

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	File No. ENF 99-10
Vista Group International, Inc.)	
)	NAL/Acct. No. 916EF0005
Apparent Liability for Forfeiture)	

ORDER ON RECONSIDERATION

Adopted: April 6, 2001

Released: April 11, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a Petition for Reconsideration (“Petition”) filed by Vista Group International, Inc. (“Vista”). Vista requests that the Commission review its October 23, 2000 Order of Forfeiture,¹ which imposed a forfeiture of \$680,000 against Vista for willful or repeated violations of section 258² of the Communications Act of 1934, as amended (the “Act”), and our related rules and orders. In the *Forfeiture Order*, the Commission found that Vista willfully or repeatedly violated section 258 of the Act by changing the preferred interexchange carriers (“PICs”) designated by 14 consumers without their authorization (a practice commonly referred to as “slamming”). In its Petition, Vista asks the Commission to rescind the forfeiture.³

II. BACKGROUND

2. Between September 1, 1998 and July 30, 1999, the Commission processed hundreds of consumer complaints regarding Vista. Following an investigation of 18 of these complaints, the Commission issued a Notice of Apparent Liability for Forfeiture (“NAL”) against Vista.⁴ Each of the

¹ *Vista Services Corporation*, Order of Forfeiture, 15 FCC Rcd 20646 (2000) (*Forfeiture Order*). The company name in the caption of this order has been conformed to that of the Notice of Apparent Liability for Forfeiture in this matter.

² Section 258 provides in pertinent part that “no telecommunications carrier shall submit . . . a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.” 47 U.S.C. § 258. In the Notice of Apparent Liability that preceded the Order, we also found that Vista apparently violated section 201(b) of the Act for its unreasonable marketing practices, but declined to assess a forfeiture for those apparent violations.

³ Vista also filed a “Motion For Stay,” requesting that the Commission stay the *Forfeiture Order* pending resolution of its Petition. At this time, Vista has not paid the forfeiture, but the Commission has not attempted to enforce the *Forfeiture Order*, so we dismiss the motion as moot.

⁴ *Vista Group International, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 13814 (1999)

complainants contended that Vista converted his or her preferred interexchange carrier (“PIC”) without authorization and provided sworn statements and evidence to that effect. Accordingly, we found that Vista was apparently liable for a proposed forfeiture of \$80,000 for each of seven violations that appeared to involve slamming through misleading sales and verification practices. In addition, we found that Vista was apparently liable for a proposed forfeiture of \$40,000 for each of the other 11 instances that involved Vista’s switching consumer accounts purchased from ATS, one of Vista’s telemarketing agents.⁵ In total, we proposed a forfeiture of \$1,000,000.⁶ Vista filed a response contesting the Commission’s findings of apparent liability under section 258, as well as the amount of the proposed forfeiture.⁷ In the *Forfeiture Order*, we rejected most of Vista’s arguments, but found Vista not to be liable for four violations and reduced the amount of the forfeiture by a total of \$320,000 accordingly.⁸

3. On November 22, 2000, Vista filed the instant petition for reconsideration (Petition) with the Commission. In its Petition, Vista contends that the Commission should rescind the remainder of the forfeiture amount because it was imposed “against the weight of the evidence, inequitably, and arbitrarily and capriciously.”⁹ Generally, Vista argues that the Commission erred by disregarding evidence describing Vista’s business practices and slamming precautions.¹⁰ Vista also claims that the Commission applied an incorrect standard of intent by finding Vista liable for actions wholly beyond its control.¹¹ Vista maintains that the Commission engaged in impermissible retroactive rulemaking by finding violations based on the 11 consumer accounts Vista purchased from ATS, even though Vista admits it failed to obtain authorization and verification prior to switching the consumers’ service.¹² Finally, Vista argues that the forfeiture amount is too high, and that the Commission disregarded evidence in that regard.¹³

(*Vista NAL*).

⁵ *Vista NAL*, 14 FCC Rcd at 13820, 13826-27. We note that in its response to Commission inquiries Vista described ATS as a telemarketing agent. In responding to the NAL, Vista did not appear to contend that ATS was an agent soliciting consumers to switch to Vista’s services on Vista’s behalf. Rather, Vista stated that it purchased “lawfully acquired customer accounts” from ATS. See *Forfeiture Order*, 15 FCC at 20651. The difference in descriptions is not material to our analysis.

⁶ *Vista NAL*, 14 FCC Rcd at 13830. The Commission has authority pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), to assess a forfeiture penalty against a common carrier if the Commission determines that the carrier has “willfully or repeatedly” failed to comply with the provisions of the Act or with any rule, regulation, or order issued by the Commission.

⁷ Vista Group International, Inc., Response to Notice of Apparent Liability, File No. ENF 99-10 (filed Sept. 30, 1999) (NAL Response).

⁸ *Forfeiture Order*, 15 FCC Rcd at 20653.

⁹ Petition at 2.

¹⁰ Petition at 3-7.

¹¹ *Id.* at 7-13.

¹² *Id.* at 13-23.

¹³ *Id.* at 23-24.

III. DISCUSSION

4. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.¹⁴ A petition that simply repeats arguments previously considered and rejected will be denied.¹⁵ Our review of Vista's Petition reveals that the Commission has already considered and rejected some of Vista's arguments in the *Forfeiture Order*. We will, therefore, limit the discussion below to those new arguments raised by Vista.

A. Liability Assessed in the CUM Save N' Share Complaint

5. Vista first argues that the Commission should rescind the penalty based on the violation described in the CUM Save N' Share complaint. As recorded in the *Vista NAL*, CUM Save N' Share filed a complaint alleging that Vista switched its PIC to Vista without authorization.¹⁶ After reviewing the complaint and Vista's response to the NAL, the Commission determined that Vista did not submit adequate evidence to counter the consumer's slamming allegation and, therefore, found that Vista had violated the Act.¹⁷ Vista contends that in so finding, the Commission ignored evidence demonstrating that Vista followed Commission rules when it switched CUM Save N' Share's PIC.¹⁸ Vista was unable to produce a tape verifying the consumer's authorization, but did provide two declarations describing Vista's verification practices. According to one declaration, Vista followed its established complaint investigation procedures by contacting the independent third party verification firm that had verified the CUM Save 'N Share authorization, Quick Response, and confirmed that it had received "a good verification" for the CUM Save 'N Share account.¹⁹ The declaration from the Operations Manager of Quick Response describes the business practices (training, monitoring, script verification) that Quick Response used during the time frame that it performed third party verifications on behalf of Vista.²⁰ Based on this description, Vista argues that the script used during the time of the CUM Save 'N Share switch was the same as that used for the verifications of the four accounts where the Commission determined that no unauthorized conversion had taken place.²¹

6. As we emphasized in the *Forfeiture Order*, liability must be determined on the facts and circumstances of each individual case.²² We uphold our determination that Vista did not provide evidence adequate to counter the complainant's allegation that it did not authorize Vista to change its PIC.²³ When

¹⁴ *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106 (b)(2).

¹⁵ *Bennett Gilbert Gaines*, 8 FCC Rcd 3986, 3987 (Rev. Bd. 1993).

¹⁶ *Vista NAL*, 14 FCC Rcd at 13826, n.66.

¹⁷ *Forfeiture Order*, 15 FCC Rcd at 20649, n.19.

¹⁸ Petition at 3.

¹⁹ Response to the NAL, Exhibit 6, Declaration of Stacey Vigneau, at 5.

²⁰ Response to the NAL, Exhibit 5, Declaration of April Reeser.

²¹ Petition at 3-6.

²² *Forfeiture Order*, 15 FCC Rcd at 20649.

²³ Not only does Vista acknowledge that it has no tape verifying that CUM Save N' Share authorized a

we examine the declarations, we see that the one from the Quick Response manager was very general, giving only the procedures it purportedly used for all the verification calls, and did not address the specific verification at issue, CUM Save N' Share. The Vista employee reiterated Quick Response's business practices, but also admitted that there was apparently no verification by the complainant to change the company's PIC to Vista.²⁴ Thus, Vista's declarations describing its business practices do not, in light of the complete record, persuade us that Vista had obtained the complainant's authorization to switch preferred carriers. We therefore find that Vista violated the Act when it switched CUM Save N' Share's service.

7. Vista also argues that because Commission rules do not require carriers to keep verification tapes, we cannot find Vista liable for its failure to submit a tape of CUM Save N' Share.²⁵ As discussed above, we found Vista liable, not because it failed to produce a confirming tape, but because it failed to provide substantive evidence to counter the complainant's allegation that Vista changed its PIC without authorization. We therefore reject Vista's contention.

B. Liability Assessed in the W.F. Magann Corporation and Colorado Partnership Complaints

8. Vista also argues that it should not be held responsible for the slamming violations based on the conversion of W.F. Magann Corporation and Colorado Partnership's PICs. Vista admits that these PIC changes were unauthorized. Magann's preferred carrier was switched based upon "verification" by an individual impersonating Ms. Ricki Bittle from Magann.²⁶ As the record indicates, not only was it not Ms. Bittle's voice on the verification tape but all of the information on the tape was incorrect, including the spelling of her name, her company's current long-distance carrier, her company's monthly long-distance usage, and her birthdate.²⁷ Vista also acknowledges that Colorado Partnership's preferred carrier should not have been switched because the verification tape indicates that the consumer did not agree to the switch.²⁸ Vista argues, nonetheless, that in both instances, Vista was unaware of these inadequacies and had taken all the precautions it could have under the circumstances.²⁹ It argues that the level of responsibility that the Commission imposes on carriers is . . . "unrealistic and unattainable . . ."³⁰

9. Vista's arguments on these issues fail. Section 217 of the Act deems "the act, omission or failure of any . . . person *acting for* or employed by" any carrier to be the act, omission or failure of that carrier.³¹ As explained in the *Forfeiture Order*, this language clearly extends to the entities "acting for" Vista in securing

change in service, it admits that two of the verification tapes it has for two of the complaints at issue (Megann Corporation and Colorado Partnership) do not provide adequate evidence of the requisite authorization. In fact, one of the tapes, that of Megann Corporation, also provided by Quick Response, was apparently falsified. *See* discussion, *infra* at 4-6. Vista did not submit these two tapes when it submitted its NAL Response.

²⁴ Response to the NAL, Exhibit 6, Declaration of Stacey Vigneau, at 5-6.

²⁵ Petition at 4.

²⁶ Response to the NAL, Exhibit 6, Declaration of Stacey Vigneau, at 4-5.

²⁷ *Vista NAL*, 14 FCC Rcd at 13819.

²⁸ Response to the NAL, Exhibit 6, Declaration of Stacey Vigneau, at 7.

²⁹ Petition at 7-10.

³⁰ *Id.* at 10-11.

³¹ 47 U.S.C. § 217 (emphasis added).

PIC-change authorizations.³² The verification problems encountered here indicate that Vista did not have the consumers' authorization to make a switch in either case. In the Magann situation, the imposter who was subsequently recorded in a conversation with Vista's third party verifier clearly could not have granted the initial PIC-change authorization. Because the tape of Colorado Partnership's "verification" shows that the complainant did not want to change her PIC, the complainant again could not have authorized the PIC change. In the *Forfeiture Order*, the Commission found that Vista violated the Act by changing the complainants' service when Vista failed to obtain authorization before the verification calls.³³ The *Forfeiture Order* did not find that Vista had proper authorization and then simply failed to obtain proper verification. None of Vista's arguments persuade us that Vista is not ultimately responsible for the unauthorized PIC changes that occurred.

10. Vista also argues that it should not be found in violation of the Act for these unauthorized conversions because it followed the Commission's rules, and lacked intent to change these complainants' PICs without their authorization. It disagrees with the Commission's interpretation of the term "willfulness" as used in section 503(b) of the Act.³⁴ Instead, it offers a different interpretation from the Administrative Procedure Act, and cites non-Commission cases in support.³⁵ We disagree with Vista's contention. Based on the definition of willful in section 312(f)(1) of the Act, and the accompanying legislative history indicating congressional intent that this definition applies to section 503(b) as well, the Commission has stated repeatedly that section 503(b) requires only a finding that Vista knew it was doing the acts in question and that the acts were not accidental.³⁶ Furthermore, section 503(b) authorizes the Commission to assess forfeitures for willful *or repeated* violations of the Act.³⁷ The record supports the fact that Vista's violations were repeated, as well as being willful under the standard imposed by the Act.

11. In further support of its position, Vista refers to a Commission rulemaking report and order discussing the strict liability standard mandated by section 258 of the Act. In addressing carrier concerns about the imposition of the Act's strict liability standard, the Commission stated: "[w]e recognize, however, that even with the greatest of care, innocent mistakes will occur and may result in unauthorized changes. In such cases, we will take into consideration in any enforcement action the willfulness of the carriers involved."³⁸ Vista contends that by this statement, the Commission determined that the definition of willfulness in section 503(b) includes consideration of intent. We reject Vista's arguments. The statement quoted by Vista was included to assure carriers that the Commission would apply its enforcement authority in a fair and even-handed manner. It did not change the standards imposed by sections 258 and 503(b) of the Act. As the Commission has stated, section 258 "imposes a strict

³² *Forfeiture Order*, 15 FCC Rcd at 20649-50.

³³ *Id.*

³⁴ Petition at 11.

³⁵ *Id.* at 13, nn 31-34.

³⁶ *ConQuest Operator Services Corp.*, Order of Forfeiture, 14 FCC Rcd 12518, 12525, n.41 (1999); *Target Telecom Forfeiture Order*, 13 FCC Rcd at 4458, *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991).

³⁷ 47 U.S.C. § 503(b) (emphasis added).

³⁸ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1542 (1998) (*Section 258 Order*).

liability standard on the carrier responsible for submitting an unauthorized change, regardless of intent.”³⁹ The Commission determined that Congress intended that such a “bright line standard . . . will minimize the threat of selective enforcement because it does not depend on divining the subjective intent of the violator.”⁴⁰ As discussed above, Vista’s actions were both willful and repeated under section 503(b) of the Act.

C. Liability Assessed in the Remaining Complaints

12. In the *Forfeiture Order*, we found Vista apparently liable for slamming 11 consumers whose accounts it purchased from ATS. Vista claims that this determination constitutes an impermissible retroactive rulemaking of proposals contained in the *Section 258 Order*.⁴¹ Vista supports this argument by reasoning that such customer base transfers were commonplace in the telecommunications industry, the Commission was aware of these transfers, and the Commission issued no orders assessing liability against those carriers for switching those customers’ accounts.⁴² Vista reasons that because it found no waiver requests filed until after the *Section 258 Order*, that order gave notice, for the first time, that verification rules applied to customer base acquisitions.⁴³ Because Vista’s acquisition of customer names came *before* the *Section 258 Order* was published, Vista claims that the Commission’s *Forfeiture Order* against Vista constitutes impermissible retroactive rulemaking of proposals contained in the *Section 258 Order*.

13. We addressed similar claims in the *Forfeiture Order* and are not persuaded to reverse our finding of liability here.⁴⁴ First, we point out that Vista is not absolved from liability for its actions because other carriers *may have* slammed consumers but no such allegations were brought to our attention. Furthermore, we are holding Vista liable for 11 slamming violations based on 11 consumer complaints, not for slamming all of the consumers involved in any transfer of a customer base. In addition, the facts in the record before us confuse the nature of the Vista/ATS business relationship. In response to the Commission’s initial inquiries, Vista identified ATS as one of its telemarketing agents.⁴⁵ Vista additionally described these ATS consumer accounts as having been telemarketed by ATS and “sold to Vista with the express or implied representation that it was properly verified by an independent third party verification company in accordance with federal and state law.”⁴⁶ In its NAL Response, Vista stated that ATS had acquired these consumer accounts with the intent to provide its own telecommunications service and but then sold the accounts to Vista.⁴⁷ Regardless of the business relationship between Vista and ATS, Vista acknowledges that it purchased consumer accounts from ATS and subsequently submitted PIC-change requests on behalf of those consumers to change their service to Vista without obtaining the consumers’

³⁹ *Section 258 Order*, 14 FCC Rcd at 1540. See also *Amer-I-Net Service Corporation*, Order of Forfeiture, 15 FCC Rcd 3118 (2000).

⁴⁰ *Section 258 Order*, 14 FCC Rcd at 1540.

⁴¹ Petition at 22-23.

⁴² *Id.* at n. 58.

⁴³ *Id.* at 20.

⁴⁴ *Forfeiture Order*, 15 FCC Rcd at 20652.

⁴⁵ *Vista NAL*, 14 FCC Rcd at 13821.

