

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

In the Matter of)
)
Styles Interactive, Inc.)
Application for Review of)
Denial of Petition for Reconsideration)
Seeking Waiver of IVDS)
Final Down Payment Deadline)

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1997

Released: October 28, 1997

By the Commission: Commissioner Ness dissenting and issuing a separate statement.

I. INTRODUCTION

1. The Commission has before it an Application for Review filed on May 29, 1996, by Styles Interactive, Inc. ("SII").¹ SII seeks Commission review of a *Memorandum Opinion and Order* by the Acting Chief of the Wireless Telecommunications Bureau ("Bureau")² that denied SII's Petition for Reconsideration requesting a waiver of the Interactive Video and Data Service ("IVDS") second down payment deadline.³ No pleadings have been filed in response to this Application for Review. For the reasons discussed below, we deny SII's Application for Review.

¹ Styles Interactive, Inc., Application for Review (filed May 29, 1996) ("Application for Review").

² Interactive Video and Data Service (IVDS) Licenses; Requests to Extend Payment Deadline, *Memorandum Opinion and Order*, 11 FCC Rcd 5240 (Wireless Telecom. Bureau 1996) ("*Memorandum Opinion and Order*").

³ See 47 C.F.R. §§ 95.816(c)(4) and 1.2107(b). Unless otherwise noted, all Commission Rules cited herein are those which were in effect at the time of the July 28-29, 1994 auction.

II. BACKGROUND

2. SII was the successful bidder for one IVDS license -- for Channel 283B in Panama City, Florida -- in the IVDS auction held on July 28 and 29, 1994. SII's net winning bid was \$281,250, which takes into account a 25 percent bidding credit that was made available to SII based upon its status as a women-owned business.⁴ As an eligible small business, SII elected to pay its net bid amount through installment payments.⁵ Under our rules, winning bidders paying by installments were required to bring their total deposits with the Commission to ten percent of their winning bids within five business days after the Commission issued a Public Notice announcing winning bidders ("first down payment deadline").⁶ Such winning bidders were required to pay another ten percent of their high bids within five business days of grant of their long-form license applications ("second down payment deadline").⁷ The first down payment deadline was August 8, 1994. SII brought its deposit up to ten percent of its winning bid by this deadline by paying the Commission the required amount of \$25,625.⁸ On February 28, 1995, the Commission awarded a license to SII conditioned upon the full and timely performance of the licensee's payment obligations.⁹ SII's second down payment of \$28,125 was due on March 7, 1995. SII did not meet this deadline.

3. On April 14, 1995, SII filed a request for waiver of 47 C.F.R. § 1.2107(b) with the Bureau.¹⁰ In its Waiver Request, SII stated that it was prevented from making its second down payment because the party supplying its financing needed to reassess whether it was making a prudent investment. According to SII, this investor's unexpected and temporary withdrawal of its financing was caused by the "deceit and fraud" of bidders who forced up prices and then

⁴ At the time of the 1994 IVDS auction, 47 C.F.R. § 95.816(d)(1) made a 25 percent bidding credit available to businesses owned by women and/or minorities. The rule was amended to offer bidding credits to small businesses after the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995), which held that all racial classifications, whether imposed at the federal, state, or local government level, are subject to a strict scrutiny standard of review. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Tenth Report and Order*, PP Docket No. 93-253, FCC 96-447 (Nov. 21, 1996), 61 Fed. Reg. 60198 (Nov. 27, 1996), ¶¶ 6-12.

⁵ See 47 C.F.R. §§ 95.816(d)(2) and 1.2110(e).

⁶ 47 C.F.R. §§ 95.816(c)(4), 1.2107(b) and 1.2110(e)(1).

⁷ 47 C.F.R. §§ 95.816(c)(4), 1.2107(b) and 1.2110(e)(2).

⁸ Ten percent of SII's net bid (winning bid less bidding credit) was \$28,125. SII had paid an upfront payment of \$2500 to participate in the IVDS auction, which was still on deposit. Thus, SII was required to submit \$25,625 to bring its deposit with the Commission up to ten percent of its winning bid.

⁹ See 47 C.F.R. §§ 95.816(c)(5), 1.2109(a) and 1.2110(e)(4).

¹⁰ Styles Interactive, Inc., Request for Waiver of Deadline to Make Down Payment (filed April 14, 1995) ("Waiver Request").

defaulted on their bids, creating uncertainty as to the value of IVDS licenses.¹¹ Citing the Commission's waiver of the one-year build-out requirement in 47 C.F.R. § 95.833(a) and its deferral of the IVDS initial installment payment deadline, SII also argued that there was no reason for the Commission to refuse to defer the second down payment deadline.¹² In addition, SII contended that the time involved in re-auctioning its IVDS license would be substantially longer than the limited extension it requested, and that any subsequent bidders would be likely to bid less than SII's winning bid.¹³ SII also stated that it had placed the full amount of its second down payment in an escrow account and would submit these funds to the Commission upon grant of its waiver request.¹⁴ In a letter dated August 8, 1995, the Bureau denied SII's Waiver Request, finding that SII had failed to demonstrate that good cause existed to waive the payment deadline.¹⁵

4. On September 6, 1995, SII filed a petition for reconsideration of the Bureau's denial of its waiver request.¹⁶ In its Petition, SII again argued that the Bureau's decision was inconsistent with other IVDS rule waivers.¹⁷ SII also argued that the Bureau had failed to give its waiver request a "hard look" as required under *WAIT Radio* and that granting its request would bring service to the public more quickly than holding another auction for its license.¹⁸ Finally, SII argued that the Bureau's decision was inconsistent with Congress's intent, expressed in Section 309(j)(3)(B) of the Communications Act, to ensure the dissemination of licenses among a wide array of applicants, and with the Commission's finding that installment payments would help small businesses overcome barriers to accessing capital.¹⁹ The Bureau's *Memorandum Opinion and*

¹¹ *Id.* at 2-4.

¹² *Id.* at 5-7. *See also Quarterly Installment Payments for IVDS "Auction" Licensees to Begin June 30, 1995*, Mimeo No. 53031 (rel. March 29, 1995) (deferring original payment deadline of March 31, 1995).

¹³ Waiver Request at 7-9.

¹⁴ *Id.* at 2. On June 30, 1995, SII filed a request for waiver of the deadline for its initial installment payment. Styles Interactive, Inc., Request For Waiver of Deadline to Make Interest Payment (filed June 30, 1995). On January 11, 1996, SII notified the Commission that it had deposited into its escrow account the amount of its first installment payment. Styles Interactive, Inc., Notification of Interest Deposit (filed January 11, 1996). The request for waiver of the initial installment payment was rendered moot by the Bureau's subsequent denial of SII's Petition for Reconsideration.

¹⁵ Letter from Regina M. Keeney, Chief, Wireless Telecommunications Bureau, to Linda Eckard dated August 8, 1995, at 2 (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

¹⁶ Styles Interactive, Inc., Petition for Reconsideration (filed September 6, 1995) ("Petition").

¹⁷ *Id.* at 5-13.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 13-14.

Order, released on April 29, 1996, concluded that SII had not demonstrated that its circumstances were unique or that good cause existed to justify a grant of its waiver request.²⁰

III. ARGUMENTS RAISED BY SII

5. In its Application for Review, SII offers the same arguments to the Commission that have already been rejected by the Bureau. First, SII argues that the denial of its waiver request is inconsistent with: (1) the Commission's mandate under Section 309(j)(3)(B) of the Communications Act to adopt special provisions to ensure that certain statutorily designated entities, including small businesses, are afforded an opportunity to participate in new communications technologies such as IVDS; and (2) the Commission's finding that it is difficult for small businesses to obtain financing.²¹ Second, SII argues that the Bureau's view of SII's failure to obtain back-up financing as an exercise of "independent business judgment" not warranting a rule waiver reflects a disregard for the realities of the IVDS market at the time its second down payment was due. According to SII, investors' confidence in IVDS was undermined after the close of the auction by a combination of factors, including the submission of speculative bids by several winning bidders and doubts about the stability of EON Corporation, the IVDS pioneer on which the industry was relying for equipment. SII maintains that under these circumstances it had no control over its temporary loss of financing.²² Finally, SII argues that the Bureau's rigid application of Section 95.816(c)(4) of the Commission's Rules is both inconsistent with the stated policy underlying the rule, which is to ensure that winning bidders have the financial capacity to attract capital to deploy their systems rapidly, and inconsistent with the Commission's grant of other waivers associated with IVDS service.²³ According to SII, the Bureau's denial of its waiver request does not serve the public interest because it deprives the public of a serious IVDS licensee who is ready and able to provide IVDS service.²⁴

²⁰ *Memorandum Opinion and Order*, 11 FCC Rcd at 5242-5244. In the same *Memorandum Opinion and Order*, the Bureau also denied three other IVDS winning bidders' requests for waiver of the second down payment deadline: Interactive Partners of America; Albert D. Ervin; and Eagle Interactive Partners, L.P.

²¹ Application for Review at 4-6.

²² *Id.* at 7-11.

²³ *Id.* at 11-14. The rule waivers cited by SII are: (1) the Commission's elimination of the one-year build-out requirement in 47 C.F.R. § 95.833(a); (2) the Common Carrier Bureau's grant of a waiver to permit a bidder additional time to submit an engineering report to support its FCC Form 574 filing in *Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, 9 FCC Rcd 6384 (1994); and (3) the Commission's grant of a partial waiver of its rules concerning bid withdrawal payments associated with spectrum auctions where the petitioner demonstrated submission of a "mistaken" bid in *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, 11 FCC Rcd 17189 (1996), *on recon.*, Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment, and Georgia Independent PCS Corporation, Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, FCC 97-154, 1997 WL 225440 (rel. May 6, 1997).

²⁴ Application for Review at 11-12.

IV. DISCUSSION

6. After carefully reviewing the record, we find no justification for overturning the Bureau's decision. In the *Second Report and Order* in the competitive bidding docket, we established the requirement of a full and timely down payment to ensure that bidders are financially capable of constructing and operating their systems.²⁵ The upfront and down payment provisions in Sections 95.816 and 1.2107 of the Commission's Rules are designed to ensure that the ultimate purpose of the auction -- facilitating the provision of reliable service to the public -- is not undermined by winning bidders who lack the financial capacity to pay for the license, construct a system, and provide service to the public.²⁶ We have also stated that the requirement of a full and timely down payment ultimately helps to deter defaults and ensure the integrity of the auction, by discouraging insincere bidders from winning licenses solely with the expectation that they can "shop" their licenses post-auction in a late effort to obtain financing.²⁷ Given the importance of the down payment deadline, a waiver is appropriate only where a petitioner demonstrates that its circumstances are unique and that good cause exists to justify the requested relief.²⁸

7. We disagree with SII's argument that the denial of its waiver request is inconsistent with the Commission's statutory mandate to adopt special provisions to ensure that certain kinds of entities are afforded an opportunity to participate in spectrum auctions, and the Commission's finding that small businesses have difficulty obtaining financing. The Commission has fulfilled its mandate and acted consistently with its own findings by making bidding credits and installment payment plans available to small businesses participating in the IVDS auction.²⁹ Neither its mandate to provide opportunities for small businesses nor its finding that small businesses have difficulty obtaining capital requires the Commission to waive payment deadlines for small businesses.

8. We also reject SII's contention that the Bureau erred in finding that SII's failure to obtain back-up financing was an independent business judgment not warranting a waiver of our rules. We agree with the Bureau that choosing the source of financing for a business enterprise is an individual business judgment for which each applicant is responsible. Moreover, we have consistently stated that a licensee's failure to comply with our rules because of a private business

²⁵ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2382-84 (1994).

²⁶ *Id.* at 2381.

²⁷ *Id.*; see also Interactive Video and Data Service (IVDS) Licenses--Requests to Extend Payment Deadline, 10 FCC Rcd 4520 (1995).

²⁸ See 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (holding that grant of a waiver in the absence of special circumstances and good cause is improper).

²⁹ See 47 C.F.R. §§ 95.816(d)(1)-(2) and 1.2110(e) (1996).

decision will not warrant a grant of a rule waiver.³⁰ In choosing its source of financing and in deciding not to secure back-up financing, SII faced the same market factors and the same risks as other IVDS licensees who submitted their down payments on time. Thus, we do not believe that SII has demonstrated "unique circumstances" warranting a waiver of our rules.

9. Finally, we do not agree that the Bureau's refusal to waive Section 95.816(c)(4) of the Commission's Rules is inconsistent with promoting the rapid deployment of service or with the grant of other waivers associated with the IVDS service. We agree with the Bureau that, even if granting SII a waiver would provide service more quickly to one segment of the public than re-auction of this particular license, the overall effect of waiving down payment deadlines for parties that do not have the funds to meet such deadlines would be a disruption to the auction process and a delay in service to the public generally. Thus, we believe that it is essential to strictly enforce our down payment deadlines. Indeed, we have granted partial relief in response to a request for an extension of a down payment deadline for a license won through competitive bidding only where the delay in making payment was either inadvertent or due to miscalculation or administrative complications.³¹ SII has made no such showing here. Its request for a waiver was not filed until several weeks after the second down payment deadline had passed, and its failure to make its payment resulted from a lack of funds, not miscalculation, inadvertence or administrative complications.

10. The rule waivers cited by SII in support of its waiver request are inapposite. In 1995, we eliminated the IVDS one-year build-out requirement because of a legal challenge to the IVDS lottery process which created uncertainty as to the validity of lottery winners' licenses and hampered their ability to meet the one-year requirement,³² and because of our finding that there was no evidence that those requesting an extension of the construction deadline had engaged in speculation or warehousing.³³ We retained the three-year and five-year construction benchmarks so that waiving the one-year deadline would not result in delays in service to the public.³⁴ SII's

³⁰ See BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Order*, FCC 96-498 (rel. Jan. 6, 1997); Personal Communications Corp., Emergency Petition for Waiver of Deadline for Submission of Upfront Payments for Broadband PCS Auction, *Order*, DA 95-37 (Wireless Telecom. Bureau 1995); P&R Temmer, d/b/a Mobile Communications Service Company, 93 FCC 2d 1051, *aff'd sub nom.*, P&R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984); AAT Electronics Corporation, 93 FCC 2d 1034 (1983).

³¹ See, e.g. RFW, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B230, *Order*, DA 97-254 (rel. February 4, 1997); MFRI, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B435, *Order*, DA 97-255 (rel. February 4, 1997); and Cenkan Towers, L.L.C., Request for Waiver of Section 90.811 of the Commission's Rules Regarding Various MTA Markets, *Order*, DA 97-247 (rel. February 4, 1997).

³² See Additional Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4546 (1995) (citing *Larry M. Warner, Esq., Trustee, John Calvin Kemmer Inter Vivos Trust v. FCC*, No. 93-1668 (D.C. Cir. 1994)). The Warner case was dismissed on October 20, 1994.

³³ Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4014 (1995); see also Additional Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4546 (1995).

³⁴ *Id.*

license is not the subject of any legal challenge, and its validity is not in question. In 1994, an IVDS winning bidder was given additional time to file an engineering study post-auction primarily because bidders who were provided with less than two weeks notice of the filing requirement encountered difficulties in retaining engineering consultants to perform the work on a timely basis because of the limited number of consultants available.³⁵ SII, however, does not claim that it missed its second down payment deadline because of insufficient notice. Finally, unlike the party who was recently granted a waiver of our bid withdrawal rules, SII has not shown that its failure to meet its down payment deadline was due to a mistake.

V. ORDERING CLAUSE

11. For the reasons discussed above, we hereby deny SII's request for a waiver of the Commission's down payment rules.

12. Accordingly, IT IS ORDERED that, under the authority of Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Styles Interactive, Inc., on May 29, 1996, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Dissenting Statement
of
Commissioner Susan Ness**

*Re: Application for Review of Denial of Petition for Reconsideration Seeking Waiver of
IVDS Final Down Payment Deadline*

³⁵ *Order, Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses*, 9 FCC Rcd 6384, 6386 (CCB 1994).

I respectfully dissent from the majority's decision to deny a request for waiver of a payment deadline that otherwise would permit the applicant to obtain the license for which it successfully bid. In this case the applicant is a very small business who won a single license; there were clear and unambiguous extenuating circumstances; and the applicant placed in escrow the full amount of the funds owed, and offered to make full payment for the bid price.

The applicant, Styles, successfully bid for the IVDS license to serve Panama City, Florida. Styles made its first downpayment of \$28,123, but requested a waiver of the deadline for making its second downpayment when its investor unexpectedly withdrew its financing so that it could reassess its investment in light of marketplace uncertainty.

As a general proposition, I believe we should maintain the integrity of the auction process, and not alter or waive the rules after the fact. But there is precedent for doing so in cases such as this, and the facts presented are both uncontroverted and exceptional. The extraordinary problems with equipment and service uncertainty in the IVDS marketplace were well-known to the Commission. In fact, contemporaneously with Styles' modest waiver request, the Commission deferred *installment* payments for all IVDS licensees because of the uncertainty in the marketplace. Just days later, the Commission also waived the first year build-out requirements for all IVDS licensees.

Where the applicant has shown good faith and waiving the deadline would serve the public interest, the Wireless Bureau previously has granted waivers of second downpayment deadlines. Additionally, given our recent decision adopting options for PCS "C" Block licensees, and that the IVDS licensee before us asks only to be permitted to pay its full bid price for the license it won in Panama City, Florida, I believe the Commission should grant the requested waiver.

In Cenkan Towers L.L.C., the Wireless Bureau permitted an applicant who had missed the second downpayment deadline by three weeks to submit the amount owed, subject only to a five percent late fee. In granting the waiver, the Bureau distinguished second down payments from upfront and first down payments. The Bureau observed that the second down payment does not affect the timing of the Commission's review of applicants' qualifications:

Thus, while we have consistently denied requests to waive these earlier down payment deadlines, we believe that once the first down payment is made and applicants have already proven an ability to meet their financial obligations, some flexibility may be appropriate in addressing a minor delinquency with respect to the final down payment.

12 FCC Rcd. 1516 at 1519 (1997).

In the case before us, the delay in payment was minimal, and the reasons for the delay clear, unambiguous, and beyond the applicant's control. Further, the applicant put the funds into escrow and offers to fulfill all of its original obligations. Under these circumstances it comports with the

public interest and is equitable to grant the relief requested instead of denying the application, keeping the applicant's funds, and possibly imposing substantial additional penalties.