

DA 01-1413
June 12, 2001

E. Ashton Johnston, Esquire
Piper, Marbury, Rudnick & Wolfe, LLP
1200 Nineteenth Street, NW
Washington, DC 20036-2412

Re: Eligibility Status of Vista Communications, Inc.

Dear Mr. Johnston:

This letter responds to your correspondence on behalf of Vista Communications, Inc. (“Vista”)¹ requesting a waiver of the grace period provisions of Section 1.2110(e)(4)² so that Vista might participate in the restructuring plan adopted in the Commission’s *218-219 MHz Order*.³ Specifically, Vista seeks a waiver of the Commission’s grace period rules and asks that the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, (“Division”) treat Vista’s June 1, 1999 Waiver Request as a timely-filed grace period request.⁴ In the alternative, Vista requests that the

¹ Letter to Thomas Sugrue, Chief, WTB, FCC, from E. Ashton Johnston, Esq., dated June 1, 1999 (“Vista Waiver Request”); and, Letter to Thomas Sugrue, Chief, WTB, FCC, from E. Ashton Johnston, Esq., dated Dec. 8, 1999 (“Vista Waiver Supplement”).

² Vista cites to the grace period provisions at 47 C.F.R. § 1.2110(f)(4)(1999), however, at the time of the automatic cancellation of its licenses in 1997, the grace period provisions were codified at 47 C.F.R. § 1.2110(e)(4). We also note that after the filing of Vista’s request, the Commission modified the Part 1 rules, including Section 1.2110. Amendment of Part 1 of the Commission’s Rules - Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd. 15293, 15 FCC Rcd. 21520 (2000).

³ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd. 1497 (1999) (“*218-219 MHz Order*”); *218-219 MHz Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, FCC 00-411 (rel. December 13, 2000) (“*218-219 MHz Second Order on Reconsideration*”).

⁴ Vista Waiver Request at 7; Vista Waiver Supplement at 2.

Division allow Vista to remit a retroactive payment, sufficient to bring its installment payments “current” through March 16, 1998.⁵ For the reasons set forth below, we deny Vista’s requests.⁶

1. Background

The *218-219 MHz Order* modified the regulations governing the licensing of the 218-219 MHz Service (formerly known as IVDS) to maximize the efficient and effective use of the band.⁷ The *218-219 MHz Order*, among other things, modified service and technical rules for the band and extended the license term from five to ten years.⁸ The *218-219 MHz Order* also announced the Commission’s decision to adopt a financial restructuring plan for “Eligible Licensees.” Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.⁹ “Ineligible Entities” are former licensees that made second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former rules; or (ii) entities that never made any installment payments and did not have a timely filed grace period request on file.¹⁰ Ineligible Entities are not entitled to participate in the 218-219 MHz Service restructuring plan as they lost their licenses through default.¹¹ However, Ineligible Entities will be granted debt forgiveness for any outstanding balances owed and will be refunded their previously paid installment payments.¹²

⁵ Vista Waiver Supplement at 2.

⁶ We also note that Vista filed a petition for reconsideration of the Commission’s *218-219 MHz Order* raising many of the same arguments that it raises here in the context of a waiver request. The Commission denied Vista’s petition. *218-219 MHz Second Order on Reconsideration*, ¶¶ 27-29 (denying Vista’s request for a modification of the definition of “Eligible Licensees”; and denying Vista’s request that licensees be able to make retroactive payments sufficient to be deemed “current as of March 16, 1998.”)

⁷ *218-219 MHz Order*, 15 FCC Rcd at 1506 ¶ 15.

⁸ *Id.* at 1517 ¶ 31.

⁹ *Id.* at 1520 ¶ 37.

¹⁰ *Id.* at 1520 ¶ 38.

¹¹ *Id.* at 1518 ¶ 33 (citing 47 C.F.R. § 1.2110 (1994)); *see also* Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., Petition for Reconsideration, Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000) (“*NextWave Order on Reconsideration*”); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2nd Cir. 1999), *mandate enforced by* 217 F.3d 125 (2nd Cir. 2000), *cert. denied*, 2000 WL 795201 (Oct. 10, 2000) (No. 99-1980); *Mountain Solutions v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (upholding the Commission’s decision, in a PCS licensing matter, to deny a waiver of its rule requiring a winning bidder to timely submit both its first and second down payment before the Commission will grant a license).

¹² *218-219 MHz Order*, 15 FCC Rcd at 1520 ¶ 38; 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*, DA 00-900, 15 FCC Rcd 7329 (WTB 2000) (noting that the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt

Prior to the issuance of the *218-219 MHz Order*, Vista sought waiver of the Commission's grace period rules¹³ as applied to the 218-219 MHz Service. After issuance of the *218-219 MHz Order*, Vista filed a supplement requesting that the Division treat its June 1, 1999 waiver request as a timely-filed grace period request.¹⁴ Alternatively, Vista requested that the Division allow Vista to remit a retroactive payment sufficient to bring its installment payments "current" through March 16, 1998.¹⁵

In January 2000, in accordance with the rules set forth in the *218-219 MHz Order*, current and former 218-219 MHz licensees were notified of their eligibility status with regard to the restructuring plan. Vista was notified that it was an Ineligible Entity.¹⁶

2. Vista's Request for Waiver of the Commission's Grace Period Rules

Vista requests a waiver of the applicable default and automatic license cancellation rules.¹⁷ In its waiver request, Vista acknowledges that after making the interest-only installment payment of March 31, 1997, it ceased making installment payments on its licenses, thus making it more than ninety days delinquent as of March 16, 1998 and, therefore, ineligible to participate in the 218-219 MHz restructuring plan.¹⁸ In order for the Commission to grant a waiver of its rules, one of two tests must be met. The entity requesting a waiver must demonstrate that either (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application in the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁹ Vista claims that its waiver request satisfies both tests.²⁰ We disagree.

Vista alleges that certain factors created confusion regarding its payment obligations and that this confusion constitutes unique or unusual circumstances that warrant a waiver.²¹ Vista alleges that

relief provisions of the *218-219 MHz Order*); *see also* *IVIDCO* Letter dated January 23, 2001 DA-170.

¹³ See Vista Waiver Request at 1.

¹⁴ Vista Waiver Supplement.

¹⁵ *Id.* at 2.

¹⁶ Letter to Elizabeth Michaels, from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, WTB, FCC, dated January 6, 2000 ("*January 6, 2000 Vista Ineligibility Letter*").

¹⁷ See Vista Waiver Request.

¹⁸ Vista Waiver Request at 5.

¹⁹ 47 C.F.R. § 1.925.

²⁰ See Vista Waiver Request at 7.

²¹ Vista Waiver Request at 2-7.

the following three factors support its position: (i) changes to the IVDS payment schedule;²² (ii) a March 1996 letter from the Billings and Collections Branch in which a review date of September 20, 1999 was noted to audit accounts;²³ and (iii) Vista's own lack of knowledge as to filing of grace period requests.²⁴ Vista contends that the above factors led to a belief that it would be given the opportunity "to make current its accounts and/or otherwise participate in a revised IVDS license program."²⁵ For the reasons below, we find that the above circumstances do not excuse Vista's individual non-compliance with the Commission's installment payment rules.

With respect to Vista's first allegation that changes to the IVDS payment schedule created confusion, the Commission provided ample notice to 218-219 MHz licensees regarding the Commission's payment rules.²⁶ The *1995 IVDS Omnibus Order*, and the *IVDS Grace Period PN*, cautioned licensees that, in accordance with section 1.2110²⁷ of our Rules, if they individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.²⁸ The Bureau further cautioned licensees that if a licensee failed to make timely payments, absent the filing of a grace period request, the license would be in default.²⁹ As the Commission noted in the *218-219 MHz Second Order on Reconsideration*, although the date for the initial installment payment was postponed for a period of time, "even the most favorable reading of the Commission's Orders and letters to licensees would not reasonably lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments."³⁰ Indeed, a March 29, 1996 letter from the Commission's Billings and Collections

²² Vista Waiver Request at 3-5.

²³ See Vista Waiver Request, Attachment 7 (March 10, 1996 Billings "Notice to IVDS Licensees," from Regina W. Dorsey, Chief, Billings and Collections Branch).

²⁴ Vista Waiver Request at 5.

²⁵ *Id.*

²⁶ 47 C.F.R. § 1.2110 (1994); Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd. 10724 (1995) (WTB) ("*IVDS Grace Period PN*"); see also Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd. 1282 at 1285 ¶ 19 (1995) ("*1995 IVDS Omnibus Order*").

²⁷ 47 C.F.R. § 1.2110 (e)(4)(ii) (1994).

²⁸ *1995 IVDS Omnibus Order*, 11 FCC Rcd. at 1285 ¶ 19; *IVDS Grace Period PN*, 10 FCC Rcd. 10724; see also Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (1995) (clarified grace period rule in the context of Personal Communications Services auction) ("*PCS Grace Period PN*").

²⁹ *IVDS Grace Period PN*, 10 FCC Rcd. 10724 ("IVDS Licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government.").

³⁰ *218-219 MHz Second Order on Reconsideration*, ¶ 28; see 47 C.F.R. § 1.2110(e)(4)(ii) (1994); *IVDS Grace Period PN*, 10 FCC Rcd. 10724; *1995 IVDS Omnibus Order*, 11 FCC Rcd. at 1285 ¶ 19.

Branch to Vista, included as an attachment to Vista's petition, explicitly stated that the dates for payments due after March 31, 1996 remained unchanged.³¹ Apparently, Vista ignored this information.

The second factor that Vista alleges created confusion was a March 10, 1996 letter from the Billings and Collections Branch entitled "Notice to IVDS Licensees."³² Vista notes in its waiver request that the "Notice to IVDS Licensees" stated that a review of accounts would be conducted on September 20, 1999.³³ Vista alleges that this statement confused Vista to the point that it withheld all installment payments assuming it could make up for a shortfall during the proposed review.³⁴ Such an assumption is unreasonable since the Commission specifically informed Vista, and other licensees, that notice of the proposed review of accounts was not meant to indicate that installment payments were stayed.³⁵

The third factor that Vista relies upon is its own lack of knowledge.³⁶ Vista argues that its lack of knowledge regarding the grace period rules, in combination with the alleged confusion created by the first two factors should excuse its failure to file a grace period request.³⁷ Vista, just as every Commission licensee, was charged with knowledge of the applicable rules.³⁸ Further, Vista admits it received the *March 29 1996 Letter*³⁹ that reminded licensees of the Commission's rules concerning grace period requests.⁴⁰ The *March 29, 1996 Letter* also reiterated that previous stays of the due dates for particular installment payments did not alter the due dates for future payment.⁴¹ Finally, in

³¹ Vista Waiver Request, Attachment 8 (Letter from Regina Dorsey, Chief, Billings and Collections Branch, to "Licensee," dated March 29, 1996, page 1) ("*March 29, 1996 Letter*").

³² Vista Waiver Request, Attachment 7 (March 10, 1996 Billings "Notice to IVDS Licensees," from Regina W. Dorsey, Chief, Billings and Collections Branch).

³³ Vista Waiver Request, at 5.

³⁴ *Id.*

³⁵ *March 29, 1996 Letter*, at 2 ("To clarify, these statements were *not* meant to indicate that all installment payments were being stayed until 1999.") The *March 29, 1996 Letter* also notified licensees that the Commission's Rules permitted licensees within the first 90 days following a missed installment payment, to request a grace period. *Id.* at 1 (citing 47 C.F.R. § 1.2110 (1996)).

³⁶ Vista Waiver Request at 5.

³⁷ Vista Waiver Request at 5.

³⁸ 47 C.F.R. § 0.406 ("Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business.")

³⁹ *March 29, 1996 Letter* at 1.

⁴⁰ *Id.* at 1 ("Please note that the Commission's Rules permit licensees, within the first 90 days following a missed installment payment, to request a 'grace period'.")

⁴¹ *Id.* at 1.

the various Orders and Public Notices issued in this service, the Commission repeatedly indicated to licensees the consequence of failing to make timely payments.⁴² Thus, Vista has failed to demonstrate unique or unusual circumstances that would warrant a waiver of the rules.

Vista also argues that enforcement of the grace period rule would be inequitable and contrary to the underlying purpose of the rules. In support of its position, Vista lists the payments it has made on its licenses⁴³ and what it describes as its efforts to comply with the Commission's installment payment rules.⁴⁴ Vista argues that it is inequitable to allow licensees that made no installment payments, but filed timely grace period requests, to retain their license(s), while refusing to permit licensees that made "substantial payments" to retain their license(s).⁴⁵ In essence, Vista seeks to change the definition of "Eligible Licensees" to include those who have made "substantial payments." The Commission, in the *218-219 MHz Second Order on Reconsideration*, specifically rejected Vista's proposal to adopt a new definition of "Eligible Licensee," which would have weighed partial payments for adequacy.⁴⁶ As we explain below, Vista's argument, although raised in a different context, continues to be unavailing.

