

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission's	)	WT Docket No. 98-169
Rules to Provide Regulatory Flexibility in the	)	RM-8951
218-219 MHz Service	)	
	)	
Amendment of Part 95 of the Commission's	)	WT Docket No. 95-47
Rules to Allow Interactive Video and Data	)	RM-8476
Service Licensees to Provide Mobile Services	)	(proceeding terminated)

To: The Commission

**Petition for Reconsideration**  
filed by  
**Kingdon R. Hughes**  
Richardson, Texas

I, Kingdon R. Hughes ("Hughes"), pursuant to the Federal Communications Commission's *Report and Order and Memorandum Opinion and Order (R&O)* in the above captioned matter, hereby submit this petition for reconsideration on certain aspects of the Commission's decision.<sup>1</sup> As stated in my comments to this proceeding, I currently hold seven Interactive Video Data Service (IVDS) licenses for the Philadelphia, Pennsylvania area and one IVDS license for Duluth, Minnesota, as a result of participation in the IVDS lottery held September 15, 1993, and the Commission's IVDS auction in July 1994. I paid for the licenses acquired at the auction in full and did not avail myself of the installment payment plan. I have invested over \$2.2 million to acquire licenses, pay legal fees and interest, and sponsor development of new IVDS equipment. Although I applaud the Commission for many of the decisions made in the R&O, for example substantial relaxation of the technical restrictions and extension of the license term to ten years, I feel that the Commission adopted payment restructuring and bidding credit options that are highly discriminatory toward me. I request that the Commission reconsider these decisions and permit any

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<sup>1</sup> See, FCC 99-239, adopted September 7, 1999, and released September 10, 1999.

licensee, regardless of its original status or method of payment, to turn the license in and receive a refund or, if the license is retained, to be refunded the equivalent of a bidding credit.

### **Issue 1: Installment Payment Restructuring**

In the R&O, the Commission adopted three payment restructuring options: 1) Reamortization and Resumption of Payments (Resumption), 2) Amnesty (which can include a refund of installment payments), and 3) Prepayment (use of cash and credits from down payments on returned spectrum). To be eligible for any of these options, licensees had to be current with installment payments as of March 16, 1998, or had to have filed grace period requests. Licensees who failed to comply with the above requirements were nevertheless also granted relief. The Commission decided to permit debt forgiveness of the principal balance and accrued interest for such ineligible entities. Ineligible entities who made some installment payments are being recommended to the Department of Justice for a refund of those installment payments.<sup>2</sup> Thus the Commission has allowed eligible licensees to obtain a refund of installments under the Amnesty option (if they turn in all of their licenses) and has also allowed ineligible licensees who made installment payments to receive a refund of those payments.

The Commission goes on to say that no restructuring options will be offered to those who have paid in full, but only, “to those experiencing financial difficulties.”<sup>3</sup> I must argue that the Commission has an insufficient record to conclude that any licensee failed to make installment payments because of “financial difficulty.” To the contrary, licensees may have simply chosen to walk away from their obligations even if they were financially capable of making the payments. Similarly, the Commission has no way to know whether one who paid for the licenses in full is or is not in financial difficulty. In other words, the Commission’s rationale for excluding those who have paid in full for their licenses from amnesty or restructuring options is flawed. The Commission has made assumptions 1) without an adequate record in the proceeding, and 2) that may not have any relation to fact. The Commission has no way of knowing whether an entity is in financial difficulty from the information it has before it. Yet these flawed, or at least unsupported, assumptions form the basis of a decision to provide me with no relief options for my licenses.

A plain reading of language in the *Report and Order* provides further evidence as to how discriminatory this decision is. At paragraph 38, the Commission says,

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<sup>2</sup> R&O at paragraph 38.

<sup>3</sup> R&O at paragraph 39.

“The Commission does not believe that Ineligible Licensees that made some payments should be at a greater financial disadvantage under this *Report and Order* than licensees that never made any installment payments.”

How can the Commission express such great concern about the equities of entities that flaunted or ignored the Commission’s rules and yet provide no equity for one who has fully complied with the rules? Such a decision flies in the face of rational judgment and fairness.

No consideration is being given to the fact that I suffered financial hardship when I paid for the licenses in a lump sum and have continued to suffer that full burden for the past five years while the government has had use of my money. Those being granted relief have not been parted from their money for five years. The bottom line is that a decision based on assumed financial hardship cannot stand in the light of day. The Commission should reverse this discriminatory policy by either 1) allowing no refunds to anyone or 2) allowing refund options to everyone who won a license in the auction. I am baffled as to what motivation the Commission would have to reward those who failed to live up to their obligations and to penalize those who have fully met their obligations.

The Commission must be consistent with its refunds. This proceeding has already been plagued with discriminatory practices though the use of bidding credits for women-owned and minority-owned small businesses. I urge the Commission to review this decision, which now has added yet another discriminatory element, and allow any auction winner to receive a refund. I continue to contend that those who paid in full should be eligible for a full refund, including the down payment.

#### **Issue Two: Retroactive Provision of Bidding Credits**

The Commission allowed women-owned and minority-owned businesses to take a 25 per cent bidding credit on licenses acquired at the auction. Almost immediately after the auction, Graceba Total Communications, Inc. (“Graceba”), pleaded that the auction had been conducted so as to artificially inflate prices.<sup>4</sup> In other words, the bidding credit caused the prices of the licenses to be inflated at least by the amount of the credit. Later, as the Commission points out at paragraph 56 of the R&O, the *Adarand* decision found such provisions unconstitutional unless “narrowly tailored” and in furtherance of “compelling governmental interests.” Thus, an unconstitutional provision introduced by the Commission in the auction caused *everyone participating in the auction to pay more than the licenses were worth*.

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<sup>4</sup> See generally, R&O at paragraph 56.

The Commission's remedy in the R&O for the illegal bidding credit was to apply the 25 per cent bidding credit to the accounts of every winning bidder that met the small business qualifications for the auction. This is not an adequate remedy. All bidders in the auction suffered from the inflated prices of the licenses caused by the bidding credits. Therefore one can only conclude that all winning bidders, whether they paid in full or not, should be afforded a remedy. How can the Commission acknowledge having an unconstitutional and discriminatory provision in the auction and yet conclude that some, based on size or method of payment, should continue to be discriminated against by being provided with no remedy for the inflated prices caused by the bidding credit? The only fair remedy is to *credit all winning participants in the auction, regardless of size or method of payment, with a 25 per cent credit (or 25 per cent refund for those who have already paid in full)*. To do otherwise continues to discriminate against those who paid for their licenses in full, as they remain victims of an illegal provision of the auction.

### **Conclusion**

In the Commission's good faith efforts to right the wrongs of the IVDS auction, it has inadvertently adopted new discriminatory practices. If some auction winners are to receive refunds of amounts paid for licenses, then all auction winners must be provided with such an opportunity. Similarly, if some auction winners are to be provided with what the Commission calls the "Remedial Bidding Credit," then all auction winners must receive the Remedial Bidding Credit. There is simply no basis in the record for the Commission to parse its remedies based on the size of a licensee or whether a licensee paid in full for its licenses. I request that the Commission reconsider its decisions and 1) allow all entities a surrender option in return for a refund of payments, and 2) grant the Remedial Bidding Credit to all auction winners. Reversal of these two decisions will finally end the discrimination in this auction rather than prolong it.

Respectfully submitted,

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