

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Weblink Wireless, Inc. )
Request for Remedial Bidding Credit and Refund )

ORDER

Adopted: May 3, 2001

Released: May 3, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a request for a retroactive bidding credit filed by Weblink Wireless, Inc. ("Weblink"), a winning bidder in the auctions for licenses in the national and regional narrowband Personal Communications Service ("PCS").

II. BACKGROUND

2. From July 25 through July 29, 1994, the Commission conducted an auction consisting of ten nationwide narrowband PCS licenses ("Auction No. 1") pursuant to rules adopted in the Commission's Competitive Bidding Second Report and Order and the Competitive Bidding Third Report and Order.

1 Request for Remedial Bidding Credit and Refund, filed by Weblink Wireless, Inc. on June 8, 2000 ("Weblink Request").

2 "Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses; Winning Bids Total \$617,006,674," Public Notice, PNWL 94-004 (rel. Aug. 2, 1994) ("Nationwide Narrowband PCS Closing PN"); "Narrowband PCS Nationwide Auction Winners," Public Notice, PNWL 94-009, Report No. PCS-NB-94-1 (rel. Aug. 17, 1994) ("Nationwide Narrowband PCS Accepted for Filing PN"); "Announcing the High Bidders in the Auction of 30 Regional Narrowband (PCS) Licenses; Winning Bids Total \$490,901,787," Public Notice, PNWL 94-27 (rel. Nov. 9, 1994) ("Regional Narrowband PCS Closing PN").

3 Nationwide Narrowband PCS Closing PN.

4 In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding and Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2398-2400 (1994) ("Competitive Bidding Second Report and Order"); In the Matter of Implementation of Section 309(j) of the Communications Act -- (continued....)

One of those rules allowed women- and minority-owned businesses that were winning bidders for certain nationwide, regional, major trading area (“MTA”), and basic trading area (“BTA”) narrowband PCS licenses to apply for a 25 percent bidding credit.<sup>5</sup> On August 17, 1994, the Commission announced the winning bidders in the nationwide narrowband PCS auction whose applications were accepted for filing.<sup>6</sup> Under the auction rules, bidding credits were available to qualified entities for three of the ten national narrowband PCS licenses.<sup>7</sup> None of the seven winning bidders, including Weblink,<sup>8</sup> qualified for the 25 percent bidding credit offered to women- and minority-owned businesses.<sup>9</sup>

3. From October 26, 1994 through November 8, 1994, the Commission conducted an auction consisting of thirty regional narrowband PCS licenses (“Auction No. 3”) pursuant to rules adopted in the *Narrowband Third Memorandum Opinion and Order*.<sup>10</sup> One of those rules allowed women- and minority-owned businesses that were winning bidders to apply for a 40 percent bidding credit.<sup>11</sup> Under the auction rules, bidding credits were available to qualified entities for ten of the thirty regional narrowband PCS licenses.<sup>12</sup> Women – or minority-owned entities won all of the ten regional narrowband PCS licenses for which a 40 percent bidding credit could be applied.<sup>13</sup> Weblink,<sup>14</sup> which was among the winning bidders, did not win a license for which a bidding credit was available.<sup>15</sup>

(Continued from previous page) \_\_\_\_\_  
Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941 (1994) (“*Competitive Bidding Third Report and Order*”).

<sup>5</sup> *Id.* at 2970 ¶ 72.

<sup>6</sup> *Nationwide Narrowband PCS Accepted for Filing PN*.

<sup>7</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2945 ¶ 10, 2983.

<sup>8</sup> Weblink, then know as PageMart Wireless, Inc., participated through its subsidiary Pagemart II, Inc., which won one nationwide narrowband PCS license. *Id.*; see also Weblink Request at 1.

<sup>9</sup> *Nationwide Narrowband PCS Closing PN*; *Nationwide Narrowband PCS Accepted for Filing PN*; see also In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding and Amendment of the Commission’s Rules to Establish New Narrowband Personal Communication Services, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 178 ¶ 4 (1994) (“*Narrowband Third Memorandum Opinion and Order*”).

<sup>10</sup> *Narrowband Third Memorandum Opinion and Order*.

<sup>11</sup> *Id.* at 201 ¶ 58, 215-16 ¶ 87.

<sup>12</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2945 ¶ 10; *Narrowband Third Memorandum Opinion and Order* 10 FCC Rcd at 233.

<sup>13</sup> *Regional Narrowband PCS Closing PN*; “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>14</sup> Weblink, then know as PageMart Wireless, Inc., participated through its subsidiary Pagemart II, Inc., which won five regional narrowband PCS license. *Regional Narrowband PCS Closing PN*.

<sup>15</sup> *Regional Narrowband PCS Closing PN*; “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).

4. On June 12, 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Pena* 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>16</sup> Almost five years later, on June 8, 2000, Weblink filed its Request for retroactive bidding credits for the nationwide and regional narrowband PCS licenses that it won in Auction No. 1 and Auction No. 3.<sup>17</sup> Weblink does not allege that it has previously raised any concerns regarding the constitutionality of bidding credits in either the nationwide or regional narrowband PCS auctions, whether through the comment and reply comment process in the rule making proceedings or through a petition for reconsideration of either the *Competitive Bidding Second Report and Order*, *Competitive Bidding Third Report and Order*, the *Narrowband Third Memorandum Opinion and Order*, or the closing PN for either Auction No. 1 or Auction No. 3.<sup>18</sup>

5. In its Request, Weblink alleges that the bidding credits offered to women- and minority-owned businesses were unconstitutional and had the effect of skewing the results of the auction as minority and women owned business "bid-up" the price for spectrum.<sup>19</sup> Weblink 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 business in the 218-219 MHz service.<sup>20</sup>

### III. DISCUSSION

6. Weblink's request for a retroactive bidding credit is 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>21</sup> Weblink 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 Report and Order*, *Competitive Bidding Third Report and Order* and the *Narrowband Third Memorandum Opinion and Order*, but did not do so.<sup>22</sup> In fact, after no

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<sup>16</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995).

<sup>17</sup> Weblink Request.

<sup>18</sup> *See* Comments, Reply Comments and Ex Parte filings made by Weblink and Pagemart in PP Docket No. 93-253. The constitutionality of bidding credits for designated entities was explicitly considered by the Commission in the rule makings that affected the nationwide and regional narrowband auctions. *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2398-2400 ¶¶ 54, 289-297 (1994); *Competitive Bidding Third Report and Order*, 9 FCC Rcd 2941, 2973 n.47.

<sup>19</sup> Weblink Request at 3. A fundamental assumption to Weblink's argument is that it knowingly made excessive bids for licenses in Auction No(s). 1 and 3. Weblink does not argue that women- and minority-owned businesses outbid it for licenses it wished to acquire.

<sup>20</sup> Weblink Request at 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*, FCC 99-239, 15 FCC Rcd 1497 (1999) ("218-219 MHz Order").

<sup>21</sup> *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); In the Matter of Community Teleplay, Inc., et. al., *Order*, 13 FCC Rcd 12,426, 12428 ¶ 5 (WTB 1998) ("*Community Teleplay*"); *Jerome Thomas Lamprecht*; 7 FCC Rcd 6794, 6794 (1992).

<sup>22</sup> *See supra* note 16.

minority- or women-owned entities won licenses in the nationwide narrowband PCS auction, Weblink filed comments supporting both bidding credits and entrepreneur blocks for women and minorities participating in the subsequent regional narrowband PCS auction.<sup>23</sup> Weblink also could have attempted to raise the constitutional issue upon conclusion of either auction in 1994.<sup>24</sup> Again, Weblink failed to do so. Weblink also could have timely objected to the payment conditions attendant to its license grants.<sup>25</sup> Finally, neither the release of the *Adarand* decision nor the *218-219 MHz Order* provided a milepost of timely objection as Weblink's request was filed almost five years after *Adarand* and nine months after the *218-219 MHz Order*.

7. In support of its position that its request is not untimely, Weblink relies upon *Graceba Total Communications* and *James Beam Distilling Company v. Georgia*.<sup>26</sup> Such reliance is misplaced. *Graceba*, a participant in the 218-219 MHz auction ("Auction No. 4"), 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.<sup>27</sup> The Weblink Request is neither timely filed petition for reconsideration nor a supplement to a timely filing. Rather, the Weblink Request for a retroactive bidding credit is analogous to the facts of *Community Teleplay* in which the Wireless Telecommunications Bureau ("Bureau") rejected *Community Teleplay*'s request for a retroactive bidding credit because the filing was untimely.<sup>28</sup> Like Weblink, *Community Teleplay*, which won licenses in the 218-219 MHz auction, filed a belated request under Section 1.41<sup>29</sup> of our rules and relied on *Graceba* to

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<sup>23</sup> Comments of Pagemart, Inc., In the matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, PP Docket No. 93-253 (filed September 16, 1994); *see also Competitive Bidding Third Report and Order*, 10 FCC Rcd at 201 ¶ 58 (Commission increased the bidding credit to 40 percent because women- and minority-owned bidders did not win any licenses in the nationwide narrowband PCS auction).

<sup>24</sup> We note that public notices are subject to reconsideration only in limited circumstances. *See, e.g.*, In the Matter of Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., Petition for Reconsideration, Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500, 17505-17506, ¶ 10, n.38-39 (2000) (explaining that in some instances it may be proper for a party to challenge a public notice that establish or deny rights); In the Matter of Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, Order, 14 FCC Rcd 6561, 6562 ¶ 3 (1999) (Commission considered an application for review of a public notice that established an auction date despite the procedural deficiency of the application).

<sup>25</sup> Section 1.110 of the Commission's rules provide 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, Weblink has similarly waived any challenge to the payment conditions on the licenses by the passage of time.

<sup>26</sup> Weblink Request at 4 (citing *James Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991) and *Graceba*, 115 F3d 1038).

<sup>27</sup> *Community Teleplay*, 13 FCC Rcd at 12428-29 ¶ 5.

<sup>28</sup> *Community Teleplay*, 13 FCC Rcd at 12429 ¶ 6.

<sup>29</sup> 47 C.F.R. § 1.41.

argue that its filing was not untimely.<sup>30</sup> In addition, like Weblink, Community Teleplay's request was not filed as a supplement to a timely filed petition for reconsideration.<sup>31</sup> Community Teleplay and Weblink both participated in auctions that preceded the *Adarand* decision.

Community Teleplay's petition was found to be untimely because it was filed six months after the *Adarand* decision.<sup>32</sup> Similarly, Weblink's Request is also untimely because it was filed nearly five years after the *Adarand* decision.

8. Weblink's reliance on the Supreme Court's decision in *Jim Beam Distilling*<sup>33</sup> is similarly misplaced. In that instance, the Supreme Court specifically noted that once a court has applied a rule of law to litigants in one case it must do so with respect to all "others not barred by procedural requirements or res judicata."<sup>34</sup> Thus, *James Beam Distilling* specifically upholds a party's responsibility to comply with procedural requirements.<sup>35</sup> As stated above, Weblink failed to comply with procedural requirements and review here is barred by the doctrine of waiver.

9. Finally, Weblink 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.<sup>36</sup> Such a conclusion is misplaced. As the Commission has recently noted in the *218-219 MHz Second Order on Reconsideration*, the retroactive credit afforded to winning bidders in the 218-219 MHz service auction was not a direct remedy for race and gender discrimination.<sup>37</sup> Rather, in order to address the questions raised by a timely filed challenge to the auction rules concerning the constitutionality of race- and gender-based bidding credits, the Commission eliminated those credits.<sup>38</sup> This was the extent of the "remedy" provided. However, as the issue was not raised until after the auction closed, the Commission determined that it would be disruptive and unfair not to provide some form of bidding credit in the 218-219 MHz service, as licensees had crafted business plans in reliance upon the credit.<sup>39</sup> Accordingly, the Commission determined to afford to winning bidders in the 218-219 MHz service auction that qualified as small businesses a retroactive bidding credit.<sup>40</sup> The credit solved a multi-faceted and complex set of regulatory issues.<sup>41</sup>

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<sup>30</sup> *Community Teleplay*, 13 FCC Rcd at 12428-29 ¶ 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Community Teleplay*, 13 FCC Rcd at 12429 ¶ 6.

<sup>33</sup> *James Beam Distilling*, 501 U.S. 529.

<sup>34</sup> *James Beam Distilling*, 501 U.S. at 544.

<sup>35</sup> *Id.*

<sup>36</sup> Weblink Request at 4 (citing *Melody Music v. FCC*, 345 F2d 730 (D.C. Cir. 1965)).

<sup>37</sup> In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, WT Docket No. 98–169, FCC No. 00–411 at ¶ 44 (rel. December 13, 2000) ("*Second Order on Reconsideration*").

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

However, such a complex procedural situation is not presented here. Thus, the directive in *Melody Music* to accord the same treatment to similarly situated parties is not implicated by Weblink's request. Accordingly, in view of Weblink's failure to timely raise its constitutional challenge despite repeated opportunities to do so, Weblink has waived the opportunity to raise this issue now.<sup>42</sup>

#### IV. ORDERING CLAUSE

10. Accordingly, for the foregoing reasons, IT IS ORDERED that the Request for Remedial Bidding Credit and Refund filed on June 8, 2000, IS HEREBY DISMISSED. This action is taken pursuant to authority delegated by Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham  
Deputy Chief, Wireless Telecommunications Bureau

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<sup>41</sup> *Id.*

<sup>42</sup> *Community Teleplay*, 13 FCC Rcd at 12429 ¶ 6.