Consistent with the Commission's obligations under Section 309(j) of the Communications Act of 1934, as amended,⁴⁷ the Commission's auction rules serve the underlying purpose of assuring and maintaining the efficient and effective assignment of spectrum licenses. The underlying purpose of the default and automatic license cancellation rules, which Vista asks us to waive, is to maintain the integrity of the auction process by encouraging licensees to timely and fully comply with their payment obligations, and effectively utilize the spectrum.⁴⁸ Strict enforcement of the Commission's payment rules ensures that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing

⁴² *1995 IVDS Omnibus Order*, 11 FCC Rcd 1282 at 1285 ¶ 19; *IVDS Grace Period PN*, 10 FCC Rcd 10724; *218-219 MHz Second Order on Reconsideration*, at ¶ 28.

⁴³ Vista Supplement at 2.

⁴⁴ Vista Waiver Request at 7; Vista Waiver Supplement at 2

⁴⁵ *Id.*

⁴⁶ *218-219 MHz Second Order on Reconsideration*, ¶ 27 ("The test proposed by Vista is inherently subjective and would be unfair to licensees in other services. Administering such a subjective test would be difficult and would invite challenge on the basis of being arbitrary. Further, allowing licensees that failed to abide by the Commission's rules, but had made 'substantial payments' to retain their licenses is inconsistent with the Commission's requirement that a licensee make full and timely payments. From such a rule current licensees, in this or other services, might conclude that no consequences would flow from failure to make full and timely payment.")

⁴⁷ 47 U.S.C. § 309(j).

⁴⁸ The courts have recognized the importance of the Commission's default rules and affirmed the Commission's authority to enforce its rules. *See generally, Mountain Solutions*, 197 F.3d 512; *NextWave*, 200 F.3d 43.

process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.⁴⁹ Thus, Vista has failed to demonstrate that application of the installment payment and grace period rules to the facts in this instance would be contrary to the underlying purpose of the rule.

3. Request to Remit Retroactive Payment

In its alternative argument, Vista requests that it be allowed to make a retroactive payment sufficient to be deemed “current as of March 16, 1998.”⁵⁰ In essence, this request seeks a change to the Commission’s eligibility rules. In the *218-219 MHz Second Order on Reconsideration*, the Commission specifically rejected Vista’s proposal that the Commission reconsider the *218-219 MHz Order* to allow retroactive payments by former licensees such as Vista.⁵¹ The Commission determined that granting Vista’s request would undermine the Commission’s rules requiring timely and full payment as a condition of retaining the license.⁵² The Commission concluded that in light of the ample notice provided licensees regarding the payment rules,⁵³ and the generous provisions for Ineligible Entities provided in the *218-219 MHz Order*, Vista’s suggestion that it be allowed to make retroactive payments was unsupportable.⁵⁴ Thus, in keeping with the Commission’s earlier rejection of this suggestion, we reject Vista’s proposal to allow it to make retroactive payments in order to become eligible for participation in the 218-219 MHz Service restructuring plan.

4. Conclusion

For the reasons detailed above, we deny Vista’s request to be accorded the status of “Eligible Licensee” for participation in the 218-219 MHz restructuring plan.

For the reasons stated above, Vista’s request for waiver of the Commission’s grace period rules as applied to the 218-219 MHz Service is DENIED.

For the reasons stated above, Vista’s request to remit funds sufficient to cover installment payments due on its licenses to make it “current” through March 16, 1998, is DENIED.

⁴⁹ See *NextWave Order on Reconsideration*, 15 Fed Rcd 17500, ¶ 25

⁵⁰ Vista Waiver Request at 7.

⁵¹ *218-219 MHz Second Order on Reconsideration*, ¶ 29.

⁵² *Id.*, ¶ 29; see also *IVIDCO*, DA 01-170.

⁵³ *Id.*, ¶ 29; 47 C.F.R. § 1.2110(e)(4)(ii)(1994); *IVDS Grace Period PN*, 10 FCC Rcd. 10724; see also *1995 IVDS Omnibus Order*, 11 FCC Rcd. at 1285 ¶ 19.

⁵⁴ *218-219 MHz Second Order on Reconsideration*, ¶ 29.

E. Ashton Johnston, Esquire
June 12, 2001

This action is taken pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 154(j), and the authority delegated pursuant to section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

Sincerely,

Margaret Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau