United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1437 **September Term, 2000**

Graceba Total Communications, Inc.,
Petitioner

Filed On: December 5, 2000 [560609]

v.

Federal Communications Commission and
United States of America,
Respondents

On Petition for Review of an Order of the
Federal Communications Commission

Before: WILLIAMS, ROGERS and TATEL, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See D.C. Cir. Rule 36(b). It is hereby

ORDERED and ADJUDGED that the petition for review of the September 1999 order issued by the Federal Communications Commission, extending a 25 percent bidding credit for Interactive Video and Data Service (IVDS) licenses to all small businesses, be denied for reasons set forth in the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

Graceba Total Communications, Inc. v. Federal Communications Commission, No. 99-1437

Graceba, a small business that is neither minority- nor women-owned, won two IVDS licenses in the Commission's July 1994 auction, in which businesses owned by minorities or women received a 25 percent bidding credit. The Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), seemingly requiring strict scrutiny for race-based preferences, assured that the Commission's credits would survive, if at all, only after protracted litigation. In September 1999, the Commission resolved the problem by extending the 25 percent bidding credit to all small businesses that participated in the IVDS auction. Remand Order, 15 FCC Rcd. 1497, 1533-34 ¶¶ 61-62 (1999). Graceba challenges this Remand Order on various grounds, and in addition seeks to recover attorneys' fees.

First, Graceba faults the Commission for having failed to give it an additional 25 percent discount. This plainly fails because Graceba did not request any such extra discount from the Commission prior to this appeal. See 47 U.S.C. § 405(a) (barring judicial review of "questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass"); Bartholdi Cable Co., Inc. v. Federal Communications

Commission, 114 F.3d 274, 279 (D.C. Cir. 1997).

Graceba alternatively (or perhaps additionally) argues that the Commission ought to have offered it the right to revoke its licenses, obtain a full refund, and avoid its loan obligations. But Graceba consistently petitioned the Commission to "place it in the same position as the preferred applicant class" by giving it the same 25 percent discount as had been provided to women and minority auction winners. Joint Appendix ("J.A.") at 92; see also Graceba Total Communications, Inc. v. Federal Communications Commission, 115 F.3d 1038, 1040 (D.C. Cir. 1997) ("Graceba I"). Graceba has never indicated that it wants to give up its licenses for a complete refund; before the Commission it instead advanced its claim for a rescission remedy merely as a back-up to the remedy that it preferred and ultimately received. Graceba cannot demand a judicial remedy where the Commission honored precisely the remedial preference that Graceba advanced.

To supplement its unsuccessful claims on its own

behalf, Graceba advances claims on behalf of others. Graceba tries to assert standing to make claims on behalf of three different groups--participants in the narrow band personal communications service (PCS) and regional narrow band PCS auctions, larger businesses that do not qualify for the remedial bidding credit, and "ineligible licensees," who, when they default on their debt, receive back all but

their down payments (which are larger than those bidders who received race- and gender-based credits). Graceba does not satisfy the strict three-prong test for third party standing for any of these groups: (1) Because it received a remedial bidding credit, Graceba no longer has a "sufficiently concrete interest" in the litigation's outcome; (2) Graceba does not have a close relation to any of these third parties; and (3) There is no reason why the third parties cannot protect their own interests. See Powers v. Ohio, 499 U.S. 400, 410-11 (1991).

Graceba's claim for attorneys' fees under the Equal Access to Justice Act ("EAJA") also fails. A prevailing party "seeking an award of fees and other expenses" under EAJA has to file a claim "within thirty days of final

judgment in the action." 28 U.S.C. § 2412 (d)(1)(B). There are three conceivable final judgments in the present litigation: Graceba I, the completion of agency remand proceedings, and this decision. Cf. Melkonyan v. Sullivan, 501 U.S. 89, 96 (1991) (interpreting "final judgment" in the EAJA context to mean "a judgment rendered by a court that terminates the civil action for which EAJA fees may be received"). Disposition of the first and third alternatives is the most obvious. If the procedural victory obtained in Graceba I constituted an EAJA-qualifying "final judgment", Graceba plainly failed to file a timely request. If Graceba has in mind the current judicial proceeding, and assuming incorrectly that the present outcome somehow renders it the "prevailing party," any request is premature.

There remains the possibility that Graceba regards the agency order now under review as the pertinent disposition, although it might seem odd for it both to seek review and to claim the status of "prevailing party." The only EAJA provision allowing for fees for administrative proceedings conducted before judicial review is 5 U.S.C. § 504, see Melkonyan, 501 U.S. at 94-

95. Graceba neither cites nor in any way explicitly invokes this provision, but in any event it calls for submission of the fee application "to the agency" within 30 days of the final disposition. 5 U.S.C. § 504(a)(2). That event occurred in September 1999, and Graceba has not made any such submission.

Lastly, there is the remote possibility that Graceba might fit itself within the narrow class of cases where fees are to be sought only after remand and return to court. The Supreme Court has held for "sentence six" Social Security cases--where the parties are expected to return to court--that "the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs." Melkonyan, 501 U.S. at 102. We doubt very much if this could have any application: after Graceba I,

the parties were not expected to return to court in the manner contemplated by Melkonyan. Because Graceba has made no argument whatever along these lines, however, we reject the claim without making any final interpretation of the relevant statutory provisions.

Graceba also invokes the fee-shifting provision of 42 U.S.C. § 1988, providing fees for winners of lawsuits under § 1982. Because Graceba never before suggested that it was suing under 42 U.S.C. § 1982, it cannot relitigate its claims now, on a new theory, simply for the purpose of securing eligibility for fees.

Graceba's final fees theory is that this court, using its jurisdiction in equity, should establish a common fund for fees. Under this theory, "if a party preserves or recovers a fund for his benefit and the benefit of others, he is entitled to recover his costs, including attorney's fees, from the fund or directly from the other parties enjoying the benefit." National Council of Community Mental Health Centers, Inc. v. Mathews, 546 F.2d 1003, 1008 (D.C. Cir. 1976) (noting due process concerns and refusing to establish a common fund). But like the attorney in National Council, who informed neither the court nor the class members that he would be seeking additional fees under a common fund, Graceba did not initially ask for a common fund to be established and did not get the approval of other

bidders to represent them. See National Council, 546

F.2d at 1008-09; J.A. at 175 n. 22. Accordingly, it waived that claim.

For the above reasons, Graceba's petition for review is denied.