

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

In the Matter of)
)
 IVDS On-Line Partnership)
)
 Request for Remedial Bidding Credit)
 Refund In the 218-219 MHz Service)
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 2010

Released: August 11, 2010

By the Commission:

I. INTRODUCTION

1. In this Order, we find that the request of IVDS On-Line Partnership (Partnership) for a refund of a remedial bidding credit is not barred by the applicable statute of limitations. Therefore, we grant Partnership’s application for review of the Managing Director’s decision to deny Partnership’s request.¹

II. BACKGROUND

2. In July 1994, the Commission conducted an auction of licenses covering spectrum in the 218-219 MHz service (Auction).² The competitive bidding rules and procedures included measures to encourage participation by providing bidding credits to winning businesses owned by minorities and/or women.³ On September 10, 1999, the Commission changed the applicable bidding credit rules in response to concerns raised by certain parties that the extant bidding credit system was an unconstitutional race-based classification in that it was not narrowly tailored in furtherance of a compelling government interest.⁴ In order to avoid litigation delays and to give the Commission time to “compile a record looking toward constitutionally appropriate means to encourage minority and female

¹ See Application for Review, In the Matter of IVDS On-Line Partnership Request For Remedial Bidding Credit Refund In the 218-219 MHz Service (Feb. 25, 2008) (AFR).

² See 47 U.S.C. § 309(j); In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994); In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (*Fourth Report & Order*); and In the Matter of Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998).

³ See *Fourth Report & Order*, 9 FCC Rcd at 2337.

⁴ See In the Matter of 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*, 15 FCC Rcd 1497, 1530-33 (1999) (*Report and Order*), citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

participation in telecommunications ownership,” the Commission replaced the race- and gender-based bidding credit system with one that would award credits of “commensurate size to *all* winning small business bidders in the first IVDS auction” (including Partnership).⁵ Specifically, the Commission stated that it would award a credit – essentially, a refund of a portion of the bid amount already paid – to those winning bidders that did not qualify for the earlier bidding credits but did meet the Commission’s small business qualifications.⁶ The Commission adopted a rule reflecting this decision:⁷

Winning bidders in Auction No. 2, which took place on July 28-29, 1994, that, at the time of auction, met the qualifications under the Commission’s rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to 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 (released September 10, 1999).

The Commission delegated to the Wireless Telecommunications Bureau (Bureau or WTB) the authority to implement the *Report and Order*, including establishing the terms and conditions by which the refund could be obtained.⁸

3. Following the Commission’s delegation of authority, the Bureau issued a Public Notice (*FAQ PN*) on April 20, 2000, setting forth answers to “Frequently Asked Questions Regarding Restructuring Rules for the 218-219 MHz Service.”⁹ Among other things, the Bureau stated:¹⁰

Where licensees paid for their licenses in full and met the qualifications for a small business at the time of auction, and did not receive the credit as a women- or minority- owned business, the Commission will process a refund based on the remedial bidding credit. The Commission will issue a separate Public Notice detailing the procedures by which entities may obtain a refund. Additional information on remedial bidding credits for small businesses may be found in the *Implementation Procedures Public Notice*.

In response to anticipated questions about the proper method and timeframe for receiving a refund, the Bureau advised:¹¹

Entities that are due a refund as a result of the remedial bidding credit for small businesses will have them processed via Automated Clearing House (ACH) Credits (*i.e.* electronic fund transfer). In order for the Commission to issue payment, all entities due a refund must submit the information necessary for an automatic deposit. The Commission will

⁵ *Report and Order*, 15 FCC Rcd at 1533 (emphasis added).

⁶ *See id.* (“[W]e will apply a twenty-five percent bidding credit (‘Remedial Bidding Credit’) to the accounts of every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualification for that auction.”).

⁷ 47 C.F.R. § 95.816(e).

⁸ *See Report and Order*, 15 FCC Rcd at 1563.

⁹ *See* “Frequently Asked Questions Regarding The Restructuring Rules For The 218-219 MHz Service,” *Public Notice*, 15 FCC Rcd 7305 (2000).

¹⁰ *Id.* at 7316.

¹¹ *Id.* at 7316-17.

issue a separate Public Notice detailing the necessary information and procedure for submission. . . . The Commission will endeavor to issue appropriate refund payments (assuming the necessary information has been provided) within approximately 60 days of the Election Date. The Commission will issue a separate Public Notice with instructions detailing the procedures by which entities may obtain a refund.

Also on April 20, 2000, the Commission issued a Public Notice (*Implementation Procedures PN*) regarding the procedures by which the determinations in the *Report and Order* would be implemented. In relevant part, the Commission stated:¹²

Refunds will be processed via Automated Clearing House Credits (ACH) (*i.e.* electronic funds transfer). In order for the Commission to issue refunds, all entities due a refund must submit the information necessary for an electronic funds transfer. . . . The Commission will release a separate Public Notice detailing the procedures by which entities may obtain a refund.

4. The public notice referenced in the *FAQ PN* and *Implementation Procedures PN* was issued by WTB on February 15, 2001 (*Refund Procedures PN*). Among other things, the Bureau reiterated the rules adopted by the Commission in the *Report and Order*; identified “the points of contact for the processing of refunds” authorized by the Commission; and offered a sample cover letter, entitled “Remedial Bidding Credit Request for Refund,” that qualifying bidders could submit to the Office of Managing Director in order to obtain a refund.¹³

5. On May 18, 2006, Partnership filed a request for a refund.¹⁴ On December 13, 2006, the Managing Director rejected Partnership’s request, finding that the request was filed more than six years after it accrued (which the Managing Director determined was September 10, 1999, the date on which the *Report and Order* was released) and was thus untimely under federal law applicable to claims or civil actions against the United States.¹⁵ On January 11, 2007, Partnership filed a petition for reconsideration with the Managing Director, asserting alternatively that its Request was not a “claim” for purposes of federal law, but to the extent that it was, it was timely filed.¹⁶ The Managing Director disagreed on both counts, denying the petition on January 24, 2008.¹⁷ On February 25, 2008, Partnership filed the instant

¹² “Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing The 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)),” *Public Notice*, 15 FCC Rcd 7329, 7334 (2000).

¹³ See “218-219 MHz Service (formerly known as IVDS) Refund Procedures,” *Public Notice*, 16 FCC Rcd 3453, 3454-55, 3457 (2001).

¹⁴ See Letter from Jay N. Lazrus, Myers Lazrus, to Marvin Washington, FCC (May 18, 2006) (Request).

¹⁵ See Letter from Marvin Washington, Deputy Chief Financial Officer, FCC, to Jay N. Lazrus, Myers Lazrus (Dec. 13, 2006) (OMD Letter), citing 31 U.S.C. § 3702(b)(3) (“A claim that is not received in the time required under this subsection shall be returned with a copy of this subsection, and no further communication is required.”); 31 U.S.C. § 3702(b)(1) (with exceptions not applicable here, providing that a claim against the U.S. government “must be received by the official responsible . . . for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues”) and 28 U.S.C. § 2401 (“[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”).

¹⁶ See Petition for Reconsideration, In the Matter of IVDS On-Line Partnership Remedial Bidding Credit Refund In the 218-219 MHz Service (filed Jan. 11, 2007) (Petition).

¹⁷ See Letter from Anthony J. Dale, Managing Director, to Jay N. Lazrus, Myers Lazrus (Jan. 24, 2008) (MD Decision).

application for review, seeking reversal of the Managing Director's decision.

III. DISCUSSION

6. Partnership maintains that the Managing Director erred in deeming its request time-barred under 31 U.S.C. § 3702(b) and 28 U.S.C. § 2401. With respect to 31 U.S.C. § 3702(b), Partnership essentially makes two arguments. First, it contends that its request for a refund is not a "claim" to which the statute of limitations applies but rather an administrative action, in that it was merely supplying to the Commission wiring instructions for the refund. Second, even if the Request *is* a claim for purposes of the statute, Partnership asserts that it was timely filed because the cause of action accrued on February 15, 2001, when the Commission issued the *Refund Procedures PN*. At that point, Partnership continues, the agency's liability for the refund was fixed and Partnership had a cognizable claim for the refund. With respect to 28 U.S.C. § 2401, Partnership argues that this statute of limitations applies only to lawsuits against the federal government, and thus does not bar Partnership's administrative action. We take each set of arguments in turn.

A. 31 U.S.C. § 3702

7. Partnership contends first that 31 U.S.C. § 3702(b)(3) does not render its claim time-barred because its request for a refund is not a "claim" to which the statute applies. It adds that the Commission did not specifically mention that a "claim" had to be filed in order to obtain a refund. Second, Partnership argues that even if its request were properly considered a "claim" for purposes of the statute, the claim was timely filed because the cause of action accrued on February 15, 2001, when the Commission issued the *Refund Procedures Public Notice*.

8. We need not address the first argument because we find the second dispositive.¹⁸ 31 U.S.C. § 3702(b) provides that "[a] claim against the Government . . . must be received by . . . the agency that conducts the activity from which the claim arises within 6 years after the claim accrues." The decisive question here is when Partnership's May 18, 2006 claim – which characterization we assume *arguendo* – accrued. The Managing Director found that the claim accrued on September 10, 1999, when the Commission released the *Report and Order*, reasoning that the Commission established Partnership's right to a refund on that date. Partnership asserts that the claim accrued no earlier than February 15, 2001, when the Commission set forth the procedures by which certain winning bidders could seek a refund.

9. We agree with Partnership that its claim accrued on February 15, 2001, when the Bureau released the *Refund Procedures PN*. To be sure, the Commission did announce in 1999 that it would establish a system of remedial bidding credits for winning bidders that were not eligible for the previous credits and that met the Commission's small business qualifications; bidders like Partnership that had already made downpayments on licenses thus became entitled to a refund of a portion of monies paid. However, neither the *Report and Order* nor the rule adopted by the Commission stated or implied that such bidders would have to file claims in order to receive the refund. Indeed, each contains language that would have suggested self-execution to a reasonable outside party.¹⁹ General notice that a claim would

¹⁸ Although we find that Partnership's request for a refund is not a "civil action commenced against the United States" to which 28 U.S.C. § 2401 applies, *see infra*, the question of whether such a request is a "claim" under 31 U.S.C. § 3702 is a distinct one given the latter statute's relatively broader application to "all claims . . . against the United States."

¹⁹ *See Report and Order*, 15 FCC Red at 1533-34 ("To implement this decision, we *will apply* a twenty-five percent bidding credit ('Remedial Bidding Credit') to the accounts of every winning bidder. Small business winning bidders that did not utilize the installment payment option in the auction shall also be eligible to receive the Remedial Bidding Credit, and they *will receive* a refund of any resulting excess payment.") (emphases added); 47 C.F.R. § 95.816(e) ("Winning bidders . . . *will receive* a twenty-five percent bidding credit pursuant to [the Report and Order].") (emphasis added).

have to be made was provided in April 2000 in statements from the Commission (in the *Implementation Procedures PN*) and WTB (in the *FAQ PN*). But these statements' references to a future public notice that would "detail[] the procedures by which entities may obtain a refund" underscored the fact that the actual procedures still were inchoate.²⁰ Not until February 15, 2001, with the release of the Refund Procedures PN, did winning bidders in the Auction know what they had to do to obtain the refund and to whom the claim against "the agency that conducts the activity from which the claim arises" should be directed. Accordingly, the statute of limitations specified in 31 U.S.C. § 3702(b) did not begin to run until that date, rendering Partnership's May 18, 2006 request for a refund timely.

10. This conclusion is buttressed if one follows the Managing Director's interpretation to its logical conclusion. If the statute of limitations began to run when the *Report and Order* was released, Partnership would have been required to seek relief before the agency had even announced the eventual existence, much less the substantive content, of procedures for obtaining a refund. This claim likely would have been rejected as premature. The *Report and Order* and related rule implied,²¹ and the *Implementation Procedures PN* and *FAQ PN* explicitly stated,²² that the agency's actions to date with respect to the bidding credit changes were not final: these actions did not mark the consummation of the decision-making process regarding the implementation of the new rules for bidding credits, nor did they fully determine bidders' rights to a refund.²³ The decision-making process did not conclude, and Partnership could not have sought relief, until the Commission spelled out in the *Refund Procedures PN* the mandatory requirements certain bidders had to fulfill in order to obtain a refund.²⁴

B. 28 U.S.C. § 2401

11. In rejecting Partnership's request, the Managing Director alternatively relied upon 28 U.S.C. § 2401, which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Partnership asserts that this statute does not apply to Partnership's mere "administrative action."²⁵ We agree. In the leading case expounding 28 U.S.C. § 2401, the Supreme Court held that "the right of action" of which [the statute] speaks is not the right to administrative action but the right to file a civil action in the courts against the United States."²⁶ This case involves a paradigmatic administrative action: The Commission established a system by which an outside party could request a monetary refund directly from the agency, and Partnership availed itself of that opportunity. Thus, we find that 28 U.S.C. § 2401 does not apply.

²⁰ See *Implementation PN*, 15 FCC Rcd at 7330; *FAQ PN*, 15 FCC Rcd at 7307.

²¹ See note 19.

²² See *Implementation PN*, 15 FCC Rcd at 7330 ("The Commission will release a separate Public Notice detailing the procedures by which entities may obtain a refund."); *FAQ PN*, 15 FCC Rcd at 7307 (same).

²³ See *Bennett v. Spear*, 520 U.S. 154, 177 (1997) ("[A]s a general matter, two conditions must be satisfied for agency action to be 'final' [for purposes of judicial review]: First, the action must mark the 'consummation' of the agency's decision making process[;] . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" (citations omitted); *Doe v. DEA*, 484 F.3d 561, 567 (D.C. Cir. 2007) ("An administrative order is final for jurisdictional purposes when it imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process.") (citations and internal quotations omitted).

²⁴ See 16 FCC Rcd at 3453 ("In order for the Commission to issue refunds, each entity due a refund must submit a written request along with information required to process the ACH transaction. . . . All refunds must be requested in writing to the Office of the Managing Director.").

²⁵ AFR at 5-6.

²⁶ *Crown Coat*, 386 U.S. at 511. See also Fed. R. Civ. P. 2 ("There is one form of action – the civil action."); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), the Application for Review filed by Partnership on February 25, 2008 is GRANTED.

13. IT IS FURTHER ORDERED that the Commission's Office of Managing Director refund \$5,500 to the Partnership at the earliest practicable time.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary