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June 13, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Via Messenger

Re: **GEN Docket No. 93-253**
Fourth Report and Order
Implementation of Section 309(j)
of the Communications Act

Dear Mr. Caton:

Submitted herewith on behalf of ITV, Inc. ("ITV") are an original plus eleven (11) copies of its Petition for Reconsideration of the Fourth Report and Order in the above-referenced docket.

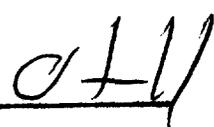
Please contact my office directly with any questions or comments concerning the attached.

Respectfully submitted,


William J. Franklin
Attorney for ITV, Inc.

Encs.
cc: ITV, Inc.

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

JUN 13 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION
OF ITV, INC.
OF THE FOURTH REPORT AND ORDER

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ITV, Inc. ("ITV") is an IVDS licensee for the San Francisco MSA. Accordingly, ITV has an interest in the upcoming IVDS auctions, and ITV has experience in assessing the economics of the IVDS business. ITV qualifies as a "Designated Entity" for the purposes of Section 309(j).

I

The Commission cannot use the Second Report and Order, adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Fourth Report and Order, which applied those tentative conclusions to IVDS.

II

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Congress was well-aware of this policy when it enacted the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Amended Section 309(j)(6)(A)-(E) of the Communications Act and the legislative history of the Budget Act clearly show that Congress intended the Commission's settlement policies to apply to auctionable IVDS licenses.

Nevertheless, the Commission has adopted IVDS auction rules which apparently preclude full settlements between mutually exclusive auctionable applications. The Commission did this without explanation and without any discussion of its existing settlement policies.

III

The Commission failed to explain why it limited bidding credits for minority and women-owned businesses to only one of the two IVDS licenses per market. That limitation is arbitrary and capricious.

IV

The Commission should modify its auction procedures to eliminate specific provisions which could well disadvantage designated entities.

The three-percent withdrawing bid penalty should not apply when the second winning bid (upon re-auction) exceeds the defaulting bid by more than three percent.

Winning bidders who prevail with low bids and thus have excess upfront payments (i.e., upfront payments above 10% or 20% of the winning bids, plus penalties) should be treated the same as losing bidders. The excess upfront payment should be immediately refunded.

V

The Commission should modify its policy to recapture the benefit accruing to a minority or women-owned business which sells a license received with bidding credits. The recapture penalty should credit the licensee's pre-sale investments in the license and should be based on the portion of the licensee's taxable gain on the sale allocated to the license, with appropriate adjustments.

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To: The Commission

PETITION FOR RECONSIDERATION
OF ITV, INC.
OF THE FOURTH REPORT AND ORDER

ITV, Inc. ("ITV") by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Fourth Report and Order in the above-captioned proceeding.^{1/} The Fourth R&O adopted rules for awarding licenses in the Interactive Video and Data Service ("IVDS") by auction. As set forth herein, certain aspects of the Fourth R&O require reconsideration in the public interest.^{2/}

^{1/} 9 FCC Rcd ____ (FCC 94-69, released May 10, 1994) ("Fourth R&O"). A summary of the Fourth R&O was published in the Federal Register on May 13, 1994. Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed.

^{2/} Because of the scope of the Fourth R&O, this Petition cannot discuss every issue presented by the Fourth R&O. ITV's silence on other issues regarding the Fourth R&O should not be taken to indicate any specific position thereon. ITV specifically reserves its appellate rights with respect to positions taken in its Comments and Reply Comments in this proceeding.

PRELIMINARY MATTERS

ITV, Inc. ("ITV") is an IVDS licensee for the San Francisco MSA. Accordingly, ITV has an interest in the upcoming IVDS auctions, and ITV has experience in assessing the economics of the IVDS business.

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....^{3/}

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{4/}

As a start-up business without revenue, ITV qualifies as a "Designated Entity" for the purposes of Section 309(j). Thus, ITV is within the class of potential bidders who are the intended beneficiaries of the policies quoted above.

^{3/} Section 309(j) (3) (B), as quoted in Fourth R&O, ¶34.

