

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1168

September Term, 2003

Filed On: May 26, 2004 [824163]

Vista Communications, Inc.
Petitioner

v.

Federal Communications Commission and
United States of America,
Respondents

Consolidated with 03-1281

Petitions for Review of Orders
of the Federal Communications Commission

Before: EDWARDS, SENTELLE, and HENDERSON, *Circuit Judges*

J U D G M E N T

This cause was considered on petitions for review of orders of the Federal Communications Commission and were briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the petitions for review of the orders of the Federal Communications Commission are hereby denied. Petitioner Vista Communications, Inc. ("Vista") had clear notice of the installment payment requirements and the requirement that grace period requests be submitted within 90 days after becoming delinquent on an installment payment. The applicable grace period rule clearly stated that "upon default with no [grace period] request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures." 47 C.F.R. § 1.2110(e)(4)(iii) (1994). The Commission has consistently taken the reasonable position that these rules require grace period requests to be filed on or before the 90th day, and on several occasions the Commission has reminded licensees of this requirement. See *Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments*, Public Notice, 10 F.C.C.R. 10,724 (Jun. 26, 1995); Letter from Dorsey to Licensees (Mar. 29, 1996), *reprinted in* Joint Appendix ("J.A.") 70-71; *Reminder to License[e]s With Installment Payment Plans: Availability of Grace Periods*, Public Notice, 12 F.C.C.R. 7971 (Mar. 25, 1997). Given these clear requirements, the Commission was not obliged to reinstate Vista's licenses after Vista failed to make several consecutive installment payments without requesting a grace period.

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We find nothing arbitrary or capricious in the Commission's definition of the class of "eligible licensees" who are permitted to participate in the restructuring of the 218-219 MHz Service licenses. See *In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 15 F.C.C.R. 1497 (1999) ("Order"); *In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 15 F.C.C.R. 25,020 (2000) ("Reconsideration Order"). The Commission reasonably excluded licensees who had defaulted on their payments or failed to make timely grace period requests in order to preserve the integrity of the competitive bidding process and fairness to those licensees that had complied with the rules. See *Order* at ¶¶ 35-38. The Commission adequately responded to each of the arguments Vista raised in its petition for reconsideration. See *Reconsideration Order* at ¶¶ 24-29.

Nor do we find any abuse of discretion in the Commission's denial of Vista's request for waiver of the grace period and default rules. The Commission ruled that strict enforcement of the grace period and default rules was necessary to insure the integrity of the competitive bidding process and that a waiver therefore would not serve the underlying purposes of these rules. See *In re Eligibility Status of Vista Communications, Inc.*, Letter from Wiener to Johnston, 16 F.C.C.R. 12,430, 12,435-36 (June 12, 2001) ("Division Order"); *In the Matter of Application for Review of the Denial of Vista Communications, Inc.'s Request for Waiver of the Installment Payment Rules for the 218-219 MHz Service*, 18 F.C.C.R. 16,957, at ¶ 12 (2003) ("Commission Order"). We have held that an agency's "strict construction of a general rule in the face of waiver requests is insufficient evidence of an abuse of discretion." *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999) (upholding Commission's denial of licensee's request for waiver of down payment deadline); *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) ("[S]trict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases."). The Commission has relied on this reasoning in denying waivers of installment payment deadlines in similar cases. See *In the Matter of Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment*, 19 F.C.C.R. 83, 85 (2004); *In re Request for Temporary Waiver of Installment Payment Due Date*, Letter from Wiener to Fox, 16 F.C.C.R. 11,786, 11,787-88 (June 1, 2001); *In re Eligibility Status of IVIDCO, L.L.C. & Contingent*

Waiver Request, Letter from Wiener to Craven, 16 F.C.C.R. 7,236, 7,242 (Jan. 23, 2001); *In the Matter of Southern Communications Sys., Inc.*, 15 F.C.C.R. 25,103, 25,105-08 (2000).

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In addition, the Wireless Telecommunications Bureau reasonably distinguished the "constructive waiver" cases upon which Vista relies. See *In the Matter of Petition for Reconsideration of the Denial of Vista Communications, Inc.'s Request for Waiver of the Installment Payment Rules for the 218-219 MHz Service*, 18 F.C.C.R. 2540, at ¶¶ 18-21 (2003) ("*Bureau Order*"). The Commission's orders responded adequately to each of Vista's other arguments, including Vista's offer to make retroactive payments to "become current" in its installments. See *Division Order* at 12,436; *Commission Order* ¶ 17. Finally, the Commission was not obligated to accept Vista's eleventh-hour offer to make full payment of the remaining license obligation. See *Petition for Reconsideration* at 10 n.32, *reprinted in* J.A. 105. This offer came in a footnote to Vista's *Petition for Reconsideration of the Division Order* over four years after Vista defaulted on its license installment payments. The Commission therefore undertook the necessary "hard look" at Vista's request for waiver, see *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)), and did not abuse its discretion in denying that waiver.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By:

Michael C. McGrail

Deputy Clerk