

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Application of Red Hot Radio, Inc. for Review)
of the Dismissal of the Petition for)
Reconsideration of the “Wireless)
Telecommunications Bureau Announces Revised)
Election Date and Amended Eligibility List for)
218-219 MHz Service,” *Public Notice*)
)

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2004

Released: April 2, 2004

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny an Application for Review filed by Red Hot Radio, Inc. (“RHR”).¹ In its Application for Review, RHR requests that the Commission review a letter order² issued by the former Auctions and Industry Analysis Division³ (“Division”) of the Wireless Telecommunications Bureau (“Bureau”), which dismissed RHR’s petition for reconsideration⁴ of a January 3, 2001 Public Notice.⁵

II. BACKGROUND

¹ Application for Review of Red Hot Radio, Inc., filed April 1, 2002. (“Application for Review”).

² Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, to Walter Steimel, Jr., Esq., Counsel for Red Hot Radio, Inc, 17 FCC Rcd 3691 (2002) (“Division Letter”).

³ Subsequent to the release of the *Division Letter*, the Commission reorganized the Bureau on November 13, 2003, and the relevant duties of the Division were assumed by the Auctions and Spectrum Access Division. *See Reorganization of the Wireless Telecommunications Bureau, Order*, 18 FCC Rcd 25414 (2003).

⁴ Petition for Reconsideration, submitted by Red Hot Radio on Feb. 2, 2001 (“Petition”).

⁵ Wireless Telecommunications Bureau Announces Revised Election Data and Amends Eligibility List for 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5937 (2001) (“Election Public Notice”). RHR also requests that the Commission take jurisdiction over RHR’s Petition for Reconsideration of the Bureau’s March 5, 2001 release, Wireless Telecommunications Bureau Announces the Elections for the 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5901 (2001) (“Election Results Public Notice”). The Commission, however, has no record of receiving such a petition, and thus, does not address this request. *See ¶ 14, infra.*

2. In September of 1994, the Bureau announced that RHR was the high bidder for three Interactive Video and Data Service (“IVDS”) licenses.⁶ As a small business, RHR was eligible to participate in the Commission’s installment payment plan.⁷ Grant of the licenses was conditioned upon RHR’s full and timely performance of all installment payment obligations and RHR did not object to these conditions when the licenses were granted.⁸

3. As explained by the Division, RHR’s first three required installment payments were owed in the following amounts: January 5, 1996, payment due in the amount of \$1,651.88; March 31, 1996, payment due in the amount of \$3,712.20; and June 30, 1996, payment due in the amount of \$3,712.20.⁹ RHR’s filings evidence payments to the Commission in the amount of \$7,419.65.¹⁰ These payments satisfied RHR’s January 5, 1996, and March 31, 1996, installment payment obligations, but only partially satisfied RHR’s June 30, 1996, installment payment obligation. RHR still owed \$1,656.63 on the June 30, 1996, installment payment. The Commission’s rules at that time provided that in the event a license holder was more than ninety days delinquent on any installment payment, its license would cancel automatically.¹¹ If, during the first ninety days following any missed installment payment, a licensee required additional time to make its payment, the rules allowed the licensee to request that the Commission grant a grace period of three to six months, during which no installment payments need be made.¹² Thus, under the Commission’s rules, RHR had until September 28, 1996, to either submit the full amount of the June 30, 1996, installment payments or file a grace period request. RHR did neither,¹³ and as a result, the licenses automatically canceled on September 29, 1996.

⁶ Interactive Video And Data Service (IVDS) Applications Accepted For Filing, *Public Notice*, 9 FCC Rcd 6227 (1994) (RHR submitted the winning bids on licenses 170A, 205A, and 252A).

⁷ 47 C.F.R. § 1.2110(d)(4) (1994); Wireless Telecommunications Bureau Staff Clarifies “Grace Period” Rule for IVDS “Auction” Licensees Paying By Installment Payments, *Public Notice*, 10 FCC Rcd 10724 (1995) (WTB) (“IVDS Grace Period Public Notice”) (“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.”).