^{4/} Section 309(j) (4) (D), as quoted in Fourth R&O, ¶34.

ARGUMENT

I. ALL ISSUES DECIDED IN THE FOURTH REPORT AND ORDER ARE SUBJECT TO RECONSIDERATION AND APPELLATE REVIEW AT THIS TIME.

As a preliminary matter, the Commission cannot use the Second Report and Order in this proceeding,^{5/} adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Fourth R&O, which applied those tentative conclusions to IVDS. For example, in the Second R&O the Commission wrote:

The five sections of this Report and Order summarized above establish general rules and regulations for competitive bidding that will apply to a variety of spectrum-based services licensed by the Commission. In the future, specific rules within the scope of these general rules will be adopted in a Report and Order for each service subject to competitive bidding.^{6/}

Thus, in the case of auction methodology for each service, the Commission wrote:

We intend to tailor the auction design to fit the characteristics of the licenses to be awarded. Given the diverse characteristics of the various services that may be subject to auctions, simultaneous multiple round auctions may not be appropriate for all licenses. * * *

In future Reports and Orders where we establish service-specific auction rules we will indicate a preferred auction design method for each particular service and specify any alternative design methods that we may test in auctioning licenses within that particular service.^{7/}

^{5/} 9 FCC Rcd _____ (FCC 94-61, released April 20, 1994) ("Second R&O"). The Second R&O is now subject to numerous petitions for reconsideration.

^{6/} Second R&O, *supra*, ¶10.

^{7/} Second R&O, *supra*, ¶¶112, 115. In the Second R&O, the Commission reserved a similar flexibility with respect minimum
(continued...)

Thus, the Second R&O did not resolve auction issues so much as specify a framework in which subsequent decisions, including the Fourth R&O, would resolve them. Further, even where the Second R&O resolved issues generically, the application of those policies to IVDS (in the context of IVDS-specific rules adopted in the Fourth R&O) can require reconsideration of all related issues in the Fourth R&O.

Under these circumstances, the Administrative Procedure Act requires that ITV -- and others seeking reconsideration of the Fourth R&O -- not be precluded as to any issue resolved therein (even if resolved by reference to the Second R&O) by their decision not to seek reconsideration of the generic auction rules.

II. THE COMMISSION'S ADOPTION OF AUCTION RULES WHICH APPARENTLY PROHIBIT FULL SETTLEMENTS BETWEEN MUTUALLY EXCLUSIVE, AUCTIONABLE IVDS APPLICATIONS VIOLATES SECTION 309(j) OF THE COMMUNICATIONS ACT.

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Any attempt to hinder that policy or to prevent full settlements between mutually exclusive applicants for auctionable licenses violates specific provisions of Section 309(j).

^{2/}(...continued)
bids (id., ¶126), stopping rules (id., ¶132), activity rules (id., ¶144), upfront payments (id., ¶¶171-72 & n.132, 178, 180), license eligibility for installment payments (id., ¶237), eligibility for bidding credits (id., ¶242), spectrum set-asides (id., ¶247), the definition of "small business" (id., ¶271), and other fundamental auction-design decisions.

A. Both The Communications Act and The Commission Have A Well-Established Policy Favoring Full Settlements of Mutually Exclusive Applications.

The Communications Act explicitly recognizes the Commission's settlement policy. Sections 311(c) and (d) permit the Commission to approve settlements between mutually exclusive broadcast applicants whenever it can find that the settlement serves the public interest and that no party to the agreement filed its application for the purposes of settlement. The Commission has found that Section 311(c) indicates a Congressional determination that:

[S]ettlement agreements "generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service...."^{8/}

Although this policy developed in a broadcast context, the Commission has applied it to services having auctionable licenses as well.

Thus, in amending Part 22 of the Commission's Rules to permit settlements between common-carrier land-mobile applicants, the Commission reasoned:

Congress recently amended Sections 311(c) and (d) of the Communications Act, liberalizing previous [settlement] standards....

^{8/} Broadcast Settlement Agreements, 6 FCC Rcd 85 (1990) (¶2), modified, 6 FCC Rcd 2901 (1991), quoting H.R. Rep. No. 765, 97th Cong. 2nd Sess. 50 (1982) (Conference Report). Although this proceeding limited settlement payments to challengers, it also reasoned that this policy "should not be applied in such a manner to preclude or unduly hinder legitimate merger transactions involving competing applicants." The Commission has also found that "settlements ... can be an efficient way to resolve comparative licensing proceedings...." Broadcast Renewals, 4 FCC Rcd 4780 (1989) (¶32).

Section 311 of the Act does not explicitly apply to the Public Mobile Services. * * * We believe that the regulatory concerns embodied in our old [settlement] rule are no longer relevant in the public mobile services. * * * In light of the policy embodied in the Congressional amendments to the Communications Act, ... we believe it is in the public interest to eliminate the prior approval requirement and adopt the [settlement] rule as proposed.^{9/}

The Commission's Part 22 settlement rule, now codified in Section 22.29 of the Rules, tracks the requirements of Section 311(c) and (d) and permits settlements between mutually exclusive applicants without prior Commission approval.

In the cellular context, the Commission's settlement policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.^{10/} At that time, Commissioner Fogarty best articulated the Commission's settlement policies:

[T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.^{11/}

^{9/} Revision of Part 22, 95 FCC 2d 769 (1983) (¶¶88-89).

^{10/} Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

^{11/} Los Angeles, supra (Fogarty, Separate Statement).

In applying the lottery process to cellular applications, the Commission explicitly retained its policy favoring full-market settlements.^{12/}

Although mutually exclusivity (and the need for settlements) traditionally has been rare in the private radio services, Section 90.621(b)(5) of the Rules permits 800 MHz SMR applicants to file short-spaced applications within the consent of co-channel applicants. In adopting this rule, the Commission reasoned:

[Adopting this rule] will further the public interest in several significant respects. First, codification of our consensual short-spacing procedures will make arrangements of this type more accessible to applicants, which in turn will encourage more efficient use of the radio spectrum and enhance competition....^{13/}

The Commission consistently has followed a similar policy permitting, if not encouraging, settlements with respect to other radio services as well.^{14/}

^{12/} Cellular Lottery Rule Making, 101 FCC 2d 577, 582 (1984), modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987). Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, supra; Telocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the Commission's policy favoring full-market settlements); First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992) (cellular unserved areas).

^{13/} SMR Short-Spacing, 6 FCC Rcd 4929 (1991) (¶3).

^{14/} See, e.g., Section 21.29 (settlements permitted in the Digital Electronic Message Service, Point-to-Point Microwave Service, and Local Television Transmission Service); Section
(continued...)

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the Commission had a well-established settlement policy.

B. In Adopting The Auction Provisions of Section 309(j), Congress Required The Commission to Apply Its Existing Settlement Policies to Auctionable Applications.

Congress explicitly affirmed the Commission's settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

(6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-

(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;

* * *

(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

[S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.^{15/}

^{14/} (...continued)

94.63(d)(4) (settlements permitted in 928-930 MHz Multiple Address Service).

^{15/} Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, (continued...))

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the Commission to carry forward its existing settlement policies.^{16/} The mandated "use [of] negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings" can only mean that settlements (which are the product of negotiation and which avoid mutual exclusivity) are to be permitted under competitive bidding.

C. The Commission Erred In Adopting IVDS Auction Rules Which Preclude Full-Market Settlements.

The Commission's IVDS auction rules are contrary to those statutory requirements. Specifically, the Commission proposes that, once a short-form auction application is filed, auction applicants "will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia."^{17/} Similarly, the Commission states that:

^{15/} (...continued)
1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

^{16/} Section 309(j)(1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... to grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section 309(j)(1) does not require that the Commission must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) ("the requirements of this subsection") clearly indicates the legislative intent to make mutual exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

^{17/} Fourth R&O, ¶21 (footnote omitted).

After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short form application.^{18/}

In other words, the Commission proposes that, once the short-form (pre-bid) applications are filed, the parties will be prohibited from entering into joint ventures or other agreements concerning their bid. However, until the short-form applications are filed, the parties cannot enter into settlement agreements. The listing of short-form applicants tells the parties with whom they must settle, i.e., it lists all the applicants for a specific license.^{19/}

Thus, the Fourth R&O appears to have prohibited settlements between applicants for IVDS licenses in a market by preventing the formation of post-filing joint ventures or similar arrangements between all the mutually exclusive applicants.^{20/} Tellingly, the Commission never mentioned the word "settlement" or explained the regulatory or statutory purposes which its prohibi-

^{18/} Fourth R&O, ¶32 (emphasis added). See also Second R&O, supra, ¶225.

^{19/} See Fourth R&O, ¶22.

^{20/} ITV recognizes that the Commission's quoted language is capable of another interpretation which is consistent with Section 309(j), i.e., that the Commission intends only to collusion between bidders and not the negotiation of full settlements which eliminate the need for an auction. Obviously, in the case of a full settlement, no auction need be held and, strictly speaking, no winning bidder exists. If the Commission so intends, it should clarify its language.

tion was intended to satisfy. As a matter of law, the Commission cannot be concerned that full settlements constitute "collusion" between auction bidders; Section 309(j)(6)(A) & (E) of the Communications Act evidence a Congressional requirement that settlements serve the public interest.

The prohibition is inconsistent with Section 309(j). Although unexplained, it appears to be motivated by revenue maximization, which is prohibited by Sections 309(j)(7)(A) & (B) of the Communications Act. It cannot be reconciled with Section 309(j)(6), as quoted above. Further, it represents poor public policy, in that potential licensees would be arbitrarily precluded from structuring rational and competitive business arrangements between themselves once the pre-bid documents had been filed.

Accordingly, upon reconsideration, the Commission must clarify its IVDS auction rules to specify that full settlements are permissible between mutually exclusive applications for auctionable licenses.

III. THE COMMISSION'S UNEXPLAINED LIMITATION OF BIDDING CREDITS TO ONLY ONE OF TWO IVDS LICENSES PER MARKET IS ARBITRARY AND CAPRICIOUS.

Section IV.B of the Fourth R&O takes almost 6 pages of printed text, 9 lengthy numbered paragraphs, and 17 footnotes to explain procedures, statutory goals, and constitutionality of allowing minority and women-owned businesses to apply a 25% bidding credit to IVDS. Specifically, the Commission found a Congressional intent "to assure that minority and women-owned

businesses have the ability to participate" in auctioned services (§40), that minority-owned businesses promote other societal goals (§41), that minority and women-owned businesses are severely underrepresented in telecommunications (§42), that bidding credits are "the best way" to end such underrepresentation (§43), that "even comparatively large businesses owned by minorities and women face discriminatory lending practices and other discriminatory barriers to entry" (§44), that Congress intended that bidding credits go to minority and women-owned businesses "independent of their status as small businesses" (§45), and that a 25% bidding credit is an appropriate discount (§46).

At the end of this discussion, literally as an afterthought, the Fourth R&O further states:

[T]o further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we are prohibiting publicly-traded companies from taking advantage of the bidding credits and we are providing bidding credits for only one license in each market for businesses owned by minorities and women.^{21/}

No further explanation is provided, and the terse "explanation" contradicts the Commission's prior discussions.

Specifically, the Commission's prior discussions did not discuss the need for "narrowly tailored" bidding credits, and in fact expanded them (§44) to cover all minority and women-owned businesses, regardless of size. Similarly, the Commission's discussion of "statutory goal[s]" (§§40 & 45) did not discuss any limitations on the use of bidding credits. There, the Commission

^{21/} Fourth R&O, §47 (emphasis added). This policy is restated in footnote 65 to the Fourth R&O.

apparently recognized that Congress did not tell it to encourage minority and women-owned businesses in any sort of limited manner.

Clearly, the Commission cannot consider any potential for revenue loss which might result if both IVDS licenses in a market received bidding credits. Section 309(j) carefully proscribes the Commission's consideration of auction revenues:

(7) Consideration of revenues in public interest determinations.-

(A) Consideration prohibited.-In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited.-In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(Emphasis added.) Thus, the Commission cannot limit IVDS bidding credits in order to maximize IVDS auction revenue. However, given the absence of Commission explanation of this limitation, it is difficult to imagine any other rational explanation.

In other words, the Commission's limitation on bidding credits for minority and women-owned businesses to only one of the two IVDS licenses per market is unexplained, arbitrary, and capricious.

IV. THE COMMISSION SHOULD MODIFY ITS AUCTION PROCEDURES TO ELIMINATE SPECIFIC PROVISIONS WHICH COULD WELL DISADVANTAGE DESIGNATED ENTITIES.

ITV respectfully suggests that the Commission should modify certain generic auction procedures which could well disadvantage Designated Entities in specific circumstances.

A. The Commission Should Not Collect the Three Percent Defaulting Bid Penalty If A Windfall Would Result.

The Fourth R&O adopted (§29) a three percent penalty to be paid by a bidder who withdraws its bid after an oral auction terminates and the Commission must re-auction the license. In the case where the second auction produces a higher winning bid than the first (defaulted) auction, the penalty is three percent of the defaulting bid.

The proposal will produce a windfall to the Treasury if the second bid exceeds the defaulting bid by more than three percent. While ITV takes no position with respect to the defaulting bidder being liable for any shortfall in the second bid, if the second bid exceeds the defaulting bid by three percent or more (i.e., the Commission will receive the penalty amount anyway), then the defaulting bidder should pay no penalty.^{22/} If the second bid exceeds the defaulting bid by less than three percent, the defaulting bidder's penalty should be the difference between the second winning bid and 103% of the defaulting bid.

^{22/} In professional basketball, this is called the "no harm, no foul" rule.

In other words, in the case of a post-auction default, the Commission should always collect at least 103% of the defaulting bid (from the defaulting and second bidder combined), but never more than amount of the second bid.

This policy should still prevent post-auction defaults; few (if any) winning bidders will be prepared to risk paying the penalty by defaulting. In most cases, the winning bidder will be defaulting because it overpaid for its license. In that scenario, the second auction likely will result in a lower bid and the penalty would still apply. The only scenario in which no penalty would apply can likely occur when if the winning bidder underpaid for its license but lacks the financial resources to avoid default. In that scenario, the winning bidder has been sufficiently penalized (by losing its bargain license) that the 3 percent penalty is clearly excessive.

B. The Commission Should Refund Upfront Fees Collected From High Bidders In Excess of Down Payment Requirements.

The Fourth R&O (§24) adopted IVDS-specific procedures for the payment, collection, and application of pre-bidding upfront payments:

The applicant or its representative will be required to show the Commission, immediately prior to the auction, a cashier's check for at least \$2,500 in order to get a bidding number... Bidders will be required to have \$2,500 upfront money for every five licenses they win. The \$2,500 upfront payment will be collected immediately after the first license is won by an applicant.⁴³ * * * The upfront money will later be counted toward the down payment.

⁴³ The upfront money will be collected immediately after the first license is won in each group of five

licenses (1, 6, 11, etc.). Bidders should bring a \$2,500 cashier's check for each five licenses they desire to purchase. The Commission will not refund money to those bringing a single check to cover the total upfront payment required, rather than multiple \$2,500 checks, if the single check is for an amount ultimately greater than the upfront payment required. On request we will, however, apply such balance to any further monies owed in the context of IVDS auctions.^{23/}

This procedure must be taken in the context of Second R&O, which (¶190 n.144) states that:

[I]f the upfront payment already tendered by a winning bidder, after applying bid withdrawal penalties, amounts to 20% or more of its winning bids, no additional deposit will be required.

This policy is incorrectly stated, and in some situations can disadvantage the winning bidder.

In the case of designated entities eligible for installment payments, the Second R&O (¶238) reduces the required deposit from 20% to 10%. When that occurs, no additional deposit should be required when the available upfront payments, less bid withdrawal penalties, exceed only 10% of the winning bids.

More importantly, for any situation in which a winning bidder's upfront payments, less bid withdrawal penalties, exceed either 10% or 20% (as appropriate) of its winning bids, the excess upfront payment should be refunded.

In other words, the Commission should not retain the excess upfront payments when winning bids are lower than expected.^{24/}

^{23/} Fourth R&O, ¶24 & n.43 (other footnotes omitted).

^{24/} The Commission's further statement (Fourth R&O, ¶24 n. 43) that "On request we will, however, apply such balance to any further monies owed in the context of IVDS auctions" needs
(continued...)

In this situation, the likelihood and adverse consequences of default by the bidder are minimized. The winning bidder should not be penalized by prevailing with a low bid. This is especially true when the winning bidder is a small business, which needs to conserve its financial resources for other auctions, and when the Commission cannot pay interest on collected funds.

V. THE COMMISSION SHOULD MODIFY ITS RECAPTURE PROVISIONS TO CREDIT DESIGNATED ENTITIES FOR THEIR INVESTMENTS IN AUCTIONABLE LICENSES PRIOR TO SALE OR LOSS OF DESIGNATED-ENTITY STATUS.

The Fourth R&O (¶47) adopted certain recapture provisions for profits allegedly accrued as a result of transfers of licenses awarded pursuant to bidding credits for minorities and women:

To prevent any unjust enrichment by minorities and women trafficking in licenses acquired through the use of bidding credits, we will impose a forfeiture requirement on transfers or assignments of such licenses to entities that are not owned by minorities and women. Minorities and women-owned businesses seeks to transfer or assign a license to an entity that is not owned by minorities or women will be required to reimburse the government for the amount of the bidding credit, plus interest ..., before transfer or assignment will be permitted.

This recapture proposal so fails to recognize the economics of constructing and operating IVDS systems that it is arbitrary and capricious.

^{24/} (...continued)

clarification. Is the Commission indicating that the excess upfront payment may be applied against the \$2,500 requirement for upfront payments for subsequent IVDS auctions? If so, why only IVDS auctions, and not all Commission auctions? Or is the Commission indicating that the excess upfront payment may be applied against the down payment, final payment, or designated entities' installment payments? What happens if the upfront payment exceeds a smaller market's purchase price?

For example, suppose a woman-owned business receives a IVDS license with a \$25,000 bidding credit. To develop this license, the license borrows \$3 million dollars, purchasing \$2 million in equipment and using the rest towards construction and operational expenses. After constructing and beginning operation of its system, the licensee proposes to sell the system (license, equipment, customer base, and all other assets) for \$2.5 million.

Under the Commission's hopelessly simplistic penalty, the Designated Entity would be subject to recapture of \$25,000. In reality, it would have suffered an aggregate loss upon the sale of over a half-million dollars.^{25/} In other words, the recapture provisions could well prevent a minority or women-owned business from ever cutting its losses and selling a money-losing IVDS business without increasing the loss.

Conversely, under the same hypothetical, if the licensee were to sell its IVDS system (license plus all assets) for \$3.55 million, the gain from the federal benefit is not a half-million dollars. The gain from the sale must be allocated across the license, the equipment, the customer base and cash-flow from the system, goodwill, and all other conveyed assets. Only the allocation portion of the purchase price assigned to the license can be subject to recapture.

^{25/} The Commission's recapture calculations could be greatly simplified if the profit or loss from the sale of a license by a Designated Entity for recapture purposes would be that applied for federal income tax purposes, a calculation which the selling Designated Entity must make in any event.

In other words, as footnote 205 to the Second R&O contemplates, fundamental principles of equity require that the Commission's recapture penalty be based on the excess of sales price over the amounts the Designated Entity has expended in the system prior to sale, with appropriate adjustments for length of time the license is held, licensee hardships, events beyond the licensee's control, and similar factors.

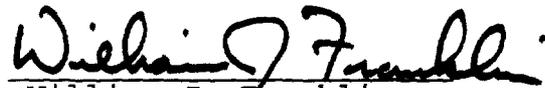
CONCLUSION

Accordingly, ITV, Inc. respectfully requests that the Commission reconsider the Fourth Report and Order as set forth herein.

Respectfully Submitted,

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