



Federal Communications Commission
Washington, D.C. 20554

November 22, 2004

DA 04-3668

Via Certified Mail, Return Receipt Requested

Robert J. Keller
Law Officers of Robert J. Keller, P.C.
P.O. Box 33428 – Farragut Station
Washington D.C. 20033-0428

Re: Auction No. 40 - Reconsideration Request

Dear Mr. Keller:

This letter responds to the petition filed on behalf of Golden Arrow Paging (“GAP”) seeking reconsideration of GAP’s claim to eligibility for a bidding credit in Auction No. 40.¹ GAP seeks reconsideration based on information provided to the Commission for the first time in its Petition. For the reasons discussed below, we deny GAP’s Petition.

Parties seeking to participate in Auction No. 40 were required to submit a short-form application no later than 6 p.m. ET on September 17, 2001.² The Commission’s rules require applicants claiming bidding credit eligibility to disclose certain information in their short-form applications, in part by listing the names, addresses, and citizenship of all officers, directors, and other controlling interests; and by listing gross revenues of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests.³ The Commission’s rules also provide applicants a limited opportunity to cure specified defects in their short-form applications and to resubmit a corrected application.⁴ For Auction No. 40, parties could resubmit corrected short-form applications until 6 p.m. ET on October 5, 2001.⁵

¹ In re Application of Golden Arrow Paging, Inc.; To Participate in the Lower and Upper Bands Paging Auction Scheduled to Commence on October 30, 2001; FCC Auction No. 40; Petition for Reconsideration (filed October 23, 2001) (“Petition”).

² Lower and Upper Paging Bands Auction Scheduled for October 30, 2001, DA 01-1961, *Public Notice*, 16 FCC Rcd 15,430 (2001).

³ 47 C.F.R. §1.2112(b)(1)(i) and (iii); see 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, DA 01-2122, *Public Notice*, 16 FCC Rcd 16,391, 16,393-94 (2001) (“all applicants seeking bidding credits must list ‘the names, addresses, and citizenship of **all** officers, directors, and other controlling interests[.]’ . . . To avoid any uncertainty, applicants should state that their application provides a complete list of relevant parties.”) (emphasis in original; citation omitted).

⁴ 47 C.F.R. §1.2105(b)(2).

⁵ See Auction of Licenses for Lower and Upper Paging Bands, DA 01-2262, *Public Notice*, 16 FCC Rcd 17,185 (2001) (“*Auction No. 40 Status Public Notice*”).

GAP timely submitted its initial short-form application. Upon review, the Commission found GAP's initial short-form application incomplete.⁶ GAP resubmitted its short-form application on October 5, 2001. GAP's October 5, 2001 resubmitted short-form application did not identify all persons serving as GAP's corporate directors or officers, but only Mr. Foster, who serves as both its corporate President and the Chairman of its Board of Directors.⁷ Therefore, GAP's claim to bidding credit eligibility was denied, although its short-form application to participate in Auction No. 40 was accepted.⁸ On October 23, 2001, GAP filed its Petition. GAP participated in Auction No. 40 without a bidding credit.⁹

GAP must verify its claimed eligibility for a bidding credit based on information it submitted to the Commission prior to the October 5, 2001 short-form application resubmission deadline. After the October 5, 2001 resubmission period deadline, applicants could make only minor changes or correct minor errors in their short-form applications.¹⁰ If an applicant has not verified eligibility for a bidding credit by the resubmission deadline, any change that later would verify eligibility for a bidding credit would be an impermissible major change.¹¹

As GAP acknowledges, its resubmitted short-form application neglected to state that Ms. Sherry Wheeler is the Secretary/Treasurer of GAP and that Mr. Foster is GAP's sole director.¹² Based on the resubmitted short-form application, which disclosed only that Mr. Foster was the President and Chairman of the Board of Directors for GAP, GAP had not disclosed all its officers and/or directors and the Commission could not draw any conclusions regarding gross revenues attributable to any undisclosed officers and/or directors. The resubmitted short-form application therefore provided insufficient information to verify GAP's claim to a bidding credit.

⁶ *Auction No. 40 Status Public Notice*, 16 FCC Rcd at 17,202.