⁸ 47 C.F.R. § 1.2110(d)(4) (1994); *IVDS Grace Period Public Notice*, 10 FCC Rcd 10724.

⁹ *Division Letter*, 17 FCC Rcd at 3692; Initial installment payments for all IVDS licensees were stayed by an Order issued on September 22, 1995. In the Matter of Interactive Video and Data Service (IVDS) Licenses, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, 11 FCC Rcd. 3031 (1995). The stay was lifted and initial installment payments were ordered to resume on January 5, 1996. Interactive Video and Data Service (IVDS) Licenses, Various Requests by Auction Winners, *Order*, 11 FCC Rcd. 1282 (1995). The new installment payment schedule was clarified by two letters sent to all IVDS licensees on March 10, 1996 and March 29, 1996. Notice To IVDS Licensees, dated March 10, 1996 from Regina Dorsey, Chief, Billings and Collection Branch, Federal Communications Commission; Letter dated March 29, 1996 from Regina Dorsey, Chief, Billings and Collection Branch, Federal Communications Commission. We note that RHR, in its Application for Review, does not dispute this payment history.

¹⁰ *Id.*

¹¹ 47 C.F.R. § 1.2110(d)(4) (1994).

¹² 47 C.F.R. § 1.2110(d)(4)(ii) (1994).

¹³ *Division Letter*, n. 13. RHR alleged in its Petition that it filed a timely grace period request with respect to its June 30, 1996 obligation, however, RHR provided no documentary support for that allegation. Moreover, RHR concedes in its Application for Review that neither it nor the Commission have any record of such a filing. Application for Review at 1.

4. After the automatic cancellation of RHR's licenses, a financial restructuring plan for the 218-219 MHz service was proposed.¹⁴ On September 17, 1998, the Commission issued the *218-219 MHz Flex Order*, which, among other measures, re-designated IVDS as the 218-219 MHz Service and proposed a financial restructuring scheme that allowed non-defaulting licensees the option of retaining their licenses under reamortized payment obligations or returning their licenses to the Commission in exchange for cancellation of debt, *i.e.*, amnesty.¹⁵

5. On September 10, 1999, the Commission issued the *218-219 MHz Restructuring Order*, which, among other measures, adopted a financial restructuring plan for "Eligible Licensees."¹⁶ Eligible Licensees included those 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.¹⁷ "Ineligible Entities" were those that had made second downpayments and either (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) never made any installment payments and did not have a timely filed grace period request on file. Ineligible Entities were not entitled to participate in the restructuring plan for the 218-219 MHz Service because they lost their licenses through default. Ineligible Entities, however, were granted debt forgiveness for any outstanding balances owed and were informed that their previously paid installments would be refunded. Finally, the Commission also delegated to the Bureau and the Office of Managing Director ("OMD") the authority to implement the provisions in the *218-219 MHz Restructuring Order*.¹⁸

6. Pursuant to its delegated authority, the Bureau sent individual letters on January 6, 2000, to former and current 218-219 MHz licensees confirming their status.¹⁹ The letter sent to RHR confirmed that it was an Ineligible Entity and therefore was not eligible to participate in the restructuring plan.²⁰ Additionally, on April 20, 2000, the Bureau issued two public notices explaining the restructuring procedures.²¹ One of those public notices, the *Implementation Public Notice*, included a list of entities

¹⁴ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998) ("218-219 MHz Flex Order").

¹⁵ *Id.*

¹⁶ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 15 FCC Rcd 1497, at 1506, 1517 ¶¶ 15, 31 (1999) ("218-219 MHz Restructuring Order").

¹⁷ *Id.* at 1520, ¶ 37.

¹⁸ *218-219 MHz Restructuring Order*, 15 FCC Rcd at 1529, ¶ 54.

¹⁹ See, e.g., Letter to Walter Steimel, Jr., Radio Hot Radio Counsel, from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, dated January 6, 2000 ("Ineligibility Letter").

