

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

In the Matter of)	
)	
Procedural Amendments to Commission Part 1)	WT Docket No. 10-18
Competitive Bidding Rules)	
)	

ORDER

Adopted: January 6, 2010

Released: January 7, 2010

By the Commission:

I. INTRODUCTION

1. By this Order, we make two procedural amendments to our competitive bidding rules. First, we amend the rule specifying how to report potential violations of section 1.2105(c), which prohibits certain communications between auction applicants.¹ We provide that such reports shall be made as directed by public notice or, absent such direction, solely to the Auctions and Spectrum Access Division (“Division”) of the Wireless Telecommunications Bureau (“Bureau”) by the most expeditious means available. Currently, such reports are made both to the Division and to the Office of the Secretary of the Commission. This revised procedure will reduce the risk that bidding-related information might be disseminated to auction applicants, which would be contrary to the purpose of section 1.2105(c). We also amend the heading of section 1.2105(c).

2. Second, we amend the rules specifying how quickly applicants must modify pending auction applications.² We provide that such modifications shall be made within five business days after the reportable event occurs, or no more than five business days after the applicant becomes aware of the need to make an amendment or modification, whichever is later. This revision will enhance the usefulness of application information during the auction process and enable the Commission to respond promptly to changing circumstances if necessary.

II. DISCUSSION

A. Reporting Potential Violations of Section 1.2105(c)

3. Subject to specific exceptions, section 1.2105(c) of the Commission’s rules prohibits applicants³ from cooperating or collaborating with respect to, discussing with certain other applicants, or disclosing to such other applicants, the substance of any applicant’s bids or bidding strategies, or discussing or negotiating settlement agreements.⁴ The rule’s prohibitions begin at the deadline for filing

¹ 47 C.F.R. § 1.2105(c).

² 47 C.F.R. §§ 1.65(a), 1.2105(b).

³ Section 1.2105(c) defines “applicant” for purposes of the rule to include various parties, including holders of ownership interests amounting to 10 percent or more of the entity submitting the application to participate in the auction. See 47 C.F.R. § 1.2105(c)(7)(i).

⁴ 47 C.F.R. § 1.2105(c)(1)-(4).

short-form applications⁵ to participate in an auction and end at the post-auction down payment deadline.⁶ Applicants making or receiving prohibited communications must report such communications in writing to the Commission immediately.⁷ The current rule provides that “[s]uch reports shall be filed with the Office of the Secretary, and a copy shall be sent to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau.”⁸

4. The creation and filing of the required reports unavoidably creates a risk that information that the rule is intended to restrict may be disseminated inadvertently. The reports required under the rule themselves may constitute or contain information that applicants are otherwise barred from sharing. The Bureau has attempted to address this concern by advising applicants to request confidential treatment when filing reports.⁹ We conclude that we can further minimize the risk of inadvertent dissemination by requiring parties to file only a single report and to file that report with Commission personnel expressly charged with administering the Commission’s auctions. Accordingly, we amend section 1.2105(c)(6) of our rules to provide that reports required by that section shall be filed as directed in the public notices that describe the procedures for the bidding that was the subject of the reported communication. If no public notice provides direction, such reports shall be filed with the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available. We delegate to the Bureau the authority to specify how such reports shall be made.

5. The current heading of section 1.2105(c) of our rules is “Prohibition of collusion.” Given that “collusion” is a term used in many contexts, legal and economic, we recognize that using it to describe the prohibitions of this section may cause confusion. Accordingly, we amend the heading of section 1.2105(c) to read “Prohibition of certain communications.” This amendment makes no change to the substance of the rule, or to its interpretation or application.

B. Modifying Applications to Participate in Commission Auctions

6. Section 1.65(a) of the rules currently obligates an applicant to maintain the accuracy and completeness of information furnished in any application pending before the Commission and to notify the Commission “as promptly as possible and in any event within 30 days” of any substantial change that may be of decisional significance to that application.¹⁰ Failure to comply exposes an applicant to dismissal of its application and, potentially, enforcement action.¹¹ Section 1.2105(b) contains additional

⁵ A short-form application, also referred to as the FCC Form 175, provides information used in determining whether the applicant is legally, technically, and financially qualified to participate in Commission auctions for licenses or permits. *See* 47 C.F.R. § 1.2105.

⁶ 47 C.F.R. § 1.2105(c)(1)-(4).

⁷ 47 C.F.R. § 1.2105(c)(6).

⁸ *Id.*

⁹ *See, e.g.*, “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 Red 8277, 8287 ¶ 29 (2009). We note that in any case the information provided in such reports is not routinely available under the Freedom of Information Act. *See, e.g.*, 5 U.S.C. § 552(b)(7); *see also* 47 C.F.R. § 0.457(g).

¹⁰ 47 C.F.R. § 1.65(a).

¹¹ *See, e.g.*, In the Matter of SBC Communications, Inc., *Notice of Apparent Liability for Forfeiture and Order*, 16 FCC Red 19,091 (2001).

rules specifically addressing the modification and dismissal of short-form applications in competitive bidding proceedings.¹²

7. We find that, in the context of competitive bidding for Commission construction permits and licenses, it is appropriate and reasonable to require that applicants furnish additional or corrected information more quickly than within 30 days. Most, if not all, information in auction applications is made available to the public and all auction participants during the auction. Auction participants may depend on ownership information in other participants' applications when determining whether contact with a third party regarding potential financing is permissible under section 1.2105(c).¹³ In addition, if a change to an application could raise an issue as to the applicant's continued eligibility to participate, the Bureau needs the information as soon as possible in order to consider whether to take any action and minimize disruption of the auction. Accordingly, through its public notices, the practice of the Bureau has been to require reports or amendments to short-form applications within a shorter interval than 30 days.¹⁴ The Bureau also has long required that any change that causes a loss of or reduction in eligibility for a bidding credit be reported "immediately."¹⁵

8. We amend sections 1.65(a) and 1.2105(b) of our rules to require applicants in competitive bidding proceedings to furnish additional or corrected information within five days of a significant occurrence, or to amend their short-form applications no more than five days after the applicant becomes aware of the need for amendment. We believe this change will facilitate the auction process, making the information available promptly to all participants and enabling the Bureau to act expeditiously on those changes when such action is necessary. Moreover, we emphasize that applicants can readily make and submit any changes to their short-form applications electronically using the FCC Auction System.

9. The rule amendments adopted in this Order involve rules of agency organization, procedure, or practice. The notice and comment and effective date provisions of the Administrative Procedure Act are therefore inapplicable.¹⁶

III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

10. This document contains a change to previously approved information collection requirements with respect to section 1.2105(c). The change is neither material nor substantive and, accordingly, is not subject to the Paperwork Reduction Act of 1995, Public Law 104-13.¹⁷ More

¹² 47 C.F.R. § 1.2105(b).

¹³ For example, if two competing applicants both were looking for additional financing during an auction, once Fund X acquires a 10 percent ownership interest in Applicant A, Applicant B may not discuss its bidding strategies with Fund X. See 47 C.F.R. 1.2105(c). Accordingly, Applicant B may rely on information in Applicant A's application, which must disclose all parties with ownership interests of 10 percent or more, when deciding whom to contact.

¹⁴ See, e.g., "Auction of Advanced Wireless Services Licenses, 168 Bidders Qualified to Participate in Auction No. 66; Information Disclosure Procedures Announced," *Public Notice*, 21 FCC Rcd 8585, 8590 (2006) (ten business days); "Auction of FM Broadcast Construction Permits; 214 Bidders Qualified to Participate in Auction No. 62," *Public Notice*, 20 FCC Rcd 19,937, 19,941 (2005) (ten business days).

¹⁵ See, e.g., "Auction of FM Broadcast Construction Permits; 456 Bidders Qualified to Participate in Auction No. 37," *Public Notice*, 19 FCC Rcd 19,773, 19,777 (2004).

¹⁶ 5 U.S.C. § 553(b)(3)(A).

¹⁷ See 44 U.S.C. §§ 3501 *et seq.*

specifically, for reasons set forth above, the rule amendments made by this document will modify the provision specifying how parties make reports required pursuant to 47 C.F.R. § 1.2105(c)(6) so that parties shall make the reports as directed by public notice or only to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, rather than to the Chief and the Office of the Secretary of the Commission, as required prior to the modification. Given that this change is neither material nor substantive, this document does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

B. Congressional Review Act

11. The Commission will not send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), because the amended rules are rules of agency organization, procedure or practice that do not substantially affect the rights or obligations of non-agency parties.¹⁸

IV. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED, that pursuant to sections 4(i), 4(j), 5(c), 303(r), 47 U.S.C. §§ 154(i), 154(j), 155(c), 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. Part 1 IS AMENDED, as set forth below, effective 30 days after the publication of the summary of this Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ 5 U.S.C. § 804(3)(C).

APPENDIX

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

2. Section 1.65(a) is amended to read as follows:

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except as otherwise required by rules applicable to particular types of applications, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information as may be appropriate. Except as otherwise required by rules applicable to particular types of applications, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

3. Section 1.2105(b) is amended by adding subparagraph (4), as follows:

(4) Applicants shall have a continuing obligation to make any amendments or modifications that are necessary to maintain the accuracy and completeness of information furnished in pending applications. Such amendments or modifications shall be made as promptly as possible, and in no case more than five business days after applicants become aware of the need to make any amendment or modification, or five business days after the reportable event occurs, whichever is later. An applicant's obligation to make such amendments or modifications to a pending application continues until they are made.

4. Section 1.2105(c) is amended by removing the heading and adding the following:

"Prohibition of certain communications."

5. Section 1.2105(c)(6) is amended by deleting the last sentence and adding the following:

"Such reports shall be filed as directed in public notices detailing procedures for the bidding that was the subject of the reported communication. If no public notice provides direction, such notices shall be filed with the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available."