

II. BACKGROUND

2. Insta-Check Systems was the high bidder on one license in Auction No. 3, which concluded on November 8, 1994.⁶ At that time, Commission rules provided a 40 % bidding credit for women- and/or minority-owned businesses on 10 out of the 30 available licenses.⁷ 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).⁸ At the close of Auction No. 3, women- and/or minority-owned entities won all of the ten licenses for which a bidding credit could be applied.⁹

3. In 1995, the Supreme Court decided *Adarand Constructors v. Pena*,¹⁰ in which it held that any federal program wherein the “government treats any person unequally because of his or her race” must satisfy the “strict scrutiny”¹¹ constitutional standard of review. In response to the Court’s holding, but without rendering a decision on the constitutionality of its designated entity rules, the Commission decided to refrain in the future from providing bidding credits to women- and/or minority-owned businesses until it developed a record that would provide the evidentiary support necessary to withstand strict scrutiny review.¹²

4. In its November 12, 1999, Request, Instapage sought a 40% reduction or remedial bidding credit for the license won by Insta-Check in Auction No. 3.¹³ In dismissing Instapage’s Request as untimely according to our rules, the Bureau observed that Instapage did not file the Request until more than five years had passed since the Commission had promulgated the rules for the regional narrowband PCS auction, the auction had concluded, and the Commission had awarded the license to Insta-Check.¹⁴ The Bureau also found that Instapage had waived its challenge.¹⁵

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Bidding Credit, *Memorandum Opinion and Order*, 17 FCC Rcd 24,642, 24,647 ¶ 13 (2001) (“*Weblink MO&O*”). See n.26, *infra*.

⁶ *Regional Narrowband PCS Closing Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

⁷ 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, 201 ¶ 58, 215-16 ¶ 87 (1994).

⁸ *Regional Narrowband PCS Closing Public Notice*; 47 C.F.R. § 24.309(b)(2) (1994).

⁹ *Regional Narrowband PCS Closing Public Notice*; *November 29th News Release*.

¹⁰ *Adarand v. Pena*, 515 U.S. 200 (1995).

¹¹ “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Id.* at 227.

¹² Implementation of Section 309(j) of the Communications Act – *Competitive Bidding, Tenth Report and Order*, 11 FCC Rcd 19,974, 19,975-19,977, ¶¶ 1-3 (1996) (“*Competitive Bidding Tenth Report and Order*”); see Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19,341, 19,369 ¶ 67 (1996) (proposed rules for the then-planned second IVDS auction)

¹³ Request.

¹⁴ *Bureau Letter*, 17 FCC Rcd at 13,290-91.

¹⁵ Under the doctrine of waiver, 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 waiving it in subsequent proceedings. *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwestern Indiana Telephone*

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5. Myers Lazrus contends in its Petition that the Commission failed to provide a remedy for the alleged constitutional violation of offering bidding credits to women- and/or minority owned businesses, that the Commission should give *Adarand* retroactive effect with respect to Auction No. 3 and provide a remedy,¹⁶ that the Commission erred in concluding that the doctrine of waiver applied against Instapage,¹⁷ and that the remedy requested by Myers Lazrus is also supported by contract doctrines.¹⁸

III. DISCUSSION

6. Myers Lazrus, a law firm filing on its own behalf, requests reconsideration of the *Bureau Letter*. Although Myers Lazrus did not previously participate in the Instapage matter, it asserts standing to participate in the reconsideration under Section 1.106(b)(1) of the Commission's rules and, alternatively, under the third party standing doctrine.¹⁹ As we explain below, Myers Lazrus has failed to establish standing under Section 1.106(b) and its alternative third party standing argument is inapplicable in this instance.

7. To establish standing to file its Petition under Section 1.106(b)(1) of the Commission's rules, Myers Lazrus must show that its interests are adversely affected by the action taken by the Bureau and that it did not have the opportunity to participate in the earlier stages of the proceeding.²⁰ To determine if a party's interests have been adversely affected, the Commission frequently relies upon the three-pronged standing test under which a party must establish: (1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent's conduct and (3) redressable by the relief requested.²¹

8. Myers Lazrus bases its claim of standing on the Bureau's description of the Commission's grant of a retroactive bidding credit in the 218-219 MHz service as non-remedial.²² Myers Lazrus alleges this description has injured it by affecting the contractual relationship between the law firm and its client, the Ad Hoc Coalition. Specifically, Myers Lazrus alleges that its compensation for services was based on the achievement of a remedial action in the 218-219 MHz service.²³ Myers Lazrus asserts

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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, 12,428 ¶ 5 (WTB 1998) ("*Community Teleplay*"); *Jerome Thomas Lamprecht*, 7 FCC Rcd 6794, 6794 (1992).

¹⁶ Petition at 13-19.

¹⁷ *Id.*, at 19-24.

¹⁸ *Id.*, at 24.

¹⁹ Petition at 1-6. In order to assert third party standing: (1) the litigant must have suffered injury in fact, thus giving him or her sufficiently concrete interest in outcome of issue in dispute; (2) the litigant must have close relation to the third party; and (3) there must exist some hindrance to third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

²⁰ 47 C.F.R. § 1.106(b)(1) provides that "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken."

²¹ *See AT&T Corp., Complainant, v. Business Telecom, Inc., Defendants, Order on Reconsideration*, 16 FCC Rcd 21,750, 21,753-21,754 ¶ 7 (2001); Chris C. Hudgins, *Order on Reconsideration*, 16 FCC Rcd 7941 (2001).

²² Petition at 2-3. We note that the Court of Appeals for the D.C. Circuit recently affirmed the Commission's position that the retroactive bidding credit in the 218-219 MHz service was not a remedy for discrimination, but was instead crafted to address a "multi-faceted and complex set of regulatory issues." *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 676 (D.C. Cir. 2003), *cert. denied sub nom. Self Communications, Inc. v. Federal Communications Commission*, No. 03-1181, -- U.S.--, -- S. Ct. --, 2004 WL 335478 (U.S., Apr. 19, 2004).

²³ Petition at 2.

that it has private, substantive legally protected interests in its contingency fees with its clients, and argues that the Bureau's characterization of the retroactive bidding credit as something other than remedial and the product of Myers Lazrus' efforts on behalf of its clients undermines and interferes with the law firm's contingency fee agreements.²⁴ Myers Lazrus also alleges that the *Bureau Letter* interferes with its ability to develop contingency fee agreements with prospective narrowband PCS clients.²⁵

9. The issues raised by Myers Lazrus stem from a fee dispute between an attorney and its client. This is not a matter regulated by the Commission and therefore does not form a redressable injury for which the Commission may provide relief.²⁶ The Commission has a long-standing practice of not addressing matters related to private contractual agreements and this matter does not present any extenuating circumstances that would make it an exception to Commission practice.²⁷ The Commission has previously observed, "private disputes are beyond our regulatory jurisdiction and must be resolved in a local court of competent jurisdiction."²⁸ Myers Lazrus does not establish any of the elements for standing under Section 1.106(b)(1) because it fails to articulate how its interests have been adversely affected by the Commission in a cognizable manner.²⁹

10. With respect to the third party standing alternative argument, we note that it has been generally disfavored by the Commission.³⁰ This is not surprising because third party standing contravenes a basic prudential principle that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."³¹ Moreover, to assert third party standing, Myers Lazrus must demonstrate the existence of some hindrance to Instapage's ability to protect its own interest.³² Myers Lazrus does not claim that Instapage suffers from any hindrance to its ability to protect its interest in this matter. Clearly nothing has prevented Instapage from pursuing the particular claim at issue here although such claims are now untimely.³³ Myers Lazrus has failed to provide a basis to diverge from this principle here. Thus, it would be inappropriate to recognize third party standing in this instance.

11. In essence, Myers Lazrus is using the Petition for Reconsideration of the *Bureau Letter* as an opportunity to re-argue the issues raised by its request for a determination that it is entitled to a "common fund award" in connection with the 218-219 MHz service and the regional and nationwide

²⁴ *Id.*

²⁵ *Id.* at 3-4.