²⁰ *Id.* Notably, RHR has never disputed receipt of this letter.

²¹ *Implementation Public Notice*, 15 FCC Rcd 7329; Frequently Asked Questions Regarding the Restructuring Rules for the 218-219 MHz Service, *Public Notice*, 15 FCC Rcd 7305 (2000). The Bureau also had previously released a public notice containing preliminary implementation procedures on December 28, 1999. Wireless Telecommunications Bureau Announces Preliminary Implementation Procedures for 218-219 MHz Service (Formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, 15 FCC Rcd 22 (1998).

that would be eligible to participate in the 218-219 MHz restructuring plan.²² RHR was not among those listed as Eligible Licensees.²³

7. On January 3, 2001, the Bureau released the *Election Public Notice*, which changed the election date and provided an amended list of eligible licensees.²⁴ Although RHR's status was unaffected by the release of the *Election Public Notice*, RHR filed a petition for reconsideration of this public notice on February 2, 2001, seeking to challenge the Commission's determination that RHR was not eligible to participate in the financial restructuring plan.²⁵

8. On March 5, 2001, the Bureau released the *Election Results Public Notice*, which listed the restructuring choices of Eligible Licenses.²⁶ The *Election Results Public Notice* also listed filings received from Ineligible Entities purporting to make elections, including a filing by RHR.²⁷

9. On February 28, 2002, the Division dismissed RHR's Petition.²⁸ In its order, the Division explained that Congress, by statute, limited the Commission's jurisdiction to review petitions for reconsideration to those filed within a specific time period.²⁹ Section 1.106(f) of the Commission's rules implemented this statutory mandate and required that a petition for reconsideration be filed within thirty days from the date of public notice of the Commission's action.³⁰ The Division stated that its records indicated that RHR failed to make full payment on its June 30, 1996, installment obligation and failed to file a timely grace period request for the licenses by September 28, 1996.³¹ Accordingly, the licenses automatically cancelled on September 29, 1996.³² The Division also stated that RHR did not file a timely challenge to this automatic cancellation, and that RHR ignored the untimely nature of its Petition and instead argued that the *Election Public Notice* constituted a "grant" of eligibility.³³ The Division explained that RHR's contention was incorrect, noting that while in some instances it may be proper for a

²² *Implementation Public Notice*, 15 FCC Rcd 7329.

²³ *Id.*

²⁴ *Election Public Notice*, 16 FCC Rcd 5937.

²⁵ Petition.

²⁶ *Election Results Public Notice*, 16 FCC Rcd 5901 (2001).

²⁷ *Id.*, attachment B.

²⁸ *Division Letter*, 17 FCC Rcd 3691.

²⁹ *Id.* at 3694 (citing 47 U.S.C. § 405 (limiting the Commission's power to consider petitions for reconsideration to those filed within 30 days from public notice of the order, decision, report or action complained of); and *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (1986) (narrowly construing the judicially created "extraordinary circumstances" exception to statutory time limit for filing petitions for reconsideration)).

³⁰ *Id.* (citing 47 C.F.R. § 1.106(f)).

³¹ *Id.*

³² *Id.* (citing 47 C.F.R. § 1.2110(d)(4) (1994)).

³³ *Division Letter*, 17 FCC Rcd at 3694-95.

party to challenge a Commission public notice that establishes or denies rights,³⁴ the *Election Public Notice* was not an order or action of the Commission (or the Wireless Telecommunications Bureau) canceling RHR's licenses.³⁵ Rather, the *Election Public Notice* was issued to announce the date by which Eligible Licensees were required to choose a restructuring option.³⁶ Thus, the Division concluded that RHR had failed to establish that its petition for reconsideration was timely, and dismissed RHR's petition pursuant to section 1.106(f) of our rules.