⁷ Golden Arrow Paging, Inc. FCC Form 175, Exhibit A, resubmitted October 5, 2001. In the resubmitted short-form application, GAP provided information regarding Ms. Sherry Wheeler in her capacity as GAP's contact person and one of its eligible bidders. In those capacities, GAP was not required to provide, and did not provide, any information regarding gross revenues attributable to Ms. Wheeler. GAP disclosed in its Petition for the first time that Ms. Wheeler is the Secretary/Treasurer of GAP and that Mr. Foster, the previously disclosed Chairman of the Board of Directors, is GAP's sole director. Petition at 1-2.

⁸ *See* Letter to Sherry Wheeler from Kathryn Garland, October 17, 2001.

⁹ Auction No. 40 commenced on October 30, 2001.

¹⁰ 47 C.F.R. §1.2105(b)(2).

¹¹ *See* Two Way Radio of Carolina, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 12,035, 12,039 ¶8 (1999) ("modification of an applicant's small business status [*i.e.*, bidding credit eligibility] does not constitute a minor change under our competitive bidding rules").

¹² Petition at 1-2.

GAP attempted to remedy this insufficiency by providing the previously undisclosed information in its Petition. Pursuant to Section 1.106(c) of the Commission's rules, a petition for reconsideration relying on facts not previously presented to the designated authority may be granted only if: (1) the facts arose since the last opportunity to present the matter; or (2) the petitioner relies on facts which, through the exercise of ordinary diligence, could not have been known prior to the last opportunity to present the matter; or (3) the consideration of the facts relied on is required in the public interest.

GAP's Petition does not meet the Commission's standard for reconsideration based on newly presented facts. Obviously, GAP knew the identity of its directors and officers prior to submitting its short-form application and had notice of the requirement to submit that information prior to the deadline for resubmission of its short-form application.¹³ Thus, the facts at issue did not arise after the last opportunity to verify GAP's eligibility claim in its resubmitted application and GAP knew the facts prior to the resubmission deadline.

Hoping to come within the third category permitting reconsideration based on new facts, GAP asserts that it is in the public interest to grant reconsideration. According to GAP, its oversight was minor; it disclosed Ms. Wheeler's general involvement by naming her in the resubmitted application as an eligible bidder and contact person; and its attributable gross revenues, and therefore its eligibility for the claimed bidding credit, is unchanged by the fact that Ms. Wheeler is an officer.¹⁴ GAP further asserts that no other parties would be prejudiced by grant of the bidding credit, given the large number of other participants in Auction No. 40 that had bidding credits.

GAP's assertions are insufficient to merit the reconsideration of its claim to a bidding credit. The Commission's rules governing the short-form application process are designed to identify qualified bidders from among the applicants to participate in a timely manner prior to the auction. The burden of providing information and demonstrating qualifications by the applicable deadlines falls on the applicants, not the Commission.¹⁵ Where, as here, routine enforcement of regular procedures provides applicants with every opportunity to obtain the full benefits to which they are entitled under the Commission's rules, the Commission's competitive

¹³ 47 C.F.R. §1.2112(b)(1)(i) and (iii); *see* 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, DA 01-2122, *Public Notice*, 16 FCC Rcd 16,391, 16,393-94 (2001) ("all applicants seeking bidding credits must list 'the names, addresses, and citizenship of **all** officers, directors, and other controlling interests[.]' . . . To avoid any uncertainty, applicants should state that their application provides a complete list of relevant parties.") (emphasis in original; citation omitted).

¹⁴ Petition at 2.

¹⁵ *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 15,293, 15,324, ¶62 (2000) ("*Part 1 Fifth Report and Order*"); *see also* 47 U.S.C. §309(j)(5)(participation in auctions prohibited "unless such bidder submits such information and assurances as the Commission may require").

bidding rules and the public interest are best served by fair and consistent enforcement of those rules and procedures, including applicable deadlines. The public interest in a transparent auction process which assures that applicants satisfy eligibility qualifications prior to the auction could be substantially impaired if the Commission is required to guess whether applicants will qualify for bidding credits.

For the foregoing reasons, GAP's Petition is denied. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.¹⁶

Sincerely,

John Muleta
Chief, Wireless Telecommunications Bureau

¹⁶ 47 C.F.R. §0.331.