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October 3, 1996

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

Via Messenger

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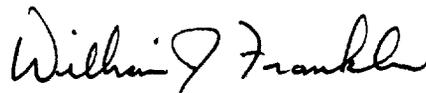
Re: ITV, Inc. and IVDS Affiliates, LLC
PP Docket No. 93-253
Comments on Competitive Bidding (IVDS)

Dear Mr. Caton:

Transmitted herewith on behalf of ITV, Inc. and IVDS Affiliates, LLC is an original and nine (9) copies of their Comments filed in the above-captioned proceeding.

Please contact this law firm if you have any questions with respect to this matter.

Respectfully submitted,



William J. Franklin
Attorney for ITV, Inc.
and IVDS Affiliates, LLC

Encls.
cc: ITV, Inc.
IVDS Affiliates, LLC

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

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding for IVDS)

To: The Commission

COMMENTS OF ITV, INC. AND
IVDS AFFILIATES, LLC

ITV, Inc. ("ITV") and IVDS Affiliates, LLC ("IALC"), by their attorney and pursuant to Section 1.415(b) of the Commission's Rules, hereby comments on the rules proposed by the Sixth Memorandum Opinion and Order and Further Notice of Proposed Rulemaking for future auctions of Interactive Video and Data Service ("IVDS") authorizations.^{1/} In general, ITV and IALC support the proposed rules, but with certain improvements discussed herein.

DESCRIPTION OF ITV AND IALC

ITV and IALC are commonly owned. ITV is an IVDS licensee for the San Francisco MSA. Accordingly, ITV has experience in assessing the technical and economic realities of the IVDS business. As a result of that assessment, ITV formed IALC to develop a product line of IVDS equipment for ITV's use and for

^{1/} 11 FCC Rcd _____ (FCC 96-330, released September 10, 1996) (PP Docket No. 93-253) ("6th MO&O/FNPRM"). The 6th MO&O/FNPRM both ruled on Petitions for Reconsideration filed with respect to the original IVDS auction rules (61 FR 49066, September 18, 1996) and proposed modified rules for future IVDS actions (61 FR 49103, September 18, 1996). These Comments are limited to discussing the proposed rules.

the use of other IVDS licensees. That equipment, which is now type-accepted and has been operational for an in-market field trial, uses the IVDS spectrum to distribute business and commercial data to subscribers.

Accordingly, ITV and IALC possess a demonstrated level of expertise in the design and operation of IVDS systems. Thus, their comments should receive enhanced consideration from the Commission.

I. SPECIFIC COMMENTS ON THE 6TH MO&O/FNPRM

Based on their review of the proposed IVDS auction rules, ITV and IALC have the following comments:

Auction Eligibility. A sizeable number of winning bidders defaulted in their payments after the 1994 IVDS auctions, either failing to make their post-auction payments or their post-grant installment payments. Unless otherwise granted a payment deferral by the Commission, those defaulting parties should be declared not eligible for future IVDS auctions.

Allegations have been made that the defaulting parties skewed the 1994 auction by making unreasonably high bids, and by taking markets away from serious bidders who would have made all payments to the U.S. Treasury. Without regard to the specific accuracy of those allegations, the Commission should exercise its inherent authority over applicant eligibility to prevent the previously defaulting parties from having an opportunity to do so again.

Auction Methodology. Although stating (6th MO&O/FNPRM at 10-11) that it intends to auction IVDS licenses by oral outcry, the Commission proposes (id. at 11-16) to give the Wireless Telecommunications Bureau the authority to use simultaneous multiple-round (computer-implemented) bidding and to adopt specific rules for such bidding.

ITV and IALC are familiar with both oral-outcry and simultaneous multiple-round bidding, and believe that simultaneous multiple-round bidding would permit them to participate in the IVDS auction at a lower cost and with a higher likelihood of implementing a multiple-market, potentially clustered IVDS business plan. Accordingly, they urge that the Commission explicitly do what it appears to prefer, and explicitly adopt simultaneous multiple-round (computer-implemented) bidding for future IVDS auctions.

Separate Ownership. ITV and IALC support the Commission's decision (id. at 23) to maintain the requirement that the two IVDS authorizations in a market be separately owned. The Commission has correctly analyzed the potential for anti-competitive abuse if one entity were to control both licenses.

Further, the Commission's divestiture proposal represents a reasonable procedure to prevent hardship which might result from accidental or phased cross-ownership. However, the Commission should create an exception or waiver process where a licensee, officer, director, principal, or manager of one license in a market is permitted to own less than 5% of the other license if

the party (a) does not have de facto or de jure control of the other license, and (b) does not manage the other licensee's system.

Designated Entities. ITV and IALC support the Commission's proposal (id. at 29-31) to replace the current IVDS definition of designated entity with one which deems race-neutral and gender-neutral "small businesses" and "very small businesses" as designated entities. To the extent that any party merits a preference in an IVDS auction, that preference should be based on its lack of economic strength. While a significant portion of minority- and women-controlled businesses are smaller, there are some which are economically powerful (e.g., the Washington Post, the Black Entertainment Television network). The Commission's preferences should go to those who need the assistance in a race- and gender-neutral fashion.^{2/}

The Commission has proposed (id. at 30) to define a "small business" "as an entity whose average gross revenues for each of the preceding three (3) years do not exceed \$15 million." Similarly, the Commission proposed to define a "very small business" "as an entity with less than an average of \$3 million in gross revenues in each of the last three (3) years." Although those definitions are potentially ambiguous,^{3/} ITV and IALC

^{2/} The Commission also has correctly decided (id. at 21-22) not to give further preferences for rural telephone companies.

^{3/} An alternative interpretation (which ITV and IALC believe incorrect) would be that the Commission would compare its thresholds against the average gross revenue for (a) the 3rd
(continued...)

assume that the Commission intends that small-business eligibility be determined by averaging gross revenue over the last three fiscal years of an entity, and comparing that average against the specified thresholds.^{4/}

However, because of lack of operating experience of any IVDS system, IVDS licensees likely will be forced to finance their systems without having access to bank debt or other sources of lending. This suggests that the thresholds for determining what is a "small business" or a "very small business" should be increased. ITV and IALC recommend that a "small business" have a average gross revenue threshold of \$18 million, and a "very small business" have a average gross revenue threshold of \$5 million.^{5/}

Bidding Credits. As a threshold matter, ITV and IALC applaud the Commission's proposal (id. at 19-20) to make bidding credits available to both IVDS licenses in a market. It was

^{3/} (...continued)
preceding year (the average of previous years 3, 4, and 5); (b) the 2nd preceding year (the average of previous years 2, 3, and 4); and (c) the immediately preceding year (the average of previous years 1, 2, and 3).

^{4/} Once eligible as a "small business" or "very small business", an entity should not lose that eligibility through internal increases in gross revenues in subsequent years. To hold otherwise would penalize entities trying to prosper.

^{5/} For similar reasons, the Commission should only attribute gross revenues of controlling principals and its affiliates in making the small-business determinations. As it has done with other auctionable services, the Commission should clarify that only entities (corporations, partnerships, limited liability companies, trusts, etc.) -- and not natural persons -- can have attributable gross revenue.

clear from the 1994 IVDS auction that only having one bidding credit distorted the operation of the auction.

Beyond that, the Commission proposed (id. at 31-32) to have tiered bidding credits, with "small businesses" receiving a 10% bidding credit and "very small businesses" receiving a 15% credit. Subject to the revisions proposed above with respect to the "small business" definitions, ITV and IALC support the concept of tiered bidding credits.

As noted above, IVDS licensees likely will be forced to finance their systems from equity, i.e., without having access to bank debt or other sources of lending. This suggests that smaller businesses, who by definition will have less money, will need greater bidding credits. ITV and IALC suggest that "small businesses" receive a 15% bidding credit, and "very small businesses", a 25% credit.

Upfront Payments. ITV and IALC support the Commission's proposal (id. at 32-33) to increase the upfront payments. However, ITV and IALC suggest that the MSA and RSA per-market upfront payments should be chosen such that the MSA payment is an even multiple of the RSA payment. For example, per-market payments of \$7,500/2,500 or \$9,000/3,000 (MSA/RSA) would be satisfactory. Making this change will prevent a bidder from having a "stranded" up-front payment, which cannot be applied against the eligibility for any market.^{6/} Further, this change

^{6/} For example, assume (under the proposed rules) that a bidder makes an up-front payment of \$10,000, seeking to acquire
(continued...)

will reduce computational complexity in figuring bidding eligibility over the course of an auction.

II. THE COMMISSION SHOULD SCHEDULE FUTURE IVDS AUCTIONS ONLY AFTER IT HAS FINALIZED THE MOBILE IVDS RULEMAKING AND RULED ON POTENTIAL DEFAULTS FROM THE 1994 IVDS AUCTION.

In the Mobile IVDS rulemaking, the Commission recently amended the technical rules for IVDS in several significant ways, specifically to permit IVDS licensees to provide mobile service to subscribers.^{2/} As part of this decision, the Commission made another important changes to its IVDS rules.

First, it limited the maximum Effective Radiated Power of IVDS Response Transmitter Units ("RTUs") to one-hundred milliwatts mean power on a nationwide basis.^{3/} Second, it eliminated the "duty cycle" requirement for both fixed IVDS operations outside the TV Channel 13 Grade B contour, and for mobile IVDS usage where the IVDS licensee's entire service area doesn't overlap the Channel 13 contour.^{4/} Third, it permitted both indirect RTU-to-RTU communications and direct CTS-to-CTS (fixed

^{4/}(...continued)
four (4) RSAs. If he were to actually acquire one MSA, \$9,000 of his up-front payment would be applied there, and the remaining \$1,000 could not used to bid on any further markets, i.e., it would be "stranded". If the ITV/IALC \$7,500/2,500 proposal were instead adopted, the bidder could use its same \$10,000 upfront payment to obtain eligibility for either one MSA and one RSA, or four RSAs.

^{2/} Mobile IVDS, 11 FCC Rcd 6610, 6612-15 (1996) (Report and Order) (WT Docket No. 95-47) ("R&O"), recon. pending, 61 FR 42021 (August 13, 1996), corrected September 5, 1996.

^{3/} Id. at 6617.

^{4/} Id. at 6617-19.

point-to-point) communications, but prohibited direct RTU-to-RTU communications.^{10/} Finally, it prohibited interconnection between IVDS systems and the Public Switched Network ("PSN").^{11/}

Although potentially fundamental to the development of the IVDS spectrum, those rule changes are controversial. At present, the Commission is considering three Petitions for Reconsideration filed with respect to the Mobile IVDS Report and Order. At the same time, certain IVDS auction winners (from the last auction) have failed to make their post-auction down payments and/or periodic installment payments on their winning markets. The issue whether those auction winners should be declared in default, and their licenses should be re-auctioned, remains undecided.

Until both the Mobile IVDS and auction-default issues are finally resolved, the Commission should not schedule another IVDS auction. Resolving the auction-default issues will define the scope of the auction. Similarly, resolving the Mobile IVDS

^{10/} Id. at 6619-21.

^{11/} Id. at 6621-22. ITV and IALC filed a Petition for Reconsideration of the R&O, seeking clarification of the scope of this prohibition. Specifically, ITV/IALC felt that the Commission's prohibition on interconnection of IVDS systems with the PSN should be applied consistently with the Commission's definition of "interconnection with the PSN" for the purposes of categorizing wireless mobile licensees as either Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service ("PMRS") providers. See Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1434-36 (1994) (GN Docket No. 93-252) (Second Report and Order). Specifically, any use of the PSN permitted for a PMRS licensee's internal control purposes should also be permitted for an IVDS licensee's internal control purposes.

Petitions for Reconsideration will define how IVDS spectrum can be used.

Until these questions are answered, the value of IVDS spectrum remains uncertain. Although IVDS authorizations were first lotteried in the early 1990s, to ITV's and IALC's knowledge there is no commercial operation of an IVDS system in the United States today. Thus, the value of an IVDS authorization in an auction depends exclusively on the bidders' evaluations of the likely profitability of permitted use of the spectrum.

If bidders can't know how the spectrum can be used (or even what authorizations will be available), then bidders cannot rationally bid in the auction. This uncertainty could well translate into lower bids, if not a failure of many potential bidders to enter the auction. For these reasons, the Commission should resolve the unanswered questions regarding the IVDS rules prior to scheduling another IVDS auction.

CONCLUSION

Accordingly, ITV, Inc. and IVDS Affiliates, LLC respectfully request that the Commission adopt the rules proposed in the 6th MO&O/FNPRM with the modifications and improvements discussed herein. However, the Commission should schedule future IVDS auctions after it has disposed of all major pending IVDS issues,

including the Petitions for Reconsideration in the Mobile IVDS
proceeding.

Respectfully Submitted,

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