10. The Division also held that RHR's Petition was barred by the doctrine of waiver, *i.e.*, a party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it subsequently.³⁷ The Division reasoned that because RHR was obligated under the Commission's rules to bring any dispute over the automatic cancellation of its licenses to the Commission's attention in a timely manner, then RHR's failure to file a grace period request before RHR's licenses automatically canceled, or a petition for reconsideration or waiver request after the licenses automatically cancelled, along with RHR's subsequent failure to bring any concerns regarding the status of its licenses to the Commission's attention when other events reasonably should have prompted inquiry, *i.e.*, release of the *218-219 MHz Restructuring Order*, RHR's receipt of the *Ineligibility Letter*, and issuance of the *Implementation Public Notice*, effectively waived RHR's right to appeal the automatic cancellation of its licenses.³⁸ On April 1, 2002, RHR filed the Application requesting review of the *Division Letter*.

III. DISCUSSION

11. In the Application, RHR presents two threshold issues for review. First, RHR argues that the Division erroneously concluded that the *Election Public Notice* was not an order or action of the Commission subject to reconsideration.³⁹ Second, RHR alleges that the Division made an erroneous finding as to an important or material question of fact when it concluded that RHR failed to file a timely grace period request with respect to RHR's June 30, 1996 installment payment.⁴⁰ For the reasons set forth below, we affirm the Division's findings with regard to both of these issues and, consequently, affirm the Division's dismissal of the Petition as untimely.

12. With respect to RHR's allegation that the *Election Public Notice* was subject to reconsideration because it was a final determination of the status of RHR's licenses, RHR contends that before the release of the *Election Public Notice* there was reasonable and genuine doubt as to its status as

³⁴ *Id.* at 3695.

³⁵ *Id.*

³⁶ *Id.* (citing *Election Public Notice*, 16 FCC Rcd. 5937, which stated that the Commission, having addressed various petitions for reconsideration to the *218-219 MHz Order* in a December 13, 2000 order, had moved the Election Date back to Wednesday, January 31, 2001).

³⁷ *Id.* (citing *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwest Indiana Telephone Company, Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); Weblink Wireless, Inc., *Order*, DA 01-1143, ¶ 6 (rel. May 3, 2001) ("Weblink"); Community Teleplay, Inc., et. al., *Order*, 13 FCC Rcd 12426, 12428 ¶ 5 (WTB 1998) ("Community Teleplay").

³⁸ See *supra* fn. 13.

³⁹ Application for Review at 3-6.

⁴⁰ Application for Review at 7.

an Ineligible Entity because of errors, rule changes, and informal staff opinions⁴¹ of the Commission.⁴² Thus, RHR argues, the *Election Public Notice*, released on January 3, 2001, finally settled the question of whether the eligibility rules had been applied to RHR. Accordingly, RHR contends that the Petition, filed on February 2, 2001, should have been considered a timely challenge to the application of those rules. We disagree.

13. As stated in the *Division Letter*, RHR's licenses automatically canceled on September 29, 1996, pursuant to our rules because RHR failed either to make a timely payment, or to file a timely grace period request in lieu of payment, by September 28, 1996.⁴³ The 218-219 MHz financial restructuring plan was adopted subsequently after a notice and comment period that specifically considered the question of eligibility to participate in the plan by entities whose licenses automatically canceled under our rules.⁴⁴ RHR chose not to submit comments with respect to this rulemaking. On January 6, 2000, the Division specifically sent RHR actual notice, via the *Ineligibility Letter*, of its status as an Ineligible Entity under the *218-219 MHz Restructuring Order*.⁴⁵ RHR did not dispute the *Ineligibility Letter*, nor did it file any challenge to the April 20, 2000, *Implementation Public Notice*, which also listed licensees eligible to participate in the financial restructuring plan, and which did not include RHR among those listed.⁴⁶ Thus, after receiving its licenses conditioned upon compliance with our installment payment rules,⁴⁷ RHR failed to challenge the installment payment rules, the application of those rules to RHR's licenses when those rules mandated the automatic cancellation of RHR's licenses, the 218-219 MHz financial restructuring rulemaking, the *Ineligibility Letter* advising RHR of its status, or the *Implementation Public Notice*.