⁴⁶ *Id.*

⁴⁷ Response to the NAL at 39.

authorization or verification.⁴⁸

14. Vista's argument that it had no statutory duty to follow the Commission's slamming rules under this type of customer account sale until after the *Section 258 Order*, is unavailing. As the Commission recently stated in a notice of proposed rulemaking addressing the slamming waiver process:

The rules we adopted in the *Section 258 Order* modified our existing requirements for the authorization and verification of preferred carrier changes and added procedures for handling preferred carrier freezes. In the *Section 258 Order*, we also adopted liability rules designed to take the profit out of slamming. The *Section 258 Order*, however, did not specifically address carrier changes associated with the sale or transfer of a subscriber base from one carrier to another.⁴⁹

Although Vista is correct in asserting that no carrier filed a waiver request of the Commission's slamming rules until after the *Section 258 Order*, it is not because the waiver issue was raised there.

C. Appropriateness of Assessed Forfeiture Amount

15. Vista further argues that the Commission did not consider material Vista submitted which contained financial information supporting Vista's contention that payment of the forfeiture amount ordered would jeopardize its ability to stay in business.⁵⁰ This material containing financial forms was not clearly marked nor was it described in the text of the NAL Response. Upon careful review of this material now, however, using the same standard that it described in the *Forfeiture Order*, the Commission reaffirms the amount of the forfeiture due. In considering a carrier's claim of inability to pay, case precedent reveals that the best indicators of a carrier's ability to pay a forfeiture are its gross revenues,⁵¹ and that gross revenues and current financial status can be shown in an audited or otherwise authenticated income statement of the company.⁵² Here, under a request for confidentiality,⁵³ Vista provided federal tax returns for 1997 and 1998, audited financial statements for those years, and two unaudited statements for the first two quarters of 1999. In this instance, we consider the most reliable financial information that Vista provided us⁵⁴ to be its 1998 federal tax return and audited financial statement for that year because they

⁴⁸ Petition at 13-14.

⁴⁹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Further Notice of Proposed Rulemaking, FCC No. 00-451 (rel. Jan. 18, 2001).

⁵⁰ Petition at 24.

⁵¹ See, e.g., *Target Telecom Forfeiture Order*, 13 FCC Rcd at 4464 ("the use of gross revenues to determine a party's ability to pay is reasonable, appropriate, and a useful yardstick in helping to analyze a company's financial condition for forfeiture purposes").

⁵² *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3305-06 (2000).

⁵³ Because the Commission is not describing the documents except in general terms, we are not acting on Vista's confidentiality request. See generally, *New York Tel. Co. and Material Enterprises Co.*, Request for Confidential Treatment of Certain Financial Information, 5 FCC Rcd 874 (1990).

⁵⁴ We note that the Commission has the flexibility to consider documentation that it considers to be reliable and objective evidence of a violator's ability to pay. See *Commission's Forfeiture Policy Statement and*

were the most recent audited information. When we look at its gross revenues as given in those documents, we see that the proposed forfeiture amount, \$680,000, is within the range of percentage of gross revenues that the Commission has found not excessive in other cases.⁵⁵

IV. CONCLUSION

16. After reviewing all the information filed by Vista in its Petition, we find that Vista has failed to identify facts or circumstances to persuade us that we should rescind the *Forfeiture Order*, or that a further reduction of the forfeiture amount is warranted.

V. ORDERING CLAUSES

17. Accordingly, for all the reasons stated above, IT IS ORDERED, pursuant to Section 405 of the Communications Act, as amended, 47 U.S.C. § 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Vista Services Corporation, Inc. IS DENIED.

18. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Act, 47 U.S.C. § 154(i), Vista's Motion for Stay filed on November 22, 2000, IS DISMISSED as moot.

19. IT IS FURTHER ORDERED pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), that Vista Services Corporation SHALL FORFEIT to the United States Government the sum of six hundred and eighty thousand dollars (\$680,000) for violating section 258 of the Act, 47 U.S.C. § 258, as well as the Commission's rules and orders in effect from December to August, 1999 governing interexchange carrier conversions.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order, 12 FCC Rcd 17087, 17107 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999).

⁵⁵ *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992); *David L. Hollingsworth d/b/a Worland Services*, 7 FCC Rcd 6640, 6641 (1992).