²⁶ We note that the Bureau held that Myers Lazrus did not have standing to seek reconsideration of the Bureau's order dismissing Weblink Wireless, Inc.'s request for retroactive bidding credits after Myers Lazrus presented the same argument to the Bureau in that matter that it presents in this instance. *Weblink MO&O*, 17 FCC Rcd 24,642, 24,647 ¶ 13.

²⁷ See *Weblink MO&O*, 17 FCC Rcd at 24,647 ¶ 13.

²⁸ *State Street Bank and Trust Company v. Arrow Communications*, 833 F.Supp. 41 (U.S.D.C. D.Mass. 1993) (citing *In re: KMJC-FM, Clinton, Iowa, Assignment of License*, File No. BALH-921008HF, *Letter Ruling* (Feb. 25, 1993); see also *Weblink MO&O*, 17 FCC Rcd at 24,647 ¶ 13.

²⁹ *Weblink MO&O*, 17 FCC Rcd at 24,647 ¶ 13.

³⁰ *Id.* at 24,647 ¶ 14.

³¹ *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Weblink MO&O*, 17 FCC Rcd at 24,647 ¶ 14.

³² *Lepelletier v. Federal Deposit Insurance Corporation*, 164 F.3d 37, 43 (D.C. Cir. 1999) (citing *Powers v. Ohio*, 499 U.S. 411 (1991)).

³³ In the *Weblink MO&O*, the Commission dismissed as untimely a similar claim of third-party standing by Myers Lazrus. *Weblink MO&O*, 17 FCC Rcd at 24,647 ¶ 14.

narrowband PCS services.³⁴ The request was denied initially, the Bureau affirmed on reconsideration, and the Commission denied an application for review.³⁵ Subsequently, Myers Lazrus filed a petition for reconsideration challenging the Commission's order and at the same time filed a petition for review with the Court of Appeals for the District of Columbia Circuit.³⁶ Clearly, a petition for reconsideration of the *Bureau Letter* is an inappropriate vehicle for a collateral attack on the *Common Fund Orders*.³⁷ We, therefore, dismiss the Myers Lazrus Petition for lack of standing.³⁸

IV. ORDERING CLAUSES

12. Accordingly, for the foregoing reasons, IT IS ORDERED that the Petition for Reconsideration filed by Myers Lazrus Technology Group on August 7, 2002, IS HEREBY DISMISSED.

13. This action is taken pursuant to authority delegated by Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

14. It is FURTHER ORDERED that copies of this Order on Reconsideration will be sent to Myers Lazrus Technology Law Group by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Peter Tenhula
Acting Deputy Chief
Wireless Telecommunications Bureau

³⁴ See Petition for Order to Declare a Common Fund, filed by Hill & Welch and Myers Keller Communications Law Group on March 8, 2000; *compare with* Petition.

³⁵ Hill and Welch and Myers Keller Communications Law Group, Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, *Order*, 15 FCC Rcd 2432 (2000), *aff'd on recon*, Hill and Welch and Myers Keller Communications Law Group, Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, *Order on Reconsideration*, 16 FCC Rcd 9485 (2001) ("*Common Fund Orders*"), *application for review denied*, Hill and Welch and Myers Keller Communications Law Group, Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, 18 FCC Rcd 6909 (2003).

³⁶ Hill and Welch and Myers Keller Communications Law Group, Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, Petition for Reconsideration, filed May 1, 2003; *Myers Lazrus Technology Law Group v. FCC*, No. 03-1154 (D.C. Cir. June 30, 2003) (order holding case in abeyance pending conclusion of reconsideration proceedings).

³⁷ In this instance, the expense of time and resources to address what appear to be frivolous arguments is a detriment to the public interest. We therefore put Myers Lazarus and any others similarly disposed on notice, that we are prepared to impose abuse of process remedies should meritless petitions be filed in the future. See Commission Taking Tough Measures against Frivolous Pleadings, *Public Notice*, FCC No. 96-42, 11 FCC Rcd 3030 (1996).

³⁸ See Applications of No Wire, LLC, *Order on Reconsideration*, 15 FCC Rcd 10,257 (2000).