⁴¹ Application for Review at 1-4. RHR alleges that the Commission misplaced a grace period request of which RHR itself has no record. RHR also alleges that the Commission delayed issuing orders on a timely basis, continuously changed the IVDS rules, and retroactively changed the rules that applied to IVDS licensees. (citing the *218-219 MHz Restructuring Order*.) RHR alleges that, after it made "several attempts to get the record corrected," it was advised that its licenses were in good order, however, RHR does not cite to any specific facts that support its allegation.

⁴² Application for Review at 3-7 (citing *Nextwave Personal Communications, Inc., et al. v. Federal Communications Commission*, et al, 254 F. 3d 130 (D.C. Cir. 2001) ("Nextwave"). RHR argues that the release of the *Election Public Notice* removed the uncertainty with regard to RHR's eligibility, and thus constituted a determination of eligibility that would be subject to reconsideration. RHR further argues that a party affected by the application of a rule may pursue substantive objections to that rule when public notice is given that the rule has been applied to the party. However, unlike *Nextwave*, RHR did not file for bankruptcy and so any "reasonable and genuine doubt" that may have been created by differences between our automatic cancellation rules and the bankruptcy code that was present in *Nextwave* is absent here. The automatic cancellation rule applied to RHR's licenses on September 29, 1996, and no further notice of this cancellation was required since the licenses themselves stated explicitly that they were conditioned on timely payment. As the court of appeals for the D.C. Circuit has held, "[a]cceptance of a license constitutes accession to all [license] conditions." *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984).

⁴³ *Division Letter*, 17 FCC Rcd at 3692-94; see also *21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. FCC*, 318 F.3d 192, at 201 (U.S.C.A., D.C. Cir., 2003) (upholding the Commission's automatic cancellation rule and stating that the Commission need not provide a licensee with notice of its payment obligations before canceling its licenses where the licensee was provided, previously, with notice of those obligations).

⁴⁴ *218-219 MHz Restructuring Order*, 15 FCC Rcd at 1520, ¶ 38.

⁴⁵ RHR did not dispute receipt of the *Ineligibility Letter* in either its Petition or its Application for Review.

⁴⁶ *Implementation Public Notice*, 15 FCC Rcd 7329.

⁴⁷ 47 C.F.R. § 1.2110(d)(4) (1994).

14. In contrast to the instances outlined above when eligibility was being determined or announced, the January 3, 2001 *Election Public Notice* challenged by RHR had no bearing upon RHR's eligibility whatsoever.⁴⁸ The Division's and Bureau's previous statements concerning the status of RHR's licenses were unequivocal, therefore, RHR's suggestion that a question existed regarding its eligibility before the release of the *Election Public Notice* is untenable.⁴⁹ RHR also alleges that it filed a petition for reconsideration of the March 5, 2001 *Election Results Public Notice*, however the Commission has no record of any such filing and RHR does not provide any date upon which the alleged petition was filed. Bureau staff twice requested by telephone that RHR's counsel provide the Commission with a date-stamped copy of the alleged petition, but RHR failed to do so. However, even if RHR had filed a petition for reconsideration of the subsequent *Election Results Public Notice* seeking to challenge the Commission's determination that RHR was not eligible to participate in the 218-219 MHz restructuring plan, such a challenge would have been untimely for the same reasons that RHR's challenge to the *Election Public Notice* was untimely. Accordingly, we affirm the Division's dismissal of RHR's Petition as an untimely challenge to the determination of eligibility, pursuant to section 1.106(f) of our rules.⁵⁰

15. We also disagree with RHR's contention that the Division erred when it concluded that RHR failed to file a timely grace period request regarding its June 30, 1996, installment payment obligation.⁵¹ The Division thoroughly reviewed RHR's Petition and all filings of record with respect to RHR's installment payment obligations before arriving at this conclusion.⁵² In challenging this finding, RHR does not point to a specific payment or grace period request that it filed pertaining to the June 30, 1996, installment payment obligation, nor does RHR dispute the Division's conclusion that RHR did not recognize that it had not paid the full amount of its June 30, 1996 installment payment.⁵³ Instead, RHR

⁴⁸ *Division Letter* at 3695 (citing *Election Public Notice*, 16 FCC Rcd 5937).

⁴⁹ *Division Letter* at 3694-3695; *Implementation Public Notice*, 15 FCC Rcd at 7340; see also *21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. Federal Communications Commission*, 318 F.3d 192, at 202 (holding that appellant could not rely upon a missed payment notice to assert confusion regarding its payment obligations and extend its filing deadline where it had been given actual notice of those obligations independent of that missed notice).

⁵⁰ *Id.*; 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

⁵¹ Application for Review at 1.

⁵² *Division Letter*, 17 FCC Rcd at 3693; see also note 10, *supra*.

⁵³ As explained by the Division, RHR does not offer any substantive indication that it filed a timely grace period request with respect to its June 30, 1996 obligation. *Division Letter* at 3693, n 13. Instead, RHR offers vague representations in its Petition that it was aware of its payment obligations and that it filed timely grace period requests. Petition at 1 (alleging that RHR made all required installment payments or request grace periods as necessary); Declaration of Marjorie K. Connor, attached to Petition, dated February 2, 2001 (alleging that she prepared several letters to the Bureau to request grant of various grace periods). As the Division also explained, however, the record fails to support RHR's contention. *Division Letter* at 3693, n 13. Rather, documents submitted as attachments to RHR's Petition suggest that RHR did not recognize that it had not paid the full amount of its June 30, 1996 installment payment. Letter from Marjorie K. Conner, General Partner, Red Hot Radio, to William F. Caton, Secretary, dated December 31, 1996 (seeking a grace period for the September 30, 1996 installment payment and making no mention of the June 30, 1996 installment payment. This letter itself was untimely as to the September 30, 1996 installment payment); Letter from Ronnie London, Hunton & Williams, to A. Jerome Fowlkes, Federal Communications Commission, dated April 1, 1997 (noting that RHR had filed a grace period request on December 31, 1996 with respect to the September 30, 1996 installment payment, but again failing to mention any

(continued....)

argues that it made several “attempts to get the record corrected as to the status of its licenses, and had been advised that its licenses were in good order.”⁵⁴ These conclusory allegations amount to nothing more than an applicant citing alleged informal staff opinions to support its Application.⁵⁵ It is well established that informal opinions that contradict Commission rules will not provide relief from the enforcement of those rules.⁵⁶ Therefore, we affirm the Division’s conclusion that RHR’s licenses automatically cancelled pursuant to our installment payment rules.

16. Furthermore, RHR’s failure to point to specific payments, grace period requests, or communications from the Commission, other than those that the Division considered in its earlier decision, also results in the denial of its Application for Review. In its Application for Review, RHR cites to Section 1.115(b)(2)(iv) of the Commission’s rules, which states that any aggrieved person may apply for Commission review if the action complained of is an erroneous finding based upon an important or material question of fact.⁵⁷ As the Commission has stated previously, applications for review based upon Section 1.115(b)(2)(iv) must introduce, in the application for review, something that establishes an erroneous finding as to a material question of fact or the application for review will be denied.⁵⁸ Thus, RHR was required to concisely and plainly state not only that it disputed the Division’s conclusion that RHR failed to file a timely grace period request with respect to its June 30, 1996, installment payment request, but also to provide factual references in support of this contention.⁵⁹ However, RHR fails to state any of the particulars that would support its contention, e.g., RHR does not allege when it made such a request. Instead, RHR’s Application only refers to alleged assurances given by unnamed individuals that

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prior grace period requests). Further, in its petition, RHR does not specifically allege that it filed a grace period request with respect to the June 30, 1996 installment payment.

⁵⁴ Quoting Application for Review at 4.

