

United States Court of Appeals For the First Circuit

No. 15-1584

BARRY P. LUNDERVILLE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES,

Respondents.

Before

Torruella, Lynch and Barron,
Circuit Judges.

JUDGMENT

Entered: March 16, 2017

Barry P. Lunderville was one of a number of parties who participated in an auction of radio licenses held under the auspices of the Wireless Telecommunications Bureau (WTB) of the Federal Communications Commission (FCC) in 2004. Lunderville and several other bidders withdrew their bids while the auction was ongoing. These withdrawals subjected each of them to liability for the difference between their bid on a license and the price for which that license would ultimately sell. One of these bid-withdrawing parties, Advance Acquisition, Inc., succeeded in obtaining from the WTB a waiver of nearly all of its overbid liability. In the Matter of Advance Acquisition, Inc., DA 07-34367 (Oct. 22, 2007). Lunderville and some other parties who had withdrawn bids then requested the same consideration from the WTB, but the WTB denied their requests because their overbids were not as extreme as Advance Acquisition's. In the Matter of Barry P. Lunderville, et al, DA 08-1581 (July 2, 2008).

Lunderville was among those who requested reconsideration by the WTB. Rather than being decided by the WTB, the reconsideration request was taken up by the Commissioners of the FCC. The Commissioners decided that the WTB's decision in DA 07-34367 had been in error, and that waiver of overbid liability for withdrawn bids should not have been made available to Advance Acquisition or any of the other parties. In the Matter of Barry P. Lunderville, et al, FCC 13-7 (January 14, 2013). Lunderville made a lone request for "reconsideration" by the FCC. He

argued that, as a matter of legal fairness and constitutional right, he should not be barred from obtaining the same relief that Advance Acquisition had already been afforded. The FCC rejected his arguments and denied reconsideration. In the Matter of Barry P. Lunderville, FCC 15-48 (April 17, 2015). This petition for judicial review followed.

The parties contest jurisdiction over this appeal because it is taken from an order by the FCC denominated as a denial of "reconsideration." See I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 279 (1987)(holding against jurisdiction over agency's denial of motion for reconsideration based on claim of "material error"). Because Lunderville's request for "reconsideration" was his initial response to the Commissioners taking up, *sua sponte*, his request before the WTB and holding that the WTB's decision in Advance Acquisition was overruled as erroneous, there is reason to question whether this case is controlled by Locomotive Engineers.

Assuming without deciding that the matter is properly before the court, the merits of Lunderville's claim are still unavailing. Lunderville did not suffer invidious discrimination in comparison to Advance Acquisition. Lunderville did not make or withdraw his bid in reliance on the type of relief Advance Acquisition obtained, which was only afforded by the WTB after the auction was over. Lunderville can do no more than cite Advance Acquisition as having received a kind of windfall because the WTB waived most of its overbid liability in DA 07-4367, and because the FCC Commissioners did not have occasion to claw back this windfall before identifying it as error in their holding in FCC 13-7. Lunderville has not identified precedent suggesting that these are grounds for a viable claim on the basis of constitutional Equal Protection or any other provision of law.

The petition for judicial review is **denied**

By the Court:

/s/ Margaret Carter, Clerk

cc: Barry P. Lunderville
Jacob Matthew Lewis
David M. Gossett
Scott M. Noveck
Robert B. Nicholson
Steven J. Mintz