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August 31, 1999

Mr. Ari Fitzgerald
Office of the Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: Written *ex parte* contact in WT Docket 98-169, Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service.

Dear Mr. Fitzgerald:

Thank you for meeting with us last week to talk about the possible remedies for IVDS auction winners. During the meeting, you asked that I provide you with a list of reasons why my situation is unique, not only among the other IVDS auction winners, but also among auction winners in general. I believe the following items form a strong case why I should receive a refund of what I paid to obtain the IVDS licenses at auction.

**1. Open Outcry Auction.** The IVDS auction was only the second auction ever to be conducted by the Commission. The first auction started only three days before the IVDS auction and had not even concluded when the IVDS auction started. Thus, the Commission had to rely on theory rather than experience in conducting the IVDS auction. When the Commission adopted the rules for the IVDS auction, it pointed out the fact that the IVDS auction was being used as a test of less complex auction methods.[1] Specifically, the Commission stated the following at paragraph 11 (emphasis added):

> 11. We find that the generally preferred method of simultaneous multiple round auctions is not the most appropriate for IVDS, and that IVDS also presents a good opportunity ***to test less complex alternative procedures.*** As discussed below, of the auction methods

[1] *See,* In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fourth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2330, adopted April 20, 1994.



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> described in the *Second Report and Order*, oral bidding (open outcry) and single round sealed bidding appear best suited to the IVDS. Both are relatively inexpensive for the Commission to administer, and the costs of participation by bidders are fairly low. Moreover, both have the advantage of being relatively simple for bidders to understand and also generally can be completed quickly. Thus, these methods are likely to promote the statutory goal of rapid implementation of service to the public. n20 We therefore adopt these two methods to auction IVDS licenses. ***If, as we gain experience, we find that another auction design for the IVDS would better achieve the goals of the Budget Act, we may revisit this issue.***

The Commission has gained experience and has chosen not to use the open outcry auction method in any auction since the IVDS auction. The problems associated with the open outcry auction have been documented and it is unlikely that the Commission will ever use that method again. In fact, in recognition of the difficulties with the IVDS auction and associated rules, the Commission, on its own motion, proposed relief for those on the installment plan.[2] The proposal, if adopted, would make most who participated in the IVDS one-and-only open outcry auction experiment eligible to recover some or all of the money they have paid for the licenses as credit in future auctions or receive debt forgiveness. Neither proposal provides relief to one who has paid in full for their licenses and has no plans to participate in future auctions. The relief granted must be broad enough so as not to exclude anyone not currently in default.

**2. I paid for my licenses in full at the conclusion of the auction.** I am unique in that I believe I may be the only IVDS auction winner to pay for their licenses in full after the auction. The Commission has not had to carry a loan for me for the past five years, in fact, the government has had use of my money for the period. I have lost other communications opportunities because I did not have access to the money I paid at the auction. This is not true of those on the installment payment plan. Those auction winners paid the government only a portion of their bids and have had access to the remainder of their bids for other investments. If the Commission decides that debt forgiveness is due to those on the installment plan, then equity dictates that relief must similarly be provided to one who paid for their licenses in full. *The Commission must provide relief for all -- or relief for none.* The method of payment of the debt to the government should not dictate whether or not relief is available. In fact, the Commission should consider a full refund, including the down payment for anyone who has already paid in full.

**3. DOJ should balance equities of debt forgiveness versus a refund.** It is my understanding that in deciding to forgive debt owed to the government, the Department of Justice balances the cost of collection against the amount to be collected. If the costs of collection are expected to be high and the amounts to be collected are low, the DOJ will recommend debt forgiveness. This auction provides a unique situation in application of this policy. Because I paid in full for my licenses, debt forgiveness for those on the installment payment plan equates to imposing a substantial penalty on me if I do not receive a refund. I may be the only one in the auction that

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[2] *See,* In the matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, WT Docket 98-169, FCC 98-228, Adopted September 15, 1998, at paragraphs 37 - 39.

has totally played by the rules, e.g. not currently in default of at least some payments. Yet, I may be the only one penalized under the current proposal. Because I have no debt to be forgiven, the only way to avoid discriminatory treatment is for my money to be refunded

**4. The IVDS auction was not like the PCS A&B Block vs. C Block auctions.** In the broad band PCS auctions, the Commission allowed special treatment for designated entities only in a separate auction, the C Block auction. Thus it was not possible for designated entities to "bid up" prices for the A and B Blocks based on having bidding credits. (Bidding credits reduce the dollars that actually have to be paid for licenses, which tend to force the gross bids higher.) In the IVDS auction, designated entities were bidding directly against those with no bidding credits. In my view, this had the effect of inflating the gross prices (non-discounted bids) paid at the auction. Thus, because of the unique circumstances of the IVDS auction, a decision to grant relief in this auction will have no effect on how the Commission might eventually treat claims of PCS A and B Block winners.

I hope this is helpful. I believe that my situation is unique because the IVDS auction was the only auction to use the open outcry method, and because the designated entity issues in the IVDS auction were different than those for other auctions. The fact that I paid in full for my licenses at the conclusion of the auction, coupled with the fact that debt forgiveness for those on the installment plan equates to a penalty for me, makes my situation unique. Granting relief to me will not set a precedent for other auctions because many troublesome auction rules have been changed as a result of the IVDS auction. The relief I request will provide me with the equity those who chose the installment plan received.

I look forward to a successful resolution of this issue. If you desire any additional information, please give me a call.

I am filing a copy of this letter to document this written *ex parte* contact.

Sincerely,

Kingdon R. Hughes