⁵⁵ We note that RHR admits that licensees cannot rely on staff opinions, but alleges that it did so as the basis for its argument. Application for Review at 7.

⁵⁶ See Mary Ann Salvatiello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-8, ¶ 22 (1991) (citing *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990), which held that Commission precedent establishes that where a party has received erroneous advice, the government is not estopped from enforcing its rules in a manner that is inconsistent with the advice provided by the employee, particularly where relief is contrary to a rule); see also Request for Request by San Benito Literacy Center, *Order*, 17 FCC Rcd 12049, at 12051, ¶¶ 9-10 (2002) (holding that an applicant’s claim of receiving incorrect oral advice from the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), which the applicant claims resulted in its missing a filing deadline, is insufficient to merit a waiver of the Commission’s rules, nor is a denial of a request for waiver based upon such circumstances arbitrary given the fact that the deadline was announced and established by the SLD); Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, *Order*, FCC No. 99-56, 14 FCC Rcd 6561, 6562 ¶ 4 (1999) (denying a claim that staff members entered into a binding contract with an investor in a licensee or that any form of promissory estoppel could be based upon staff statements) (“...representations, if any, made by staff members do not bind the Commission to a course of regulatory action unless such action has been duly authorized in expressly delegated terms.”)

⁵⁷ 47 C.F.R. § 1.115(b)(2)(iv).

⁵⁸ See RCN Telecom Services of Pennsylvania, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 15615 (2001).

⁵⁹ 47 C.F.R. § 1.115(b)(2)(i).

told RHR at some unspecified time that it was in good standing.⁶⁰ Such vague allegations fail to provide us with the required specificity mandated by our rules. Accordingly, we affirm the Division's order.⁶¹

17. RHR also contends that the *Election Public Notice* is in conflict with various statutes of limitations, Constitutional protections, and provisions of the Communications Act of 1934 ("Act").⁶² Because we agree that the Division properly dismissed RHR's Petition, we do not address those arguments here.⁶³

IV. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Sections 1.115(b) and (g) of the Commission's rules, 47 U.S.C. §§ 1.115(b), (g), the Application for Review filed by Red Hot Radio, Inc. in the above-captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁰ Quoting Application for Review at 4 ("RHR had made several attempts to get the record corrected as to the status of its licenses, and had been advised that its licenses were in good order").

⁶¹ 47 C.F.R. § 1.115(b).

⁶² RHR's Application for Review includes allegations that the automatic cancellation of RHR's licenses violates, generally, "the statute of limitations, and a specific two year statute on some actions," along with "the provisions of Section 503(b)(6)(B) of the Communications Act of 1934 (the "Act"), 47 U.S.C. § 503(b)(6)(B)." Application for Review at 6-9. Additionally, RHR alleges in the Application for Review that cancellation deprives RHR of its substantive and procedural due process rights, constituted a taking without due process and compensation in violation of the Fifth Amendment, and violated Section 312 of the Communications Act, 47 U.S.C. § 312. *Id.* For the reasons set forth above we will not address these allegations, however, we note that the United States Court of Appeals for the District of Columbia recently upheld the Commission's automatic cancellation rule against a challenge based upon Section 312 of the Communications Act and due process arguments. The court held that where a licensee had actual notice of its payment obligations and failed to make a timely payment or file a timely grace period request, the Commission appropriately dismissed untimely arguments asserted outside the 30 day filing window prescribed for such petitions by section 405(a) of the Act. *21st Century Joint Venture and 21st Century Bidding Corp. v. Federal Communications Commission*, 318 F.3d 192 at 199 (2003).

⁶³ We note that RHR's Application for Review attempts to incorporate by reference RHR's Petition and "all other filings made with the Commission" as well as "all of its arguments and attachments into this Petition as though they were restated and attached hereto." Application for Review at 2. Such incorporation by reference is not allowed under our rules. Our rules do not allow for a "kitchen sink" approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review. 47 C.F.R. § 1.115(b)(2)(i).