a minor one.

10. We also disagree with ClearCall's contention that its proposed amendment is minor because it does not affect any other parties. Bidders placed bids during the auction based upon their understanding that ClearCall was entitled to a 10 percent bidding credit. The amount of ClearCall's bids may have affected the actions, bidding strategies, and bids of other bidders. The fact that there were bids higher than ClearCall's bids in other markets in the Denver MTA is not dispositive that its filing status did not affect the actions of other bidders. Bidders are interdependent because bids of one bidder have a direct effect on the bidding strategies of other bidders. Consequently, we believe that providing ClearCall with the benefit of a more favorable bidding credit arrangement after the close of the auction would affect other bidders and the integrity of the auction process.

11. We also believe that the 42-day period within which to prepare and file applications for this auction provided adequate time to obtain clarification of the rules, seek information, and review financial records. ClearCall notes there were 34 days to prepare and file applications from the date of publication of the Public Notice in the Federal Register.²⁸ We find that even 34 days is sufficient time to prepare and file applications and is consistent with the filing windows in other proceedings.²⁹ Applicants are responsible for the correctness and completeness of their applications. We believe that the certainty in filing deadlines is significant to both the integrity and functioning of the auction process.³⁰

12. We further find unpersuasive ClearCall's claim that unique circumstances existed to warrant a waiver of the rule. While ClearCall claims that Section 90.814(d) of the Commission's rules did not define "gross revenues," we note that Sections 90.814(b)(2) and 90.814(g) do provide guidance on this matter. Section 90.814(b)(2) of the Commission's rules specifies that for purposes of determining whether an entity meets the \$3 million or \$15 million average gross revenues size standard, "the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated ..." Section 90.814(g) of the Commission's rules defines what will be considered "attributable interests." Moreover, as indicated by the Commission's Public Notice announcing the 900 MHz SMR auction, prospective bidders specifically were put on notice that they were to ensure their

²⁸ Petition at 9.

²⁹ See, e.g., June 26, 1996, *Public Notice* announcing August 1, 1996, application deadline for the Broadband Personal Communications Service (D, E and F Blocks) auction (Report No. AUC-96-11-A, Auction No. 11).

³⁰ See, e.g., *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2350 (1994), *recon. granted in part, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("... procedural and payment issues regarding announcement of auctions and the filing of applications, bidder and licensee qualifications, pre-auction upfront payment and post-auction down payment, and penalties ... are intended to ensure that the competitive bidding process is limited to serious, qualified applicants.").

understanding of all provisions concerning participation in the auction.³¹

13. We likewise reject ClearCall's position that its employee's alleged embezzlement warrants a waiver of the rule. ClearCall admits that it knew of the embezzlement when it filed its short-form. At that time, ClearCall was under an obligation to provide this information to the Commission. The FCC Form 175 requires that an applicant certify, among other things, that it is financially qualified to operate a station for which it is applying. Embezzlement of an unknown amount of funds could have a direct, material effect upon an applicant's financial ability and, thus, it was incumbent upon ClearCall to disclose all facts at the time it filed its short-form application. To the extent that ClearCall did not want such information to be publicly available, it could have availed itself of the measures we provide for confidential treatment of certain information and sought such treatment.³² Finally, because there is no record as to the amount of funds actually embezzled, it is unclear to what extent ClearCall's revenues were affected. For this additional reason, a waiver is not justified. On balance, we believe that ensuring the integrity of the competitive bidding process outweighs the financial burdens ClearCall may experience as a result of its own filing error.

³¹ See September 1995 Public Notice, *supra*. This *Public Notice*, in relevant part, provided as follows:

A. Applicant Certification Requirements

The Terms contained in the Commission's Report and Orders, Public Notices and in the Bidder Information Package are not negotiable. Prospective bidders should review these auction documents thoroughly prior to the auction to make certain that they understand all of the provisions and are willing to be bound by all of the Terms before making any bid.

September 1995 Public Notice at 20.

³² See 47 C.F.R § 0.459.

V. Conclusion and Ordering Clause

14. For the reasons stated above, we find that ClearCall has failed to show that it is entitled to the relief it requests and, thus, we find that the Division was correct in denying ClearCall's Waiver Request. Accordingly, IT IS ORDERED that, pursuant to Section 0.331 of the Commission's rules, the Petition for Reconsideration filed by ClearCall, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau