

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

In the Matter of)
)
Application of) File No. 0004041872
ZTARK COMMUNICATIONS, LLC)
)
For New Broadband Radio Service Stations in the)
Albuquerque, New Mexico (BTA008) and Las)
Cruces, New Mexico (BTA244) Basic Trading)
Areas)

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 2013

Released: October 29, 2013

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we conclude that Ztark Communications, LLC (“Ztark”) has failed to demonstrate its eligibility for an auction bidding credit. Ztark has not provided gross revenue information for Douglas Kratz, the father of Ztark’s owner Tyler Kratz. Douglas Kratz’s gross revenues are attributable to Ztark because we find Ztark has failed to rebut the presumption in the Commission’s kinship affiliation rule that makes them attributable. We therefore deny Ztark’s request for an entrepreneur bidding credit towards its winning bids in Auction 86 for Broadband Radio Service (“BRS”) licenses.

II. BACKGROUND

2. On October 30, 2009, the Commission completed Auction 86 for BRS licenses in the 2496-2502, 2602-2615, and 2616-2673.5 MHz bands.¹ Pursuant to the Commission’s designated entity (“DE”) rules, which are designed to encourage auction participation by small businesses, eligible bidders in Auction 86 were permitted to apply for bidding credits as entrepreneurs, small businesses, or very small businesses, depending on their attributed average annual gross revenues for the three years immediately preceding the auction.²

¹ See Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced For Auction 86, *Public Notice*, 24 FCC Rcd 13572 (WTB 2009) (“*Auction 86 Closing PN*”).

² See 47 C.F.R. § 1.2110; Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277, 8296 ¶ 71 (WTB 2009) (“*Auction 86 Procedures PN*”). The level of bidding credit was determined as follows:

- A bidder with attributed average annual gross revenues that exceeded \$15 million but did not exceed \$40 million for the preceding three years (“small business”) would receive a 15 percent discount on its winning bid.
- A bidder with attributed average annual gross revenues that exceeded \$3 million but did not exceed \$15 million for the preceding three years (“very small business”) would receive a 25 percent discount on its winning bid.
- A bidder with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years (“entrepreneur”) would receive a 35 percent discount on its winning bid.

(continued....)

3. Ztark was the winning bidder in Auction 86 for BRS licenses in the Albuquerque, New Mexico and Las Cruces, New Mexico Basic Trading Areas (BTA).³ Under the Commission's rules, an applicant must timely submit a short form application in order to bid at an auction.⁴ Once an applicant is notified that it is a high bidder, it must also submit an additional long form application containing additional information.⁵ Ztark timely submitted its long form application on November 23, 2009.⁶ Ztark's long form application, as amended, indicates that it is a limited liability company owned by Tyler Kratz, its sole member and manager.⁷ In its long form application, Ztark certified to average gross revenues of \$579,335.84 for itself and all its affiliates for the three years preceding the auction (*i.e.*, 2006, 2007, and 2008),⁸ and sought a 35% entrepreneur bidding credit, which was available to entities with average gross revenues of \$3,000,000 or less for the three years immediately preceding the auction.⁹ Among the average gross revenues Ztark certified to in its long form application were those of its controlling interest holder Tyler Kratz, whose average gross revenues were reported as \$3,925.33.¹⁰ Ztark's application also listed Ztark Broadband Corp. as an affiliate, with average gross revenues of \$1,832.80, and further listed Ztark Spectrum, LLC and Ztark Broadband LLC as affiliates with no gross revenues.¹¹

4. In adopting rules to determine eligibility for small business benefits, the Commission adopted rules to ensure that family members could not be used to evade its bidding credit eligibility requirements.¹² The Commission therefore adopted a rule that immediate family members will be presumed to have an identity of interest with an applicant or its controlling interest.¹³ The rule states:

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the

(Continued from previous page) _____
Auction 86 Procedures PN, 24 FCC Rcd at 8296 ¶ 73.

³ See *Auction 86 Closing PN*, 24 FCC Rcd at 13582, 13583 Attachment A.

⁴ See 47 C.F.R. § 1.2105(a).

⁵ See 47 C.F.R. § 1.2107(c); *Auction 86 Closing PN*, 24 FCC Rcd at 13572.

⁶ Ztark Communications, LLC, File No. 0004041872 (filed Nov. 23, 2009) ("Ztark Long Form Application"); see also *Auction 86 Closing PN*, 24 FCC Rcd at 13572.

⁷ See Ztark Communications, LLC, File No. 0004041872 ("Ztark Long Form Application"), Exhibit C: Designated Entities (filed Jan. 12, 2010).

⁸ *Id.*, Revenue Information.

⁹ Ztark's gross winning bids totaled \$1,182,000. *Auction 86 Closing PN*, 24 FCC Rcd at 13582, 13583 Attachment A. Thus, a bidding credit received pursuant to the entrepreneur credit would equal \$413,700.

¹⁰ Ztark Long Form Application, Revenue Information. Ztark later amended its revenue information to decrease Ztark's average gross revenues to \$480,372.49 and increase Tyler Kratz' average gross revenues to \$446,335.33. Ztark Long Form Application, Amendment (filed Aug. 8, 2012), Revenue Information.

¹¹ Ztark Long Form Application, Revenue Information.

¹² See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7262 ¶ 102 (1994) ("*Competitive Bidding 2nd MO&O*").

¹³ *Id.*, see 47 C.F.R. § 1.2110(c)(5)(iii)(B).

family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.¹⁴

5. The father of an applicant's controlling interest falls within the definition of "immediate family member."¹⁵ When a person has an "identity of interest" with an applicant, that person is considered an affiliate of the applicant,¹⁶ and that person's gross revenues (including the gross revenues of that person's affiliates) must be attributed to the applicant and disclosed on its auction and license applications.¹⁷ Recognizing that not all kinship relationships present the same potential for abuse, however, the Commission does allow applicants the opportunity to rebut the presumption of kinship affiliation "by showing that the family members are estranged, or that family ties are remote, or that the family members are not closely related in business matters."¹⁸ The Commission noted that the Small Business Administration ("SBA") used this standard when interpreting its "identity of interest" rule.¹⁹ The Commission has stated that "an applicant should be able to rebut the presumption regarding kinship affiliation with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members."²⁰

6. In the course of processing Ztark's Auction 86 long form application, the Wireless Telecommunications Bureau's ("Bureau") Broadband Division ("Division") requested additional information from Ztark about ownership of other companies owned by Tyler Kratz and his immediate family members. In response, Ztark requested a ruling that it had rebutted the presumption that Tyler Kratz has an identity of interest with his father Douglas Kratz.²¹ Ztark argued that "Mr. Douglas Kratz, or an entity controlled by him: (1) does not control any entities in the same line of business as Tyler Kratz; (2) does not own any stock in or have any other financial interest in Tyler Kratz's companies; (3) is not now, nor has ever been, a director, shareholder or board member of any of Tyler Kratz's companies; (4) does not have contractual obligations, ongoing business arrangements or joint business proposals with any of Tyler Kratz's companies; (5) does not have any employees in common with or share any administrative affinities with Tyler Kratz; (6) has never provided any subcontracts, subcontracting, or technical assistance to Tyler Kratz; and, (7) does not provide financial assistance to Tyler Kratz."²² The Division subsequently requested additional information from Ztark, including written responses to a letter of inquiry pursuant to section 308(b) of the Communications Act.²³

7. The record contains the following information concerning the relationship between the applicant Ztark, its controlling interest Tyler Kratz, and his father Douglas Kratz:

¹⁴ 47 C.F.R. § 1.2110(c)(5)(iii)(B).

¹⁵ *Id.*

¹⁶ *See* 47 C.F.R. § 1.2110(c)(5)(i)(D).

¹⁷ *See* 47 C.F.R. § 1.2110(b)(1)(i).

¹⁸ *Id.* *See also* 47 C.F.R. § 1.2110(c)(5)(iii)(B).

¹⁹ *Competitive Bidding 2nd MO&O*, 9 FCC Rcd at 7262 ¶ 102.

²⁰ *Id.* at 7262 ¶ 103.

²¹ *See* Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response.

²² *Id.* at 3.

²³ *See* Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Mr. Tyler Kratz, Ztark Communications, LLC (Apr. 23, 2012) ("308(b) Letter"). Ztark requested confidential treatment of its response ("Ztark 308(b) Response Letter"), which was filed on June 22, 2012. In this *Memorandum Opinion and Order*, "[REDACTED]" indicates information that Ztark has requested be treated as confidential or proprietary information.

- [REDACTED]
24 25
- The address originally provided for Ztark in its long form application is Ztark Communications, LLC, c/o The National Bank 852 Middle Rd, Bettendorf, IA 52722, ATTN: Tyler M. Kratz.²⁶ Douglas Kratz is a co-founder of The National Bank²⁷ and, during the relevant time period, a shareholder of The National Bank.²⁸
- Both wire transfers for payments to the Commission on Ztark's behalf were initiated by an employee of The National Bank.²⁹ Tyler Kratz was out of the country when those wire transfers were made.³⁰
- In the wire transfer for the initial down payment to the Commission, Ztark's address is listed as a post office box in Rock Island, Illinois. This post office box has also been used as the address for two businesses, APX Management and Rickey Corporation, which Douglas Kratz has an ownership interest in.³¹ Douglas Kratz has also used this post office box as his personal address when making political contributions.³²
- Tyler Kratz was a limited partner with a 33 percent ownership interest in K Family, LP.³³ Ztark reports that K Family, LP was controlled or operated by Douglas Kratz.³⁴ [REDACTED]³⁵

[REDACTED]

³⁶ [REDACTED]

²⁴ Ztark 308(b) Response Letter at Exhibit B. [REDACTED].
Id. at 1.

²⁵ Ztark 308(b) Response Letter at 2.

²⁶ Ztark Long Form Application (filed Nov. 23, 2009).

²⁷ See The National Bank, Company History (available at <http://www.thenb.com/about-us/company-history.html>) (last visited Oct. 23, 2013).

²⁸ See Ztark Long Form Application, Exhibit C, May 3, 2011 Supplemental Response at 1.

²⁹ See *id.* [REDACTED]
Ztark 308(b) Response Letter at 3.

³⁰ See Ztark Long Form Application, Exhibit C, May 3, 2011 Supplemental Response at 1.

³¹ See <http://www.corporationwiki.com/Illinois/Rock-Island/PO-Box-3813-Rock-Island-IL-61204-a17750258.aspx>; (last visited Oct. 23, 2013).

³² See <http://campaign-contributions.chicagocurrent.com/donors/206295-Douglas-M-Kratz> (last visited Oct. 23, 2013).

³³ See Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response at 2-3 n.12.

³⁴ *Id.*

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ Tyler Kratz received \$[REDACTED] in distributions from the business dealings of K Family, L.P.³⁸ Ztark represents that K Family, L.P. last conducted business in 2007.³⁹

- Ztark has not provided gross revenue information for Douglas Kratz or companies controlled by Douglas Kratz.⁴⁰

III. DISCUSSION

8. We find that Ztark has not rebutted the presumption of the Commission's kinship affiliation rule that Tyler Kratz' father, Douglas Kratz, has an identity of interest with the applicant Ztark and its controlling interest holder, his son, Tyler Kratz. Because Ztark has not provided Douglas Kratz' gross revenues, we are unable to conclude that Ztark is eligible for an entrepreneur bidding credit in Auction 86. We discuss these findings in detail below.

9. To demonstrate eligibility for a small business bidding credit in Auction 86, specifically, for a 35 percent entrepreneur bidding credit, Ztark must show that the average gross revenues for itself, its controlling interest holders and its affiliates did not exceed an aggregate of \$3,000,000 for the three years immediately preceding the filing of its long form application.⁴¹ The Commission's attribution rules for entities that are eligible for small business benefits set forth a presumption that immediate family members own or control or have the power to control interests owned or controlled by other immediate family members.⁴² This kinship affiliation rule can be rebutted with evidence that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.⁴³ If the kinship affiliation rule is not rebutted, then an applicant for a small business bidding credit must report the immediate relative as a controlling interest holder or an affiliate of the applicant, and must provide the family member's gross revenues for the relevant time period.⁴⁴

10. Ztark claims that neither it nor Tyler Kratz has any relationship with any of the entities controlled by Douglas Kratz, and that Tyler and Douglas Kratz have no ability to control or influence the operations of each other's entities.⁴⁵ We conclude, however, that Ztark has failed to demonstrate that Douglas Kratz and the applicant do not have a close relationship in business matters. Furthermore, Ztark has made no attempt to show that Tyler Kratz and Douglas Kratz are estranged or have remote family ties. [REDACTED]

⁴⁶ [REDACTED]

As noted in paragraph 7, *supra*, there is also some evidence that companies in which Douglas Kratz has an interest have provided assistance to Ztark by providing a contact point for or arranging for payments

³⁷ *Id.*

³⁸ Ztark Long Form Application, Confidential Attachment to Amended Exhibit C (filed July 15, 2010).

³⁹ See Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response at 2-3 n.12.

⁴⁰ [REDACTED].

⁴¹ *Auction 86 Procedures PN*, 24 FCC Rcd at 8296 ¶ 73.

⁴² 47 C.F.R. § 1.2110(c)(5)(iii)(B).

⁴³ *Id.*

⁴⁴ See 47 C.F.R. § 1.2110(b)(1)(i).

⁴⁵ See Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response at 3.

⁴⁶ Ztark 308(b) Response Letter at 2.

on behalf of Ztark, and that such companies may share common facilities with Ztark. As also noted in paragraph 7, *supra*, Tyler Kratz also had interests in K Family LP and [REDACTED], which are entities that are controlled and managed by Douglas Kratz. Under these circumstances, we conclude that Douglas Kratz and Tyler Kratz have a close relationship in business matters, particularly with respect to Ztark. The record does not support Ztark's initial claims that companies controlled by Douglas Kratz were not involved in Ztark's affairs.⁴⁷ We therefore conclude that Ztark has failed to rebut the presumption of the kinship affiliation rule, and Ztark must therefore disclose the gross revenues of Douglas Kratz and his affiliates.

11. This case is distinguishable from the SBA cases Ztark cites⁴⁸ in its attempt to rebut the presumption that an identity of interest exists between Douglas and Tyler Kratz.⁴⁹ These cases involve instances where the SBA found a "clear fracture" between relatives who had ownership interests in each other's companies.⁵⁰ None of these cases involved circumstances where an immediate relative's company [REDACTED], as is the case here between Ztark and Douglas Kratz. We believe this case is more analogous to *Size Appeal of Jenn-Kans, Inc.*,⁵¹ where SBA found that there was no "clear fracture" between two businesses owned by siblings because [REDACTED] and there was continuing cooperation between the firms.

12. Where questions of kinship affiliation arise, the burden is on the applicant to rebut the presumption. If an applicant fails to do so, it must provide gross revenues for the relatives in question.⁵² Despite a request to do so,⁵³ Ztark has not provided gross revenue information for Douglas Kratz. Because we cannot determine whether Ztark is eligible for a bidding credit without having all required gross revenue information for all affiliates, we must deny Ztark's request for a bidding credit.

13. Ztark must therefore pay the full amount of its winning bid. The difference between Ztark's gross winning bids and its net winning bids is \$413,700.⁵⁴ Within 30 days of the release of this *Memorandum Opinion and Order*, Ztark must submit payment of the remaining \$413,700. Failure to complete that payment by 6:00 pm ET on November 28, 2013 will result in default.⁵⁵

⁴⁷ See Ztark Long Form Application, Exhibit C, July 15, 2010 Supplemental Response at 3.

⁴⁸ See *id.* at 1-2, citing *Size Appeal of Henderson Group Unlimited, Inc.*, SBA No. SIZ-5038 (2009); *Size Appeal of B.L. Harbert International LLC*, SBA No. SIZ-2002-09-12-42 (2002); *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-95-3-3-19 (1995).

⁴⁹ The Commission's designated entity rules, including the kinship affiliation rule, were modeled after the SBA's small business designation rules. See *Competitive Bidding 2nd MO&O*, 9 FCC Rcd at 7262 ¶ 102. Therefore, SBA cases are often cited in cases that implicate the Commission's DE rules.

⁵⁰ See *Size Appeal of Henderson Group Unlimited, Inc.*, SBA No. SIZ-5038 (2009); *Size Appeal of B.L. Harbert International LLC*, SBA No. SIZ-2002-09-12-42 (2002); *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-95-3-3-19 (1995).

⁵¹ *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5114 (2010).

⁵² See 47 C.F.R. §§ 1.2110(b)(1)(i) & (c)(5)(iii)(B).

⁵³ 308(b) Letter at 2.

⁵⁴ *Auction 86 Closing PN*, 24 FCC Rcd at 13582, 13583 Attachment A.

⁵⁵ See 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c).

IV. CONCLUSION AND ORDERING CLAUSES

14. Ztark has failed to rebut the presumption that Douglas Kratz has an identity of interest with his son Tyler Kratz and Ztark. Furthermore, Ztark has also failed to provide Douglas Kratz' gross revenues. Accordingly, Ztark has not demonstrated that it is eligible for a bidding credit.

15. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j) and Section 1.2110 of the Commission's Rules, 47 C.F.R. § 1.2110, Ztark's request for an entrepreneur designated entity bidding credit in connection with file number 0004041872 IS DENIED.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(j) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(j), and Section 1.2109(a) of the Commission's Rules, 47 C.F.R. § 1.2109(a), that Ztark must pay \$413,700 to the Commission, pursuant to the instructions contained in Paragraphs 17-19, *supra*, by 6:00 pm Eastern Time on November 28, 2013.

17. All payments must be in U.S. dollars and made in the form of a wire transfer. No personal checks, credit card payments, automated clearing house ("ACH"), or other forms of payment will be accepted. All payments must be accompanied by a completed FCC Form 159. Questions concerning the calculation and submission of payments, and the FCC Form 159, should be directed to Gail Glasser at (202) 418-0578.

18. To submit funds by wire transfer, Ztark will need the following information:

ABA Routing Number: **021030004**

Receiving Bank: **TREAS NYC**
33 Liberty Street
New York, NY 10045

ACCOUNT NAME: **FCC**

ACCOUNT NUMBER: **27000001**

OBI Field: (Skip one space between each information item) "AUCTIONPAY"

APPLICANT FRN: (same as FCC Form 159, block 21)

PAYMENT TYPE CODE: (same as FCC Form 159, block 24A: "A86D")

FCC CODE 1: (same as FCC Form 159, Block 28A: "86")

PAYOR NAME: (same as FCC Form 159, Block 2)

LOCKBOX NO.: **#979088**

19. At least one hour before placing the order for the wire transfer (but on the same business day), a completed FCC Form 159 (Remittance Advice) must be faxed to U.S. Bank in St. Louis, Missouri, at (314) 418-4232. Proper completion of the FCC Form 159 is critical to ensuring correct credit.

20. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau